Appeal No. 08-2582

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

And

FOREST COUNTY POTAWATOMI COMMUNITY,

Intervenor-Respondent.

Petition For Review Of The Final Administrative Ruling
Of The United States Environmental Protection Agency

BRIEF OF INTERVENOR-RESPONDENT

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Dated: January 12, 2009

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The Forest County Potawatomi Community, by its undersigned counsel, hereby submit this Disclosure Statement pursuant to Circuit Rule 26.1:

(1) The full name of every party that the attorney represents in this case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Forest County Potawatomi Community, a federally recognized Indian Tribe.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

The Office of the Attorney General of the Forest County Potawatomi Community.

Godfrey & Kahn, S.C.

Sonosky, Chambers, Sachse, Endreson & Perry, LLP.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:

Not applicable.

s/Michael B. Apfeld
Michael B. Apfeld

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JURISDICTIONAL STATEMENT

Intervening-Appellee Forest County Potawatomi Community ("FCPC" or "Tribe") believes the jurisdictional statement in the brief of Appellant State of Michigan is not complete and correct.

Michigan's petition seeks review of an area redesignation pursuant to § 164 of the Clean Air Act, 42 U.S.C. § 7474. The specific administrative action for which review was sought was a final rule of the United States Environmental Protection Agency ("EPA") published at 73 Fed. Reg. 23,086 (April 29, 2008) (the "Class I Redesignation"). Michigan filed its petition for review on June 26, 2008. Appellate jurisdiction is based upon § 307 of that Act, 42 U.S.C. § 7607(b)(1).

FCPC believes there are jurisdictional obstacles to consideration of some or all of the matters on which Michigan now seeks review. As a threshold matter, it appears that Michigan lacks both Article III and jurisprudential standing to appeal many if not all aspects of the Class I Redesignation; this is discussed in Section I of the Argument, *infra* at 30-34.

Michigan's brief also seeks review well beyond the Class I Redesignation that is the express object of its Petition for Review. Specifically, Michigan's brief:

1. Seeks review of two separate rulings promulgated on April 29, 2008 resolving disputes between FCPC and the states of Wisconsin and Michigan, published, respectively, at 73 Fed.

Reg. 23,107 (the "Michigan Dispute Resolution") and 73 Fed. Reg. 23,111 (the "Wisconsin Dispute Resolution");

2. Challenges the validity of 40 C.F.R. § 49.11(a); and
3. Challenges the validity of 40 C.F.R. § 52.21(g)(1).

FCPC believes the Court has no jurisdiction to review these matters.

First, Michigan's Petition requests review of only the Class I Redesignation; neither 40 C.F.R. § 49.11(a) nor § 52.21(g)(1) is mentioned. Furthermore, the only reference to the two Dispute Resolutions in the Petition is a "*see also*" signal, a reference that cannot be construed as a request to review these separate rulings. Since the Petition is jurisdictional, *see, e.g., Miljkovic v. Ashcroft*, 366 F.3d 580, 583 (7th Cir. 2004), matters not set forth in that petition are beyond the jurisdiction of the Court to review.

Second, both §§ 49.11(a) and 52.21(g)(1) are nationally applicable regulations that must be challenged, if at all, in the United States Court of Appeals for the District of Columbia Circuit. 42 U.S.C. § 7607(b)(1). Although this Court has jurisdiction to determine the validity of agency action based upon such regulations, it has no jurisdiction to determine the validity of the regulations themselves. *See, e.g., State of New York v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998). Thus, while Michigan may challenge *implementation* of a national regulation in this circuit based on entirely local factors, a challenge to the *validity* of that regulation itself is proper only in the D.C. Circuit. *See, e.g., United States v. Cinergy Corp.*,

458 F.3d 705, 707-08 (7th Cir. 2006) ("The validity of the regulation is not in issue, just its meaning. Only the U.S. Court of Appeals for the District of Columbia Circuit has jurisdiction to review the validity of nationally applicable regulations issued pursuant to the Clean Air Act . . ."), *cert. denied*, ___ U.S. ___, 127 S. Ct. 2034 (2007). *See also Madison Gas & Elec. Co. v. United States EPA*, 4 F.3d 529, 530-31 (7th Cir. 1993); *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 914 n.6 (7th Cir. 1990).[1]

Third, any challenge to agency action brought pursuant to § 307 of the Clean Air Act (the "CAA") must be taken within 60 days of the action. Sections 49.11(a) and 52.21(g)(1), however, were promulgated more than sixty days prior to June 26, 2008, the date upon which Michigan filed its petition.[2] Although this circuit has allowed the use of a petition for review of agency implementation as a vehicle to review the validity of the regulations underlying that implementation, *see, e.g.*, *Illinois EPA v. United States EPA*, 947 F.2d 283, 289 (7th Cir. 1991); *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1032-33 (7th Cir. 1984), the rule of these cases appears to have been undermined by subsequent circuit

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[1] Earlier decisions in this circuit may have warranted a different conclusion. *See, e.g., Illinois EPA v. United States EPA*, 947 F.2d 283, 289 (7th Cir. 1991); *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1032-33 (7th Cir. 1984). These cases, which allowed parties to challenge the validity of earlier-promulgated regulations of national applicability when seeking review of local or regionally applicable implementation, appear to be irreconcilable with later decisions, cited above.

[2] Section 49.11(a) was promulgated on February 12, 1998. 63 Fed. Reg. 7,254. Section 52.21(g)(1) was promulgated on June 19, 1998. 43 Fed. Reg. 26,403.

authority, *see State of New York*; *Cinergy*; *Madison Gas & Elec.*; *Wisconsin Elec. Power*, and is inconsistent with the law of the D.C. Circuit. *See, e.g., Envtl. Def. v. EPA*, 467 F.3d 1329, 1332-34 (D.C. Cir. 2006) (no jurisdiction to hear 2004 challenge to a rule promulgated in 1997); *New York v. United States EPA*, 852 F.2d 574, 580 n.3 (D.C. Cir. 1988) (challenge two years after rules promulgated untimely). The law of the D.C. Circuit, in turn, should apply here, first because the challenge to the TAR and § 52.21(g)(1) should have been brought in the D.C. Circuit and, second, because Michigan has already challenged the validity of the TAR in the D.C. Circuit. *See Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000) (in which Michigan intervened). Having done so, it should be precluded from circumventing the rule of that circuit through the device of a second action.

STATEMENT OF THE ISSUES

1. Does Michigan have standing to object to EPA's chosen mechanism for implementing a PSD redesignation when it does not dispute that all requirements for such redesignation have been satisfied and the choice of mechanism does not directly affect its interests? [Discussed in section I of the argument.]

2. Did EPA utilize an appropriate mechanism to announce the redesignation?

A. May EPA utilize a federal implementation plan ("FIP") instead of a tribal implementation plan ("TIP"), particularly when no TIP is in place and the Tribe seeking redesignation requests that it do so? [Discussed in section II of the argument.]

B. Does EPA's use of a FIP instead of a TIP alter any substantial right of Michigan? [Discussed in section III of the argument.]

STATEMENT OF THE CASE

Michigan's description of the nature of the case, its course of proceedings and its disposition in the agency is generally accurate.

As detailed below at 22-24, however, Michigan fails to note that it withdrew from participation in its own dispute resolution proceedings and declined to participate in Wisconsin's dispute resolution proceedings.

STATEMENT OF FACTS

I. Statutory Framework

The Clean Air Amendments of 1970 restructured the Clean Air Act of 1963 by establishing a comprehensive program for the regulation of existing and new sources of air pollution. *Alabama Power Co. v. Costle*, 636 F.2d 323, 346 (D.C. Cir. 1980). The centerpiece of this program consisted of federally promulgated national ambient air quality standards

("NAAQS") for six specific pollutants.[3] The amendments contemplated application of NAAQS to individual sources of pollution primarily through enforcement of State-adopted plans called State implementation plans ("SIPs"), *Alabama Power*, 636 F.2d at 346, which consist of State statutes, regulations and other statements of State policy. EPA subsequently promulgated regulations that list the plan for implementing the NAAQS applicable in each State by specifically referencing the SIP and the federal implementation plans ("FIPs") that fill in any remaining gaps in CAA implementation. *See* 40 C.F.R. Part 52, subparts B through FFF. These applicable State plans provide, for each State, a listing of the documents that make up the approved SIP and the regulations that contain the applicable FIPs, rather than reciting the full text of any State's SIP provisions or the applicable FIP regulations.

While the regulatory scheme in the 1970 Amendments addressed the problems of dirty air in areas like Detroit, clean air in rural areas and locations like the Grand Canyon was left unprotected. This problem was addressed in 1974, when, as a result of a legal challenge brought by the Sierra Club and an ensuing court order, *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd per curiam*, 4 Env't Rep. Cases 1815 (D.C. Cir. 1972), *aff'd by an equally divided court sub. nom. Fri v. Sierra Club*, 412 U.S. 541 (1973), EPA promulgated the prevention of significant

[3] The NAAQS are expressed as maximum allowable concentrations of those pollutants that can exist over specified time periods. 40 C.F.R. Part 50. *See also* http://www.epa.gov/air/criteria.html.

deterioration ("PSD") program. *See*, *Part 52—Approval and Promulgation of Implementation Plans; Prevention of Significant Air Quality Deterioration*, 39 Fed. Reg. 42,510 (Dec. 5, 1974).

Consistent with its focus on protecting clean areas, the PSD program applied only in areas where the NAAQS are being met. 42 U.S.C. § 7471. These PSD areas were categorized as Class I, II or III. 42 U.S.C. § 7473(b). The PSD program set limits on the amount of additional concentrations (or "increments") of specified pollutants allowed over a specified time period. *Ibid.* The classification of an area determined the amount or increment of air quality deterioration that is allowed over a baseline level. *Ibid.* Class I areas had the smallest increments and therefore allowed the least amount of air quality deterioration. *Ibid.*

Because at that time no SIP contained PSD provisions, EPA disapproved all SIPs on that basis and incorporated the Federal PSD regulations codified at 40 C.F.R. § 52.21 as a FIP in each applicable state plan.[4] EPA has repeatedly noted that § 52.21 constitutes the FIP portion of state plans.[5]

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[4] EPA specified that the new federal PSD provisions be incorporated by reference in State plans then found in subparts B through DDD of 40 C.F.R. Part 52. 39 Fed. Reg. at 42,514. *See also Approval and Promulgation of Implementation Plans; Prevention of Significant Deterioration (PSD)*, 68 Fed. Reg. 74,483, 74,484 (Dec. 24, 2003) (discussion of the history of implementation of the PSD program).

[5] *See, e.g. Approval and Promulgation of Implementation Plans; Prevention of Significant Deterioration*:

The 1977 version of § 52.21 also set forth specific procedures that allowed both states and Indian tribes to redesignate their respective lands from one category of PSD protection to another. *See* 39 Fed. Reg. at 42,515-16. In issuing these regulations, EPA recognized "the independent status of Indian lands [as] not subject to State laws." 39 Fed. Reg. 42,513. Subsequently, the Ninth Circuit upheld the provision authorizing Indian tribes to redesignate their lands. *Nance v. EPA*, 645 F.2d 701, 712-714 (9th. Cir. 1981). The court also rejected the contention that the Clean Air Act authorized states to exercise authority over Indian lands. Applying the principle that "'states ha[ve] no power to regulate the Indian use or governance of the reservation provided, except as Congress cho[oses] to grant that power,'" *id.* at 713 (*quoting Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 658 (9th Cir. 1975)),[6] the court held that Act did not contain the requisite "clear

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> This rule is similar in effect to the amendments published in the Federal Register on March 10, 2003 (68 FR 11316). In that action, EPA adjusted the citations incorporated into the *Federal implementation plan portions of State plans* so that all of the substantive amendments as of December 31, 2002 to the PSD regulations would become part of the *Federal implementation plan portions of State plans*. In today's action, we are further revising references for each *FIP* to incorporate the equipment replacement provision amendments into the *Federal implementation plan portions of State plans*.

68 Fed. Reg. 74,483, 74,485 (Dec. 24, 2003) (Emphasis added.) *Cf. Review of New Sources and Modifications in Indian Country*, 71 Fed. Reg. 48,696 (August 21, 2006) (explaining that "*[u]nlike for the PSD program*, there is currently no FIP to implement either the nonattainment major NSR program or the minor NSR program in Indian country") (emphasis added).

[6] That general principle is well settled and remains the law. *See, e.g., Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976); *White Mountain Apache Tribe v.*

expression of Congressional intent to subordinate the tribes to state decisionmaking." *Id.* at 714. The court concluded that "the states and Indian tribes occupying federal reservations stand on substantially equal footing. The effect of the regulations was to grant the Indian tribes the same degree of autonomy to determine the quality of their air as was granted to the States." *Id.* at 714.

With some modification, Congress codified EPA's 1974 PSD regulations in the 1977 amendments to the Clean Air Act.[7] In so doing, Congress expressly authorized states and tribes to redesignate their lands. Prior to 1977, the statutes and regulations gave EPA discretion whether to allow such redesignation, *see* 40 C.F.R. § 52.21(c)(3)(vi)(a) (1975); § 52.21(c)(3)(ii)(d); 30 Fed. Reg. 42,510, 42,515. Under the 1977 amendments to the CAA, however, EPA must approve the request if the tribal application meets the procedural requirements for the redesignation.[8]

Bracker, 448 U.S. 136, 145 (1980); *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 n.1 (1998).

[7] Pub. L. No. 95-95, 91 Stat. 685 (Aug. 7, 1977); *see* 43 Fed. Reg. 26,388, 26,388 (Jun. 19, 1978) (describes how 1977 Amendments changed approach of 1974 PSD regulations).

[8] 42 U.S.C. § 7474(b)(2). Consistent with Congress' express authorization for tribes to redesignate their lands in the 1977 Amendments, the current regulations provide that "[l]ands within the exterior boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body." 40 C.F.R. § 52.21(g)(4) (1978). Under current EPA regulations, EPA is required to approve the application if the Indian tribe meets the following requirements:

1. Hold at least one public hearing in accordance with established procedures. *See* 40 C.F.R. § 52.21(g)(2)(i).

The 1977 Amendments also authorized EPA to negotiate with states and Indian tribes to resolve disputes regarding redesignations and proposed permits. CAA § 164(e), 42 U.S.C. § 7474(e). The section provides, among other things, that "[i]f the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan." 42 U.S.C. § 7474(e).

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2. Notify other States, Indian governing bodies, and federal land managers whose land may be affected by the proposed redesignation at least 30 days prior to the public hearing. 40 C.F.R. § 52.21(g)(2)(ii).

3. Prepare and make available for public inspection at least 30 days prior to the notice of such 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. 40 C.F.R. § 52.21(g)(2)(iii).

4. Provide written notice to the appropriate federal land manager and afford an adequate opportunity for such manager to confer with the tribe and submit written comments and recommendations prior to the issuance of notice respecting the redesignation. 40 C.F.R. § 52.21(g)(2)(iv).

5. Consult with the elected leadership of local and other sub-state general purpose governments in the area covered by the proposed redesignation. 40 C.F.R. § 52.21(g)(2)(v).

6. Consult with the State(s) in which the reservation is located and which border the Indian reservation. 40 C.F.R. § 52.21(g)(4)(ii).

7. Following completion of the procedural steps and consultation, submit to the administrator a proposal to redesignate the area. 40 C.F.R. § 52.21(g)(4).

See also Class I Redesignation, Pet. Req. Short Appx. at 8. Once these procedural requirements are met, EPA must approve the tribal request for redesignation. *See* 42 U.S.C. § 7474(b)(2). Moreover, the regulations state that if EPA believes any of these procedural requirements are not met, it must disapprove such a request "within 90 days of submission." 40 C.F.R. 52.21(g)(5).

In 1978, EPA amended the Federal PSD regulations to implement the new requirements of the Clean Air Act Amendments of 1977.[9] As in the 1974 rule, this final rule explicitly incorporated by reference the Federal PSD FIP found in 40 C.F.R. § 52.21 into each applicable State plan. 43 Fed. Reg. 26,410.

Some States later developed state PSD programs that were approved by EPA and are part of the State's SIP.[10] For these States, like Wisconsin, EPA approved the State's PSD provisions, while maintaining the Federal PSD FIP for Indian country located within that State. This is done by carving out Indian country from the State plan and incorporating the Federal PSD FIP by reference for Indian country. For example, 40 C.F.R. § 52.2581, which is included in 40 C.F.R. Part 52 as subpart YY, approves Wisconsin's PSD regulations as meeting the requirements of the CAA. However, § 52.2581 expressly excludes Indian country from Wisconsin's SIP and instead makes it subject to the Federal PSD FIP.[11]

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[9] *Part 52—Approval and Promulgation of Implementation Plans; 1977 Clean Air Act Amendments to Prevention of Significant Deterioration*, 43 Fed. Reg. 26,388 (June 19, 1978).

[10] *See* 40 C.F.R. §§ 52.96 (AK), 52.144 (AZ), 52.181(AR), 52.343 (CO), 52.683 (ID), 52.833 (IA), 52.884 (KS), 52.986 (LA), 52.1382 (MT), 52.1436 (NE), 52.1634 (NM), 52.1829 (ND), 52.1987 (OR), 52.2178 (SD), 52.2303 (TX), 52.2346 (UT), 52.2497 (WA), 52.2581 (WI).

[11] Specifically 40 C.F.R. § 52.2581 provides:

> (a)-(c) [Reserved]
>
> (d) The requirements of §§ 160 through 165 of the Clean Air Act are met, except for sources seeking permits to locate in Indian country within the State of Wisconsin.

For States that have yet to develop a fully approved PSD SIP, the PSD program remains implemented through incorporating the Federal PSD FIP into the applicable State plan.[12] As with other States with Indian country within their borders, Michigan's SIP specifically does not apply to Indian lands. 73 Fed. Reg. 53,366. For each State, the details of which components of the CAA are implemented under a SIP and which components are implemented under a FIP are contained in the applicable State plan for that State. *See* 40 C.F.R. Part 52, subparts B – FFF. *See also* CAA § 110(h), 42 U.S.C. § 7410(h) (requiring the Administrator to "assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State . . .").

> (e) Regulations for the prevention of the 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.

This same approach, with minor variations, is used throughout Part 52 to approve state SIPs with respect to state lands while maintaining federal air regulation of Indian Country. *See supra* footnote 10.

[12] *See*, *e.g.*, 40 C.F.R. § 52.1180 ("(a) The requirements of §§ 160 through 165 of the Clean Air Act are not met, since the plan does not include approvable procedures for preventing the significant deterioration of air quality. (b) Regulations for preventing 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 Michigan"). Michigan has only recently obtained conditional approval of its PSD program. *See Approval and Promulgation of Air Quality Implementation Plans; Michigan; PSD Regulations,* 73 Fed. Reg. 53,366 (Sept. 16, 2008) (Michigan PSD provisions conditionally approved, with one exception); *Approval and Promulgation of Air Quality Implementation Plans; Michigan; PSD Regulations*, 73 Fed. Reg. 53,401 (Sept. 16, 2008) (Michigan PSD provision disapproved).

Some thirteen years later, Congress enacted the 1990 Amendments to the CAA, which authorized EPA to treat tribes as States under the Act, 42 U.S.C. § 7601(d)(1), and to promulgate regulations for that purpose, 42 U.S.C. § 7601(d)(2), including regulations establishing the elements of tribal implementation plans ("TIPs") and procedures for approval or disapproval of TIPs. 42 U.S.C. § 7601(d)(3). In addition, Congress expressly authorized EPA to promulgate regulations to itself administer provisions for which the treatment of tribes identical to States was "*inappropriate or administratively infeasible*." 42 U.S.C. § 7601(d)(4) (emphasis added).

In the exercise of this authority, EPA issued a final rule in 1998 regarding "Indian Tribes: Air Quality Planning and Management" (the "Tribal Authority Rule" or "TAR"). 63 Fed. Reg. 7,254 (Feb. 12, 1998). In 40 C.F.R. § 49.3, EPA provided for tribes that meet certain eligibility requirements to be treated as States, except with respect to those requirements listed in § 49.4. In the latter section, EPA excused tribes from all of the state deadlines for submitting implementation plans. 40 C.F.R. § 49.4. EPA noted that imposing any deadline for submitting TIPs would be inappropriate because "tribal authority for establishing CAA programs was expressly addressed for the first time in the 1990 CAA Amendments, [which means that] in comparison to states, tribes in general are in the early stages of developing air planning and implementation expertise." 63 Fed. Reg. at 7,265. Thus, while Indian

tribes are allowed to seek approval for implementation plans (TIPs), the TAR "does not compel tribes to develop and seek approval of air programs." *Ibid.* Instead, the TAR requires EPA to promulgate a FIP when a tribe does not submit a TIP or a tribe's TIP submittal does not meet requirements. 40 C.F.R. § 49.11. EPA's ability to issue a FIP to cover tribal lands is critical to protecting air quality on Indian reservations since States have no legal authority to regulate Indian lands under the CAA, *see supra* at 8-9 and n.6. *See also Michigan v. EPA*, 268 F.3d 1075, 1084 (D.C. Cir. 2001) ("Petitioners [including Michigan] happily concede that tribes, and thus, potentially the EPA—acting for the tribe—have jurisdiction over *Indian country*") (emphasis in original).

The provisions of § 49.11 put tribes in a position similar to that States occupy under 42 U.S.C. § 7410(c)(1), which requires EPA to implement a FIP when a State fails to submit a SIP or a State's SIP submittal does not meet requirements. The key difference is that, as noted above, tribes are exempted from certain deadlines applicable to states. *See supra* at 13. Through its authority under § 7601(d)(4), EPA modified § 49.11's requirements to achieve the same purpose as in § 7410(c)(1) in a manner that is appropriate in light of the developing tribal expertise in air quality management.

With the promulgation of the TAR, it became clear that if an Indian tribe sought to redesignate tribal lands from Class II to Class I, the redesignation (if approved) would be noted in either a TIP approved by

EPA (*see* 40 C.F.R. § 49.9) or a FIP promulgated by EPA (*see* 40 C.F.R. § 49.11(a)) – whichever applied to the lands in question. In a like manner, the applicable plan for State lands might be a SIP or FIP. The Act's definition of "applicable implementation plan" confirms this. 42 U.S.C. § 7602(q).[13]

II. FCPC's Reservation

Introduction

The natural and historic qualities of the FCPC Reservation both define and sustain the Tribe's culture and traditions, and make the Tribe uniquely dependent on the generally pristine nature of the Reservation and surrounding area. Unfortunately, air pollution has significantly affected the water and other resources on the Reservation. In 1993, the FCPC sought Class I redesignation in order to protect the air on and around its Reservation. FCPC Supp. App. at 0005, 0053-55. Shortly thereafter, in 1995, EPA found that the Tribe met all requirements for Class I redesignation. *Id.* at 0006. Despite this, not until the spring of

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[13] 42 U.S.C. § 7602(q) provides:

> For purposes of this chapter, the term "applicable implementation plan" means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been *approved under section 7410 of this title*, or *promulgated under section 7410(c) of this title*, or *promulgated or approved pursuant to regulations promulgated under section 7601(d) of this title* and which implements the relevant requirements of this chapter.

Id. (emphasis added). With respect to both states (under § 7410(c)) and tribes (under § 7601(d)), the reference in § 7602(q) to a plan that is *promulgated* necessarily refers to a FIP (which EPA issues), as opposed to a SIP or a TIP, which would instead be *approved* by EPA. *See also* discussion *infra* at 40-41.

2008, more than fourteen and a half years after the Tribe's original request, did the Tribe receive Class I redesignation.

The FCPC and Its Reservation

The FCPC is a federally recognized Indian tribe, 73 Fed. Reg. 18,553, 18,554 (Apr. 4, 2008), with a long history in what is now Wisconsin and the Midwest states. FCPC Supp. App. 0008. At one time, the Potawatomi people occupied and controlled approximately thirty million acres in the Great Lakes area. *Ibid.*; Pet. Appx. 567. For generations, the Potawatomi people relied on the environment and its resources to meet their economic and cultural needs. FCPC Supp. App. 0008. However, starting in the early 1800's, Potawatomi lands were ceded to the U.S. government. *Ibid.* In 1833, after the Treaty of Chicago, most of the Potawatomi people were forcibly removed from the last of their lands east of the Mississippi. *Ibid.* But some of the Potawatomi, opposing the forced removal and fearing for their lives, fled north. *Ibid.* The Forest County Potawatomi are descendants of these people. *Ibid.*

In 1913, parcels of land were purchased for the Potawatomi by the federal government, using money owed to the Tribe from payments that had been promised under earlier treaties. *Ibid.*; Pet. Appx. 567. This land became the Forest County Potawatomi Reservation, which is located entirely within Wisconsin. FCPC Supp. App. 0008; Pet. Appx. 569. The Tribe was recognized under a Congressional act of June 23, 1913 (38 Stat. 102). Pet. Appx. 567. It was formally organized into the Forest

County Potawatomi Community under a constitution and by-laws ratified by the Tribe in 1937. FCPC Supp. App. 0008; Pet. Appx. 567.

The Class I Area

Numerous lakes, rivers and streams, thousands of acres of wetlands, and tens of thousands of acres of forests make up and surround the proposed Class I area. FCPC Supp. App. 0008; Pet. Appx. 582. FCPC's Reservation is an integral part of this ecosystem. Forest County, named for the vast tracts of forest that cover the area, has a unique network of waterways, including over 850 miles of trout streams and 120 lakes. FCPC Supp. App. 0008. Many of its streams form the headwaters of wild and scenic rivers, the Wolf, Brule, Peshtigo, and Pine. *Ibid.* The Reservation itself is home to the second highest natural point of elevation in the State, Sugarbush Hill, from which four Class I trout streams and two wild and scenic watersheds flow. *Id.* at 0009. The eastern portion of the Reservation is adjacent to a State Wildlife management area and is a wilderness area containing many spring ponds, remote lakes, and many registered historic/traditional properties, which are remnants of ancestral homesteads. *Ibid.* Swamp Creek, which flows nearby, was recently designated as an Outstanding Resource Water by the Wisconsin Department of Natural Resources. *Ibid. See also id.* at 0179-82. The Nicolet National Forest, which is home to over 400 natural spring ponds and 1,170 lakes, surrounds the Reservation. *Id.* at 0009. *See also id.* at 0184-89. The

Headwaters Wilderness Area, which is a federally recognized wilderness area, lies within seven miles of the Reservation. *Id.* at 0009. *See also id.* at 0191-96.

The Importance of Air and Water Quality to the FCPC

The relationship between the Tribe and the natural environment, which provides subsistence and cultural resources, is well documented. FCPC Supp. App. 0001. Along with language, genealogy, and religious beliefs, natural resources form the cornerstone of Potawatomi tradition. *Id.* at 0269. Plants and animals are relied on to provide medicines and to meet ceremonial and religious needs that define unique aspects of Potawatomi culture. *Ibid.*; Pet. Appx. 590. The Tribe's belief system requires that these resources be obtained in a pure form from a clean environment. FCPC Supp. App. 0011. The continued functioning of the Potawatomi belief system depends on the Tribe's ability to obtain the requisite natural resources for cultural practices. *Ibid.*; Pet Appx. 617. Of particular importance to the FCPC is Devil's Lake, which has been set aside by the Tribe for wilderness, cultural and limited recreational use only, as well as other nearby water resources. FCPC Supp. App. 0012.

Based on the unique natural, historic and other qualities of the Reservation and surrounding area, on August 1, 2003, the U.S. Corps of Engineers determined that much of the Reservation, including Devil's Lake, and surrounding lands were eligible for the National Register of Historic Places as a Traditional Cultural Property. *Ibid; see also id.* at

0254-56. A Traditional Cultural Property is defined as a site "that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community" and that is "(a) rooted in the community's history, and (b) important in maintaining the continuing cultural identity of the community." *Id.* at 0010.

The Corps determined that two catchment areas (*i.e.*, areas with natural resources sufficient to supply the resources needed by a given human population in any given year) were Traditional Cultural Properties because the areas "have been foci of the traditional procurement of resources for the Forest County Potawatomi for the last 120 years" and "contain the essential resources necessary to the maintenance of many aspects of the Forest County Potawatomi cultural identity, including the pure water, plants and animals necessary for ceremony, medicines, and special traditional foods." FCPC Supp. App. 0254.

The Corps' finding of eligibility was based on the traditional relationship of the Tribe and its members to the natural environment and the critical importance of hunting, fishing and gathering to Potawatomi subsistence. *Id.* at 0011. Not only do "long oral and written histories of the Forest County Potawatomi agree that the use of wild game, fish, and plant products gathered from nature sustained the Potawatomi until after the midpoint of the twentieth century," but their significance continues today. *Id.* at 0255; Pet. Appx. 590.

The fact that environmental and land use changes have steadily reduced the Potawatomi's access to critical resources from the natural environment only serves to make these catchments as well as the resources they contain all the more valuable. FCPC Supp. App. 0012.

The Present Threat to Air and Water Quality

Despite the generally pristine nature of the FCPC Reservation and surrounding areas, the resources that the Tribe wishes to protect have already been altered by air pollution. *Id.* at 0013. Devil's Lake and its fish have been significantly affected by toxic methyl mercury. *Ibid.*; Pet. Appx. 600. The lake has been studied by the Wisconsin Department of Natural Resources, U.S. Geological Survey and U.S. Fish and Wildlife Service as well as the Tribe. FCPC Supp. App. 0010. These studies have shown that elevated levels of toxic mercury in the lake are caused primarily by the deposition of mercury and sulfur compounds from the air. *Ibid.*

Mercury contamination in Devil's Lake (as well as other waters on or connected to the Reservation) is of grave concern to Tribal members, who fish this lake and hold other fish-eating wildlife such as bald eagle, otter, and mink as special to their culture. *Ibid.* These developments greatly concern tribal members, because they affect the core of Potawatomi life. *Id.* at 0014; *see also* Pet. Appx. 570-71.

III. History of FCPC's Class I Application

On December 7, 1993, the FCPC requested redesignation of the air quality status on the Reservation in northeast Wisconsin from Class II to Class I. FCPC Supp. App. 0053-55. Attached to the request was a resolution of the General Council of the Tribe seeking Class I redesignation. *Id.* at 0225.

The Class I redesignation request consisted of trust parcels of the Reservation of 80 acres or more, located in Forest County, Wisconsin. Portions of the Reservation are located outside this county. However, FCPC did not seek Class I designation of those lands.

In August, 1994, the Tribe submitted the FCPC PSD Class I Area Redesignation Technical Report (the "Technical Report") to EPA. Pet. Appx. 554-638. The Tribe held a public hearing on the proposed redesignation in Crandon, Wisconsin on September 29, 1994. *Id.* at 477-507. Notice of the hearing had been given to EPA Region 5, the States of Wisconsin and Michigan (even though the reservation to be redesignated lay 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 the area, and many other organizations, along with numerous other public notices of the hearing (all of which EPA found adequate). 73 Fed. Reg. 23,090; Pet. Appx. 702. All appropriate notices were given. Copies of those notices, as well as a transcript of the hearing

and comments received, as well as the Tribe's response to those comments are all included in the record. *Ibid.* Prior to the public hearing, the Tribe had examined the existing ecology and economy of the region and analyzed the potential impact of Class I redesignation on both, and made this analysis available for public inspection. Pet. Appx. 554-638.

On February 14, 1995, FCPC submitted a formal proposal to EPA to redesignate its reservation to Class I. Pet. Appx. 226 *et seq.* In June 1995, the Tribe submitted supplemental guidance relating to air quality related values and anticipated impacts on adjoining areas. FCPC Supp. App. 0360-370.

On June 29, 1995, after reviewing all of the submittals provided by the Tribe as well as the Original Comments, EPA determined that all requirements had been met for the Class I Redesignation and issued a proposed rule approving the redesignation of the FCPC's tribal lands as a Class I area. *See* 60 Fed. Reg. at 33,780, FCPC Supp. App. 0374-377, ("the documentation submitted by the Tribal Council *shows that all statutory and regulatory procedural requirements for redesignation have been met*") (emphasis added). EPA then scheduled another public hearing for its own rulemaking on August 2, 1995 and invited the public to comment once again. *Ibid.* On July 31, however, Wisconsin and Michigan formally invoked the dispute resolution process provided for under 42 U.S.C. § 7474(e), FCPC Supp. App. 0378-379, and EPA

accordingly postponed the public hearing dates and extended indefinitely the period for public comment. 60 Fed. Reg. 40,139. FCPC Supp. App. 0374.

After two years, EPA rescheduled the public hearings for August 12 and 13, 1997. *See* 62 Fed. Reg. 37,007, FCPC Supp. App. 0376; Record Item 7 (transcripts of hearings). In early September 1997, Wisconsin advised EPA that it still wanted to participate in the dispute resolution process. FCPC Supp. App. 0380. Michigan, on the other hand, advised EPA that, although it would continue to participate in Wisconsin's dispute resolution, it declined to participate in its own dispute resolution, citing a purported lack of "adequate rules." *Id.* at 0381-382. In August 1998, Michigan advised EPA that it declined to participate in any further dispute resolution. *Id.* at 0383-384, 0385-387.

During 1998 and 1999, extensive discussions took place between the Tribe and the State of Wisconsin as part of the dispute resolution process, which resulted in the Class I Final Agreement between the State of Wisconsin and the FCPC (the "Wisconsin/FCPC Class I Agreement"). *See* Pet. Appx. 668. FCPC advised EPA of that result and expressly requested EPA to promulgate the Class I area redesignation in a FIP as opposed to a TIP because the Tribe was continuing to build its capacity and infrastructure to run a Tribal Air Program and was not yet ready to submit its own TIP. *Id.* at 0388. On October 20, 1999, EPA provided the parties with a copy of the fully executed and recognized Wisconsin/FCPC

Class I Agreement and declared its intent to issue its Class I designation decision within the next six months. *Id.* at 0389-390.

After the Wisconsin/FCPC Class I Agreement was signed by the parties and recognized by EPA, the State of Michigan for the first time indicated an interest in directly participating in the dispute resolution process. Pet. Appx. 678. Although the Tribe took the position that Michigan had waived participation in that process, *see, e.g.*, *id.* at 0391-393, the Tribe expressed a willingness to discuss Michigan's concerns, *ibid.*, and even offered Michigan essentially the same agreement it had struck with Wisconsin. *Id.* at 0394-400. Michigan's proposal, however, would have exempted Michigan from any Class I analysis, *see, e.g., ibid.*; *id.* at 0007; *id.* at 0410 (". . . with respect to AQRVs, the State [of Michigan] and affected sources will possess only the same duties and responsibilities they possessed prior to any proposed or final redesignation . . ."); *id.* at 0413 ("If the EPA redesignates the FCP lands to Class I status in any manner that imposes any additional obligations on Michigan's air program, Michigan will likely be forced to ask the U.S. Sixth Circuit Court of Appeals to review the matter").

Because of Michigan's refusal to engage in meaningful discussion, the Tribe requested EPA to resolve the parties' dispute pursuant to 42 U.S.C. § 7474(e). *See id.* at 0168-75.

On December 18, 2006, EPA issued the proposed FIP. Record Item 9, 71 Fed. Reg. 75,694 Pet. Appx. 205-222. EPA scheduled two

more public hearings and extended the period for public comment yet again. 72 Fed. Reg. 8138 (Feb. 23, 2007), Record Item 10. Many such comments were received, almost all of which strongly favored Class I status. *See generally* Record Item 24 (oral and written comments). The Tribe also submitted extensive additional analysis. *See* FCPC Supp. App. 0001-359.

On April 29, 2008, EPA issued its decision redesignating portions of the FCPC Reservation as a Class I area. The EPA decision makes clear that the Tribe fully satisfied all requirements for the redesignation imposed by 42 U.S.C. § 7474(b)(2) and 40 C.F.R. § 52.21(g)(2) and (4). *See generally* 73 Fed. Reg. 23,089-23,092, Pet. Req. Short Appx. 1-31. In separately published rules, EPA concluded the dispute resolution proceedings with Michigan and Wisconsin. *Id.* at 32-41 (Michigan), 42-48 (Wisconsin).

The portions of FCPC's Reservation redesignated Class I join at least three other areas in the Upper Midwest that have received Class I designations: Rainbow Lakes Wilderness Area in Bayfield County, Wisconsin; the Boundary Waters Canoe Area Wilderness in Northern Minnesota; and the Seney Wilderness Area in Schoolcraft County in Michigan's Upper Peninsula. FCPC Supp. App. 0019.

SUMMARY OF ARGUMENT

Over thirteen years ago, EPA preliminarily determined that FCPC had satisfied all prerequisites for redesignation of portions of its

reservation to Class I status, and lately has reaffirmed that determination in its final ruling. Michigan does not now challenge that determination. Instead, Michigan contends that EPA used the wrong type of plan to implement the redesignation (*i.e.*, a FIP instead of a TIP). Its attack, while multi-faceted, boils down to two propositions: (1) the CAA requires the use of a TIP whenever tribal lands are redesignated; and (2) this particular redesignation potentially increases the obstacles to issuing permits for major stationary sources in Michigan. The first proposition is both incorrect and insubstantial; the second (where not simply mistaken) is addressed to the wrong branch of government.

The CAA grants Indian tribes the right to redesignate without specifying the means for implementing that redesignation. Instead, both the CAA and the implementing regulations give EPA broad discretion to utilize a FIP when the tribe either does not or cannot promulgate a TIP. Here, FCPC's reservation already was regulated by a FIP and the Tribe itself asked EPA to use a FIP to effect the redesignation. Thus, EPA's choice of the means of implementation was proper.

Similarly, the supposed regulatory confusion of which Michigan complains does not in any way impugn FCPC's entitlement to Class I redesignation. At its heart, Michigan's objection is a critique of the statute itself which, by allowing enhanced air quality protection of near-pristine areas like FCPC's reservation, necessarily increases the potential burdens placed on permitting authorities and permit applicants. Many

of the uncertainties and burdens of which Michigan complains are inescapable consequences of the statutory scheme itself. Others are exaggerated or unfounded. And virtually all are premature, consisting of *potential* problems, not yet ripe, that may be addressed, if and when they ever become concrete, in the permitting processes for individual facilities.

But entirely aside from the insubstantiality of Michigan's position, Michigan has no standing to assert it. Redesignation is unavoidable; all conditions have been satisfied and the Tribe is entitled to it. Michigan has not shown that it has any cognizable interest in the type of plan used to implement it or that it has suffered any injury for EPA's choice of the plan.

The time has come to fulfill the intent of the CAA and allow FCPC's reservation the protection for which it qualifies before any further deterioration takes place. The petition must be denied.

ARGUMENT

STANDARD OF REVIEW

Issue I addresses standing. The party who seeks review of administrative decisions bears the burden of establishing its standing. *See, e.g.*, *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 675 (7th Cir. 2008); *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the . . . case, each element must be supported . . . with the manner and degree of evidence

required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Furthermore, because Michigan seeks review of administrative decisions of the EPA, which are not subject to Article III of the U.S. Constitution, its "burden of production on standing is the same as that of a plaintiff moving for summary judgment in the district court," *Citizens Against Ruining the Environment*, 535 F.3d at 675. Michigan was thus required to support each element of its claim by affidavit or other evidence and to "substantiate [its] entitlement to judicial review at the earliest possible point." *See id.* at 675-76.

Questions of statutory and regulatory interpretation pervade issues II(A) and (B) (argument sections II and III). Where questions of statutory construction are involved, the Court engages in a two-step analysis: "If Congress has clearly spoken on the issue in question, our inquiry is at an end for 'that intention is the law and must be given effect.'" *Illinois EPA v. U.S. EPA*, 947 F.2d 283, 289 (7th Cir. 1991), *citing Chevron U.S.A., Inc. v. Natural Res. Defense Coun'l, Inc.*, 467 U.S. 837, 843 n.9 (1984). "If, however, the statute is silent or ambiguous with respect to the specific issue addressed by the regulation, a court must proceed to the second step of the *Chevron* test where its inquiry becomes whether the agency regulation is a reasonable and permissible construction of the statute." *Ibid.* In conducting that inquiry, EPA's interpretation "is entitled to great deference . . . and we will not substitute our judgment

for that of the EPA." *Id.* at 290 (citations omitted). The court "defer[s] even more to an agency's construction of its own regulations." *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 907 (7th Cir. 1990). "An agency's interpretation must be upheld unless it is plainly erroneous or inconsistent with the regulation." *Ibid.* (citations omitted).

With respect to the ripeness question addressed in section III, a party invoking federal jurisdiction must satisfy the case or controversy requirement of Article III of the Constitution, *Tobin v. Ill. State Bd. of Elections*, 268 F.3d 517, 527 (7th Cir. 2001), and "bears the burden of demonstrating its existence." *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 679 (7th Cir. 2006). The justiciability of a case "concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Tobin*, 268 F.3d at 527 (*quoting Renne v. Geary*, 501 U.S. 312, 320 (1991)). In other words, "[o]ne important element of the 'case' or 'controversy' is satisfying the ripeness doctrine." *Sprint Spectrum L.P. v. City of Carmel*, 361 F.3d 998, 1002 (7th Cir. 2004). Thus, the burden of establishing ripeness falls on Michigan. *See Renne v. Geary*, 501 U.S. 312, 316 (1991).

I. Michigan Has Failed To Satisfy The Constitutional And Prudential Requirements Of Standing.

To demonstrate Article III standing, a party must show: "(1) an injury that is concrete, particularized, and actual or imminent rather than conjectural or hypothetical; (2) a causal connection between the

injury and the challenged conduct, such that the injury may be fairly traceable to that conduct; and (3) a likelihood that the injury will be redressed by a favorable decision." *Perry v. Sheahan*, 222 F.3d 309, 313 (7th Cir. 2000) (*citing Lujan*, 504 U.S. at 560-61). Michigan must also satisfy prudential standing requirements, which "embod[y] 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Disability Rights Wis., Inc. v. Walworth County Bd. of Supervisors*, 522 F.3d 796, 800 (7th Cir. 2008) (*quoting Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)). Michigan lacks standing under both Constitutional and prudential standards for at least four reasons.

First, while Michigan challenges EPA's use of a FIP to redesignate the Reservation, it cannot establish an injury in fact simply by claiming that EPA committed a procedural error in issuing a FIP. As the Supreme Court has made clear, a plaintiff can assert a procedural injury only where "the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Lujan*, 504 U.S. at 573 n.8. This court has similarly recognized that "the deprivation of a purely procedural right can be remedied by a federal court only when the individual who has been deprived of that right can demonstrate that deprivation of that right is related to another concrete injury." *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 952-953 (7th Cir. 2005).

Furthermore, to the extent that Michigan claims that the contents of the FIP or the way it was promulgated impose administrative burdens on it, it has failed to demonstrate an injury in fact. As this Court has explained, "'[i]njury' connotes (1) a palpable, ideally a measurable, harm, (2) that is reasonably likely to be prevented, alleviated, or cured by the lawsuit, (3) to a concrete, individual, nonideological, in short weighty, interest." *Ill. Dep't of Transp. v. Hinson*, 122 F.3d 370, 371-72 (7th Cir. 1997). *See also Illinois v. City of Chicago*, 137 F.3d 474, 477 (7th Cir. 1998) ("Injury . . . [is] a palpable harm to a concrete interest"). Injury in fact must also be "actual or imminent," as opposed to "conjectural or hypothetical." *Lujan*, 504 U.S. at 560. Thus, Michigan must show that it "has sustained or is immediately in danger of sustaining [that] injury." *DH2, Inc. v. U.S. Sec. & Exchange Comm'n*, 422 F.3d 591, 596 (7th Cir. 2005) (*quoting Wis. Right to Life, Inc. v. Schober*, 366 F.3d 485, 489 (7th Cir. 2004)). "Mere speculation is not enough to establish an injury in fact." *Id.*

Nowhere does Michigan point to any proof that the redesignation of FCPC's lands would have any impact on Michigan's management of air quality within its own borders. All of the alleged "injuries" described by Michigan, to itself or others, are purely conjectural and disconnected from any specific administrative proceeding. Absent identification of some specific project or permitting process that is affected by the alleged improprieties, Michigan's objections relating to the alleged uncertainties

engendered by use of a FIP do not support its standing. Like the state attorney general in *Citizens Against Ruining the Environment*, Michigan was required to "substantiate [its] entitlement to judicial review at the earliest possible point," 535 F.3d at 676, and failed to do so. Nor may Michigan now attempt to rehabilitate its weak showing of an injury in fact, for "[i]t is improper for a party to raise new arguments in a reply because it does not give an adversary adequate opportunity to respond." *Id.* at 675.

Second, to the extent that the alleged administrative burdens fall on persons seeking permits within the State of Michigan, Michigan lacks standing to assert those rights, however concrete or immediate (although it has not shown either is the case). Prudential considerations prohibit one party from establishing standing by "raising another person's legal rights." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004). "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Thus, the interest sought to be enforced in a federal court by Michigan must be its own and not those of a third party. *See Am. Fed'n of Gov't Employees v. Cohen*, 171 F.3d 460, 472 (7th Cir. 1999). The interests of Michigan's present (and prospective) stationary sources fall squarely within this prudential limitation. Nor may Michigan

assert standing to sue in a *parens patriae* capacity on behalf of its citizens against the federal government, because it is the United States, and not Michigan, that represents the people's interests. *Citizens Against Ruining the Environment*, 535 F.3d at 676 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923)).

Third, while Michigan also objects to the Class I Final Agreement with the State of Wisconsin, *see infra* at 54-55, Michigan is not a party to that agreement, nor does it apply to Michigan (nor has Michigan effectively sought review of it, *see supra* at 2). Federal jurisdiction "can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'" *Warth*, 422 U.S. at 499 (*quoting Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)); *Laskowski v. Spellings*, 546 F.3d 822, 825 (7th Cir. 2008). Michigan thus lacks standing to challenge the Wisconsin agreement.

Finally, Michigan lacks standing because it has failed to demonstrate that any injury will be redressed by a favorable decision. The redressability requirement of Article III standing "examines the causal connection between . . . the alleged injury and the judicial relief requested." *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). A plaintiff must show that "there is a 'substantial likelihood' that the relief requested will redress the injury claimed." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978). Even if this Court were to rule in favor of the State, FCPC would be entitled to redesignation

using a TIP for approval by the EPA under 42 U.S.C. § 7601. If this occurred, the tribal lands would again be designated as Class I, a portion of Michigan would again be subject to the Class I increment levels, and thus, Michigan would again have to conform its "permitting, monitoring, and enforcement programs" to the emission limits and other requirements resulting from a Class I designation. In short, the use of a TIP would not redress the injuries Michigan claims. *See Wisconsin v. FERC*, 192 F.3d 642 (7th Cir. 1999) (state's challenge to the agency's issuance of licenses for six hydropower projects on basis that each should require a fish protection study did not allege a redressable injury because it was "merely speculative" that even a favorable ruling would redress any claimed injuries to a fishery on the river).

II. EPA May Use A FIP To Promulgate A Class I Redesignation, Particularly Where No TIP Is In Place And The Tribe Requests That The Redesignation Be Accomplished With A FIP.

A. The CAA and its Regulations authorize EPA to use a FIP rather than a TIP to redesignate the reservation.

Section 301(a) of the Clean Air Act, 42 U.S.C. § 7601(a), authorizes EPA's Administrator "to prescribe such regulations [subject to § 301(d)] as are necessary to carry out his functions under [the Act]." Section 301(d), in turn, gives the Administrator authority to treat Indian tribes as States, 42 U.S.C. § 7601(d)(1), promulgate regulations to identify the provisions of the CAA for which it is appropriate to treat tribes as States,

§ 7601(d)(2), and establish the elements of tribal implementation plans and procedures for their approval or disapproval. § 7601(d)(3). Section 301(d)(4) then expressly authorizes the Administrator to "provide, by regulation, other means by which the Administrator will directly administer such provisions so as to achieve the appropriate purpose" in any instance in which the administrator determines in his discretion that "the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible." 42 U.S.C. § 7601(d)(4); *Arizona Public Serv. Comm'n v. EPA*, 211 F.3d 1280, 1298 (recognizing EPA discretion).

EPA promulgated the Tribal Authority Rule pursuant to this statutory authorization and, in so doing, expressly authorized and in fact required the Administrator to promulgate a FIP where a tribe does not submit a TIP:

> Notwithstanding any determination made on the basis of authorities granted *the Administrator* under any other provision of this section, the Administrator, pursuant to the discretionary authority explicitly granted to the Administrator under section 301(a) and 301(d)(4):
>
> a) *Shall promulgate without unreasonable delay such Federal implementation plan provisions* as are necessary or appropriate to protect air quality, consistent with the provisions of sections 304(a) and 301(d)(4), *if a tribe does not submit a tribal implementation plan* meeting the completeness criteria of 40 CFR part 51, appendix V, or does not receive EPA approval of a submitted tribal implementation plan.

40 C.F.R.§ 49.11(a) (emphasis added). Thus, the plain language of § 49.11(a) requires EPA to promulgate a FIP without unreasonable delay when a tribe does not submit a TIP.[14]

In this case, the Tribe informed EPA by letter of August 4, 1999 that it was not going to submit a TIP and explicitly requested that EPA issue a FIP to effect the redesignation. *See* FCPC Supp. App. at 0388. Since EPA already had determined that the Tribe had met all the requirements for Class I redesignation, *id.* at 0374-77, upon receiving the Tribe's letter, it was not only authorized but required to promulgate a FIP to implement Class I for the Tribe "without unreasonable delay." 40 C.F.R. § 49.11(a).

B. Use of a FIP to redesignate FCPC's Reservation was particularly appropriate since a FIP already applied to the Reservation.

While Michigan implies that there is something extraordinary about using a *federal* implementation plan to govern *tribal* territory,

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[14] At one point, Michigan suggests that EPA's own rules require it to treat tribes "as identical to a state with regarding [sic] the Act's redesignation provisions." *See* Michigan Brief at 36 (*citing* 40 C.F.R. 49.11, but probably meaning to cite 49.4). The suggestion is untenable. Section 49.11 explicitly authorizes the use of a FIP wherever "necessary or appropriate" if a Tribe fails to submit a TIP. The rule that explicitly spells out the requirements for tribal redesignation, 40 C.F.R. 52.21(g)(4), does not require the use of a TIP. And the fact that 40 C.F.R. 49.4 does not list redesignations when enumerating certain matters for which it is *never* appropriate to treat tribes as states does not permit an inference that tribes *always* must be treated as states for such a purpose (as Michigan suggests, *see* Michigan Brief at 21, 36). Michigan's contention is not merely illogical, it is contrary to the section's purpose: § 49.4 exempts tribes from certain timelines and other obligations that would be either difficult or impossible for them to satisfy, *i.e.*, its purpose is to expand their options, not limit them.

nearly every Indian reservation in the nation has been governed by a FIP since 1974. It was then that EPA promulgated the Federal PSD regulations contained in 40 C.F.R. § 52.21 as a FIP.[15] These regulations expressly apply to Indian Reservations, *see supra* footnote 11; *see also* § 52.21(a)(1), including the FCPC Reservation. *See* 40 C.F.R. § 52.2581(d) and (e) (providing that Wisconsin's SIP does not govern permitting in Indian country and instead the PSD FIP at 40 C.F.R. § 52.21 applies).

Michigan's current position is at odds with its statements to the D.C. Circuit in Michigan's earlier challenge to an EPA rule parallel to 40 C.F.R. § 49.11(a). That rule, *inter alia*, allowed the Agency to issue Federal Operating Permits to sources in Indian country under the CAA Title V operating permit program. *Michigan v. EPA*, 268 F.3d 1075, 1078-79 (D.C. Cir. 2001).[16] The D.C. Circuit noted that "*both sides* [including Michigan] *agree* that in the absence of a tribal implementation plan, EPA may provide a federal operating plan for lands under the tribe's jurisdiction." *Id.* at 1079 (emphasis added). And, indeed, Michigan did take precisely the position the court described. In its opening brief in that case Michigan declared that "for areas under tribal jurisdiction for which no tribal application has been approved under

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[15] *See supra* footnotes 4 and 5.

[16] The challenged rule provision, 40 C.F.R. § 71.4(b), allowed EPA to issue Federal Operating Permits for sources on Indian lands when no TIP including Title V permitting authority for those lands had been approved by the Agency. *See* 64 Fed. Reg. 8,247, 8,262 (Feb. 19, 1999).

§ 301(d), Congress granted EPA authority to adopt federal implementation plans ('FIPs') under CAA § 110 and FOP programs." 2001 WL 36046989, at 6. Michigan further noted that the "TAR also authorizes EPA to implement a FIP to protect tribal air quality within a reasonable amount of time if tribal efforts do not result in the adoption and approval of tribal plans or programs." *Id.* at 8.

In like manner, the TAR authorized EPA's actions here. When FCPC requested redesignation pursuant to § 7474(c), EPA properly implemented FCPC's Class I redesignation through a modification of that FIP, exercising its authority under § 49.11(a). The FIP modification, in turn, is incorporated into an existing applicable State plan (subpart YY of 40 C.F.R. Chapter 52) that satisfies emission limit requirements, is enforced by an entity with personnel and equipment necessary to administer the regulations (EPA and the Department of Justice) and is enforced by a verified legal authority that can enforce the implementation plan within all the land areas to which the implementation plan applies.[17] Thus, both before and after Class I redesignation only one plan, a FIP, has been used to implement the CAA on the FCPC Reservation. There is nothing extraordinary about this.

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[17] 40 C.F.R. 52.21 constitutes a complete implementation plan as is required by Section 110(a)(2) of the Act. For example, §§ 52.21(c) and (d) provide emissions limit requirements consistent with the Act; § 52.21(b)(17) defines EPA as the enforcing agency; and § 52.21(a)(2)(ii) authorizes EPA to issue PSD permits. That § 52.21 is a complete PSD program is further evidenced by the fact that, until September 2008, § 52.21 constituted the PSD program for Michigan. *See supra* n.12.

C. The CAA does not require that redesignation of Indian reservations be published through a TIP.

Notwithstanding the foregoing, Michigan contends that EPA's use of a FIP is contrary to various provisions of the CAA. Since EPA's use of a TIP is clearly authorized by 40 C.F.R. § 49.11(a), this is an argument that that rule is invalid, not that EPA has not implemented the rule correctly. *See* Michigan Brief at 37. For the reasons discussed in the Tribe's jurisdictional statement, this Court has no jurisdiction over any challenge to the TAR: the TAR was not mentioned in the Petition; the petition was not filed within sixty days of the promulgation of the TAR; and the petition was not filed in the D.C. Circuit. *See supra* at 2-4. In any event, none of the CAA provisions cited by Michigan mandates use of a TIP.

1. Section 164(c)

Michigan asserts that § 164(c) requires that redesignation of tribal reservation land be "*implemented* 'only by the appropriate Indian governing body,'" which, says Michigan, requires the use of a TIP. *See* Michigan brief at 33 (emphasis added). In fact, the statute provides nothing about *how* the redesignation is to be implemented—the word "implemented" is Michigan's—much less specify a TIP as the exclusive means of doing so. Section 164(c) says only that "[l]ands within the exterior boundaries" of tribal reservations may be redesignated only by "the appropriate Indian governing body," *i.e.*, it identifies *who* may

redesignate a tribe's lands. 42 U.S.C. § 7474(c). This simply requires that the *decision* to redesignate be made by the appropriate Indian governing body, as 40 C.F.R. § 52.21(g)(4) provides. FCPC, through its appropriate governing body, unquestionably satisfied this requirement. *See* 73 Fed. Reg. 23,089-092. Pet. Req. Short Appx. 6-4.

2. Section 164(e)

Michigan next asserts that the dispute resolution provision, CAA § 164(e), requires use of a TIP instead of a FIP because the section states the Administrator's decision "shall become part *of the applicable plan*," which, Michigan asserts, must refer to a TIP. *See, e.g.,* Michigan Brief at 33 (redesignations "must be part of the 'applicable plan,' being a TIP"). Yet, nowhere does Section 164(e) state that the "applicable plan" must be a TIP, either for redesignation of a tribal reservation or for resolution of any other dispute falling within its scope. Nor is such an inference warranted.

In the context of Section 164(e), the adjective "applicable" is a word of description, not of limitation. In other words, the "applicable plan" is that which the Administrator determines is appropriate to implement the decision. Since the plan applicable to FCPC's reservation immediately prior to the redesignation was a FIP, it was manifestly appropriate that the redesignation become part of that plan.

That conclusion is supported by the Act's definition of "applicable implementation plan," 42 U.S.C. § 7602(q), which provides:

> For purposes of this chapter, the term "applicable implementation plan" means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been *approved under section 7410 of this title*, or *promulgated under section 7410(c) of this title*, or *promulgated or approved* pursuant to regulations promulgated under section 7601(d) of this title and which implements the relevant requirements of this chapter.

Id. (emphasis added). By including implementation plans that are either "promulgated" or "approved," this definition makes clear that a FIP can be the applicable plan for Indian lands. The phrase "promulgated under section 7410(c)" in the first part of the definition refers to FIPs because § 7410(c) establishes EPA's authority to promulgate FIPs when states do not meet the requirements identified in §§ 7410(c)(1)(A) & (B). The phrase "approved under section 7410" refers to SIPs because the word "approved" does not apply to FIPs; EPA instead issues FIPs. Thus, the "applicable plan" for a state is either a SIP or a FIP.

The second part of the definition refers to tribal lands because § 7601(d) concerns only tribal authority, and thus the reference to "regulations promulgated under section 7601(d)" now must be read to refer to the TAR. In the term which precedes it, "promulgated or approved pursuant to [the TAR]," "promulgated" refers to FIPs, which only EPA can issue, and the term "approved" refers to TIPs, which are submitted to and "approved" by EPA. Thus, the applicable plan for Indian lands would be either a FIP *promulgated* by EPA (as authorized by § 49.11(a)) or a TIP *approved* by the Agency (pursuant to § 49.9).

3. Section 301(d)(1)

Michigan also asserts that CAA § 301(d)(1), 42 U.S.C. § 7601(d)(1), which authorizes EPA to treat tribes as states, requires the use of a TIP to accomplish a redesignation. *See* Michigan Brief at 24, 31. This argument confuses two distinctly different concepts: area designation and treatment-as-state (TAS) status.

Area redesignation is addressed in § 164(c), which expressly authorizes Indian tribes – *qua* tribes, rather than through their treatment as States – to redesignate their reservations. It does not require TAS status for redesignation of tribal reservations, much less the use of a TIP. 42 U.S.C. § 7474(c). By contrast, § 301(d)(1) addresses tribes seeking TAS status, providing the Administrator authority to treat tribes as states under certain circumstances, including authority to implement the CAA in areas under their jurisdiction. *See* 42 U.S.C. § 7601(d)(1). Although tribes that receive TAS status in accordance with § 301(d)(1) may propose TIPs, nothing in § 301(d)(1) requires TAS status as a precondition for redesignation.

4. Section 301(d)(3)

Perhaps because it confuses area redesignation with treatment-as-state status, Michigan next tries to transform § 301(d)(3), 42 U.S.C. § 7601(d)(3), which states EPA *may* promulgate regulations establishing the elements of TIPs and procedures for their approval, into a "requirement" that it *must* use a TIP for tribal Class I redesignation. *See*

Michigan Brief at 31-32. Yet, § 301(d)(3) does not suggest in even the most general terms whether or under what circumstances TIPs are required for any purpose, much less require them for redesignation.

5. Section 301(d)(4)

In the final step of its textual analysis, Michigan argues that the use of the phrase "directly administer" in § 301(d)(4), 42 U.S.C. § 7601(d)(4), implies that area redesignation may only be effected through a TIP. *See, e.g.,* Michigan Brief at 31, 41. How Michigan reaches this conclusion is puzzling. As Michigan should be aware, the D.C. Circuit has already made clear that "directly administer such provisions" under § 301(d) simply means that EPA is to implement a federal program (*e.g.*, issue a FIP) whenever a tribe does not enact an effective TIP. *Michigan v. EPA*, 268 F.3d 1075, 1078-79 (D.C. Cir. 2001). This is exactly what EPA did when it modified the PSD FIP for Wisconsin to implement Class I for FCPC.

D. Nor does any judicial decision mandate the use of a TIP to redesignate a reservation where the tribe specifically requests a FIP.

Michigan attempts to bolster its dubious textual analysis of the CAA by relying on *Arizona v. EPA*, 151 F.3d 1205 (9th Cir. 1998), *amended on other grounds*, 170 F.3d 870 (9th Cir. 1999), which held that EPA abused its discretion in promulgating the Yavapai-Apache tribe's

redesignation in a FIP. That holding, however, is inapplicable to FCPC's redesignation.[18]

First, the TAR was not before the court in *Arizona v. EPA*. Instead, in *Arizona v. EPA*, the court, concerned that "the [Yavapai-Apache] Tribe has never been given the chance to submit its own TIP," rejected EPA's use of a FIP to redesignate the Yavapai-Apache reservation on the ground that EPA had "failed to act as directed by Congress to promulgate both regulations establishing the elements of a [TIP] and the procedures for approving and disapproving [TIPs]." *Id.* at 1212. Issuance of the TAR cured that failure to act. That rule, plus FCPC's express request that EPA utilize a FIP, renders *Arizona v. EPA* inapposite.

Second, as shown above, the TAR authorizes EPA to either approve a TIP submitted by the tribe in accordance with 40 C.F.R § 49.9, or to promulgate a FIP under 50 C.F.R. § 49.11 where "a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 C.F.R. part 51, Appendix V, or does not receive EPA approval of a submitted tribal implementation plan." *Id.* The *Arizona v. EPA* court was not prompted to consider these provisions. If it had, the court would have undoubtedly noted that CAA section 302(q) references both EPA

[18] The main issue in *Arizona v. EPA* was whether the tribe had met the statutory requirements for redesignation of its reservation. The court held that it had. 151 F.3d at 1210-1212. In so doing, the court made it abundantly clear that the requirements for tribal redesignation were purely procedural and that the EPA's role in reviewing such applications was "narrow." *Id.* at 1211.

promulgated plans (FIPs) and EPA approved plans (TIPs) as applicable in Indian country.

Third, the *Arizona v. EPA* court was not asked to hold that under the TAR an "applicable implementation plan" for Indian tribes under § 302(q), 42 U.S.C. § 7602(q), may be *either* a TIP or a FIP. *See supra* at 40-41. Moreover, that argument was not available until the TAR was issued, since with respect to Indian tribes the definition of "applicable implementation plan" under § 7602(q) only includes a plan "promulgated or approved pursuant to regulations *promulgated under section 7601(d).*" Thus, a FIP was not an "applicable plan" for Indian tribes until EPA promulgated the TAR, pursuant to which it is authorized to promulgate a FIP. *See* 40 C.F.R. § 49.11.

Fourth, subsequent decisions have recognized that § 301(d)(4) grants EPA broad discretion to utilize FIPs or otherwise administer the CAA differently with respect to tribes, *see Michigan v. EPA*, 268 F.3d 1075, 1083-84 (D.C. Cir. 2001); *Arizona Pub. Serv. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000). In rejecting the original challenge to the TAR, the D.C. Circuit in *Arizona Public Service* found Section 301(d)(4) broad enough to authorize EPA to exempt tribes from suits in state court (regarding permits a tribe might issue if it had a TIP). *Id.* at 1298-99. In *Michigan v. EPA*, the D.C. Circuit relied on Section 301(d)(4) in holding that "in the absence of an EPA-approved tribal implementation program, EPA may adopt a federal implementation program." 268 F.3d at 1078-79. The

reasoning of these decisions confirms that the broad authority of § 304(d)(4) validates § 49.11 of the TAR.

Finally, the *Arizona v. EPA* court openly acknowledged that FIPs were appropriate to "fill in the gaps" where a state did not submit a SIP. *See* 151 F.3d at 1212. This suggests that the court would have had no difficulties with § 49.11 of the TAR, which authorizes the use of a FIP rather than a TIP for the same reason, namely, to fill the gap that exists where a tribe does not submit a TIP, or with the use of a FIP here, where the Tribe expressly asked for one.

E. EPA did not amend Wisconsin's SIP.

Despite the fact that most of Michigan's brief contends EPA erred by using a FIP to redesignate the FCPC, Michigan also suggests that EPA did so by amending Wisconsin's SIP. *See, e.g.*, Michigan Brief at 23, 24, 29-30. Although it is not clear Michigan would ever have standing to raise such an argument—if any SIP was altered, it was Wisconsin's, not Michigan's—in fact Michigan is simply confused.

First, although Michigan correctly asserts that FIPs serve a "gap-filling role," *see* Michigan Brief at 43, it fails to acknowledge that 40 C.F.R. § 52.21, which contains the Federal PSD FIP, filled such a gap already. As noted above at 7 and 11, after the *Sierra Club* suit, EPA disapproved all state SIPs as lacking PSD provisions, and instead promulgated and incorporated the PSD FIP (*i.e.*, 40 C.F.R. § 52.21) into all State plans. Contrary to Michigan's assertions, *see* Michigan Brief at

44, at that time the PSD FIP was "omnipresent." As states such as Wisconsin received approval for PSD SIPs, the geographic reach of § 52.21 was narrowed, but the PSD FIP remained in place for Indian lands. *See, e.g., supra* n.11. Thus, contrary to Michigan's assertions, the FCPC Class I area redesignation is an amendment to the existing FIP for Wisconsin Indian country.

This conclusion is not altered by the fact that the plan for Wisconsin, like those for several other States, recites that § 52.21 is "hereby incorporated and made 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." *See* Michigan Brief at 44-45. The "applicable State plan[s]" to which § 52.21 refers are not the State's SIPs themselves but, rather, the listings of the SIP and FIP elements that apply within a given State's borders. *See supra* at 6. EPA has repeatedly made clear that incorporation of § 52.21 is the "federal implementation plan portion of State plans," not a part of the SIP itself. *See supra* n.5. And that is necessarily true, since states have no jurisdiction over Indian reservations under the CAA. *See supra* at 8-9 and n.6. Accordingly, neither § 52.21 nor the redesignation of FCPC's reservation is a part of a SIP implemented by Wisconsin.

III. The Use Of A FIP To Promulgate The Redesignation Of Tribal Land Already Subject To A FIP Does Not Create Any Regulatory Confusion Or Uncertainty.

The remainder of Michigan's argument is a parade of speculative harms supposedly resulting from the use of a FIP. Michigan argues that the Class I Redesignation "subject[s] Michigan's air pollution programs to numerous complications and unworkable conflicts" and "create[s] a scenario whereby Michigan cannot determine for itself or explain to its citizen-applicants, and other permit holders, what additional emission limits or other requirements now apply." *See, e.g.,* Michigan Brief at 45-47. Aside from their individual implausibilities (discussed below), Michigan's complaints suffer from at least three common shortcomings.

First, many of these claims are simply not ripe. In determining whether a decision is ripe for review, this Court must "evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

As we discuss in more detail below, Michigan's claims fail under both prongs of the ripeness inquiry. The "complications" and "unworkable conflicts" on which Michigan relies are not based on concrete facts. As this Court has made clear, "Cases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as

opposed to actual, concrete conflicts." *Hinrichs v. Whitburn*, 975 F.2d 1329, 1333 (7th Cir. 1992). Moreover, if an actual conflict between the State and the Tribe were to develop, the dispute resolution process set forth at 40 U.S.C. § 7474(e) would be available to resolve it, obviating any claim of hardship. Unless and until such a dispute arises and is presented to and resolved by EPA under § 7474(e), Michigan's claims are not ripe.

Second, the alleged inconvenience of FCPC's Class I redesignation for Michigan or its permit applicants furnishes no legal reason to deny Indian tribes the right to redesignate their reservations. 42 U.S.C. § 7474(c). If by availing itself of this right FCPC has added a layer of complexity and unpredictability to the permitting process which Michigan considers unacceptable, its recourse is to Congress, not the courts.

Third, Michigan's argument assumes that its permitting process would be entirely free from complications and uncertainties in the absence of this one redesignation. This assumption is unwarranted[19] – it is impossible to determine permit conditions in advance because these conditions are based on facts that the permitting process itself reveals. Moreover, FCPC's reservation is not the only Class I area that Michigan applicants need to consider; Class I areas already exist not only in

[19] Michigan's own brief notes some of the complexities associated with PSD permitting. *See* Michigan Brief at 12-13.

Wisconsin and Minnesota, but in Michigan's own Upper Peninsula. *See supra* at 25.[20] Yet Michigan cites no "unworkable conflicts" from their existence to support its claim that such conflicts would arise here. And even if no Class I areas were nearby, Michigan major sources would still have to model for and meet PSD Class II increments. PSD requirements for sources to model their impact on Class I and Class II areas only applies to major sources that emit over 100 to 250 tons per year of a regulated pollutant, depending on the type of source. 40 C.F.R. §§ 52.21(b)(1)(i) and 52.21(k). This is not an "impossible situation"; it is the ordinary operation of the regulatory scheme.

A. Neither statute nor regulation requires that the Tribe have its own complete regulatory mechanism in place prior to redesignation.

Michigan argues that the redesignation order "fails to comply with the Act's substantive requirements" because it fails to contain emission limits, enforcement personnel, and procedures to enforce them. *See* Michigan Brief at 38-39, *citing* 42 U.S.C. §§ 7410(a)(2)(A)-(C). This argument is refuted by the plain language of the redesignation order, which expressly provides that "[t]he provisions for prevention of significant deterioration of air quality at 40 C.F.R. § 52.21 are applicable to the Forest County Potawatomi Community Reservation." 73 Fed. Reg. at 23,101. In turn, 40 C.F.R. § 52.21 sets forth the terms of the FIP for

[20] As EPA stated in issuing the redesignation, "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." 73 Fed. Reg. 23,096 (Apr. 29, 2008).

the PSD program. It contains emission limits, establishes a permit program that is administered by the Administrator, and is federally enforceable. § 52.21(b)(17). *See supra* note 17.

Even if a FIP for the PSD program were not already in place, Michigan's argument has no support in the text of the statute. The provisions on which Michigan relies, 42 U.S.C. § 7410(a)(2)(A)-(C), are explicitly confined to State implementation plans. They deal, moreover, with the creation of the regulatory mechanism itself, and have nothing to do with the redesignation of PSD areas in general or tribal reservations in particular. As discussed above, the statute and regulations set forth the specific requirements for redesignation of a tribal reservation. None of those regulations requires that a complete tribal environmental regulatory system be in place.

B. Class I Redesignation does not require the establishment of any AQRVs, let alone threshold effects levels.

Michigan next alleges that various supposed uncertainties relating to Air Quality Related Values ("AQRVs") "that FCPC ostensibly would enforce" exacerbate the supposedly "unworkable conflicts" engendered by the redesignation. *See* Michigan Brief at 39-40, 47-48. This claim is not ripe, but even if it were, it has no merit.

In determining whether issues are fit for judicial resolution under the first prong of the ripeness inquiry, this Court must look to whether they are "sufficiently concrete at this time 'to prevent the courts . . . from

entangling themselves in abstract disagreements over administrative policies.'" *Bethlehem Steel Corp. v. U.S. EPA*, 536 F.2d 156, 160-61 (7th Cir. 1976). Michigan's claim fails this examination. EPA determined that "Congress did not make AQRVs a prerequisite for redesignation of non-federal Class I areas [and] "it is therefore unnecessary for EPA to determine what AQRVs the land at issue might possess in order for the Agency to act on, including granting, the redesignation request." 73 Fed. Reg. 23,096. As EPA did not rule on that issue, it is not ripe for review. *Arizona Public Serv. Co. v. EPA*, 211 F.3d 1280, 1296 (D.C. Cir. 2000). Furthermore, questions concerning any tribal AQRVs or their quantification levels would arise only if the Tribe asserted that a particular proposed source would adversely affect such AQRVs. No such assertion has been made, and the concreteness necessary to make a claim fit for judicial resolution is therefore lacking.[21]

Even if it were concrete, Michigan's claim would not be fit for judicial review since the permitting process includes a dispute resolution mechanism, CAA § 164(e), 42 U.S.C. § 7474(e). The ripeness doctrine seeks to avoid judicial interference with an agency's decisionmaking process prior to an agency's actual application of its process to concrete circumstances. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967).

[21] Even if the issue were regarded as "purely legal," it would not be fit for judicial review if "further factual development would 'significantly advance our ability to deal with the legal issues presented.'" *National Park Hospitality Ass'n*, 538 U.S. at 812 (*quoting Duke Power Co v. Carolina Envtl. Study Group*, 438 U.S. 59, 82 (1978)). That is plainly the case here, as there are presently no facts on which to address the issue.

Nor does Michigan's claim of uncertainty overcome this principle. Indeed, if "mere uncertainty as to the validity of a legal rule constitute[d] a hardship for purposes of the ripeness analysis" the result would be that the "courts would soon be overwhelmed with requests for what essentially would be advisory opinions . . ." *National Park Hospitality Ass'n*, 538 U.S. at 811. *See also Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998) (avoidance of litigation costs not sufficient by itself to justify review in a case that would otherwise be unripe).

In any event, Michigan's claim has no merit. Granted, the presence of a Class I area will often add more stringent requirements and therefore complexity to the permitting process for a nearby proposed major emitting facility. Where this occurs, however, it is the result of the ordinary operation of the PSD program itself, and not a basis upon which to deny redesignation. Furthermore, as Michigan itself admits, no statute or regulation requires the establishment of AQRVs as a condition for Class I redesignation. *See* FCPC Supp. App. 0405 ("[t]he AQRVs are not established as part of the redesignation process, but can be created at any time after redesignation"). Since establishment of AQRVs is not a precondition to Class I redesignation, neither is the establishment of enforcement qualification levels for AQRVs a precondition to redesignation. Similarly, FCPC was under no obligation to promulgate procedures for enforcing AQRVs with respect to Michigan sources. *See* Michigan Brief at 40.

C. The geographic area over which this or any other Class I Area may affect the permitting process is a function of current technology's ability to predict the behavior of air pollutants over distance, and has nothing to do with the propriety of the area redesignation.

Michigan next complains that the redesignation of the Tribe's reservation is objectionable because its consequences for potential future emission sources extend over an unknown geographic area. *See* Michigan Brief at 48-49. Michigan's concern seems to be based on the fact that air transport modeling has improved over time, increasing the practical ability of Class I land managers to evaluate whether distant sources would adversely affect their areas. *Ibid.* The exact same concerns apply to all Class I areas, including federal Class I areas in and near Michigan, which have been in existence for decades. Furthermore, Michigan furnishes no basis on which this objection would serve to invalidate this particular redesignation.

Even if Michigan had furnished such a basis, the claim would not be ripe for the reasons shown above, namely, there are no facts on which the issue presently arises, and if it were to later arise, the permitting process, which has its own dispute resolution process, would provide the proper vehicle for its resolution without imposing any hardship on Michigan.

D. The smaller geographical scope over which PSD increment levels may apply to sources in Wisconsin is a result of a dispute resolution process in which Michigan refused to participate, which it has failed to appeal, and in which it has no interest.

Michigan then objects that the geographical scope of Class I increment analysis included in the Wisconsin/FCPC Class I Agreement is smaller than that applicable to it. *See* Michigan Brief at 50-51. First, this argument is not properly before this Court. *See supra* at 2 (lack of jurisdiction); 30-34 (lack of standing).

Second, any disparity in the scope of PSD increment analysis for the two states is a result of Wisconsin's participation in the statutorily-sanctioned dispute resolution process, which resulted in an agreement that reduces the presumptive scope of analysis.[22] If Michigan objects to the supposedly "punitive" differential, *see* Michigan Brief at 50, it should have participated in the dispute resolution process. Instead, it refused. Not only does its refusal waive its right to complain, it has nothing to complain about. The terms under which FCPC may enforce the rights flowing from Class I status *in Wisconsin* (the subject of the Final Agreement), do not affect Michigan's rights at all, since the Final

[22] The statute clearly contemplates negotiated resolutions of redesignation disputes. *See* 42 U.S.C. § 7474(e). Wisconsin and FCPC participated in extensive negotiations that led to an agreement that both provides Wisconsin certain benefits and imposes on Wisconsin certain burdens. In accordance with CAA Section 164(e), 42 U.S.C. § 7474(e), EPA adopted the "results" of that Agreement.

Agreement applies only to Wisconsin and the Tribe. *See* Pet. Appx. 668.[23]

E. There is no bona fide question as to the methods or procedures for enforcing the PSD increments or any AQRVs now applicable to the Class I area.

Finally, Michigan alleges other uncertainties relating to whether the Wisconsin/FCPC Class I Agreement applies to Michigan and the identity of enforcing authority for the FCPC Class I area. As with Michigan's other "complexity/uncertainty" objections, none of these has anything to do with the question of FCPC's right to redesignate its reservation in the first instance and, in any event, none has substance.

Michigan first suggests the provision in the Wisconsin/FCPC Class I Agreement that establishes a Scientific Review Panel to help resolve technical disputes between Wisconsin and FCPC somehow applies to it because CAA Section 164(e) states that agreements "shall become part of the applicable plan and shall be enforceable as part of such plan."

The Wisconsin/FCPC Class I Agreement on its face applies only to Wisconsin and the Tribe. *See* Pet. Appx. 668. Moreover, EPA has made clear that the plan applicable to the Wisconsin/FCPC Class I Agreement is Wisconsin's PSD SIP, not the PSD FIP. *See* Pet. Req. Short Appx. 47.

[23] Might Michigan have negotiated a similar reduction in radius had it participated? Possibly, but Michigan rejected FCPC's repeated offers to enter into an agreement similar to Wisconsin's, demanding instead a complete carve-out of the entire state from FCPC's rights under its requested Class I status. *See supra* at 24.

Since Michigan is not covered by the Wisconsin PSD SIP, the Scientific Review Panel decision will not affect Michigan or facilities in that state.

Michigan also suggests that there is uncertainty regarding the roles of FCPC and EPA in the permitting process, in particular, that EPA in its redesignation decision needed to specifically identify a land manager so that Michigan can understand the roles of the Tribe and EPA. *See* Michigan brief at 52-55. However, § 164 and 40 C.F.R. § 52.21(g), which set forth the requirements for redesignation nowhere require that a land manager, whether federal or nonfederal, be identified.

Moreover, the roles of FCPC, Michigan and EPA with respect to permitting decisions are clear and the process for addressing any Class I concern is simple: any permitting disputes between FCPC and Michigan arising out of the reservation's Class I status will be resolved by EPA. As EPA has noted, Michigan is to send EPA a copy of each permit application for a major emitting facility received by it. Pet. Appx. 726-27. It is then EPA's responsibility to inform FCPC of the application. The Tribe can then bring to Michigan's attention the Tribe's concerns regarding the effect the proposed major source or major modification may have on its Class I area. But the Tribe does not control the issuance of permits in Michigan. If Michigan agrees with FCPC's concerns, it will impose appropriate permit limitations or other requirements. If the Tribe and Michigan do not agree, then § 164(e) authorizes and requires EPA to resolve the dispute. Thus, EPA will have the final word with respect to

any concerns the Tribe may raise. And whether EPA's future resolution of a still-hypothetical dispute in an as-yet unidentified permitting process will be appropriate is not an issue ripe for this appeal, as shown above.

CONCLUSION

For the foregoing reasons, Michigan's petition should be denied.

Dated this 12th day of January, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I hereby certify that this brief conforms to the rules set forth in Fed. R. App. P. 32 and Circuit Rule 32 for a brief produced with proportionally spaced type-face. This brief was produced in Word 2003 format, and its length as set forth by the word processing system used to prepare the brief is 12,744 words.

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CERTIFICATE OF SERVICE

I, Brenda S. Sweeney, a Legal Secretary employed with the law firm of Godfrey & Kahn, S.C., hereby certify under penalties of perjury that I caused two copies of the Brief of Intervenor-Respondent and one copy of the Separate Appendix to be served on the following persons by FedEx and electronic transmission (Brief only) at Milwaukee, Wisconsin on the 12th day of January, 2009:

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