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 AND REQUIRED SHORT APPENDIX OF PETITIONER, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

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Statement in Support of Oral Argument

Oral argument may be useful to the Court in light of the numerous statutes, rules, and Federal Register references.

Jurisdictional Statement

The basis for the United States Environmental Protection Agency's ("EPA's") subject-matter jurisdiction is Sections 110, 164, 301(a), 302(a), and 307(d) of the Clean Air Act ("CAA" or "the Act").[1] The EPA, claiming statutory authority under Sections 110, 164, and 301 of the CAA,[2] took final agency action, approving a request by the Forest County Potawatomi Community ("FCPC")[3] to redesignate certain FCPC lands within the state of Wisconsin ("Wisconsin") as "Class I" under the CAA.[4] Sections 301(a), 302(a), and 307(d), of the CAA authorize EPA to administer the Act, including authority to promulgate rules and issue other final agency actions, such as those challenged by Petitioner.

The basis for this Court's jurisdiction is Rule 15(a) of the Federal Rules of Appellate Procedures and Section 307(b) of the CAA. On April 29, 2008, the EPA published in the Federal Register ("FR") as a "Final rule" the primary subject final agency action entitled "Approval of Promulgation of Air Quality Implementation Plans; Wisconsin; Redesignation of the Forest County Potawatomi Community Reservation to a PSD Class I Area."[5] Also on April 29, 2008, the EPA published

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[1] 42 U.S.C. § 7401 *et seq*.
[2] 73 Federal Register 23086 (April 29, 2008) at 23089 [Required Short Appx. 29].
[3] The FCPC is a federally recognized Indian Tribe by a congressional Act of June 23, 1913 (38 Stat. 102). (The FCPC was granted intervention as "a federally recognized sovereign Indian nation." *See*, *FCPC Motion to Intervene* at 1.)
[4] 73 Federal Register 23086 (April 29, 2008) [Required Short Appx. 1-31].
[5] 73 FR 23086 (April 29, 2008) [Required Short Appx. 1-31].

the two companion subject final agency actions: (1) "Redesignation of the Forest County Potawatomi Community Reservation to a PSD Class I Area; Dispute Resolution with the State of Michigan,"[6] and (2) "Redesignation of the Forest County Potawatomi Community Reservation to a PSD Class I Area; Dispute Resolution with the State of Wisconsin."[7]

On June 26, 2008, Petitioner filed its Petition for Review of the EPA's primary subject final agency action (published at 73 FR 23086 (April 29, 2008) [Required Short Appx. 1-31]). The Petition for Review also cited the EPA's two companion subject final agency actions (published at 73 FR 23107 (April 29, 2008) [Required Short Appx. 32-41], and 73 FR 23111 (April 29, 2008) [Required Short Appx 42-48]). Petitioner seeks review of all three EPA final agency actions issued on April 29, 2008, all of which are final administrative actions by which EPA disposed of all issues, exhausting Petitioner's administrative remedies.

[6] 73 FR 23107 (April 29, 2008) [Required Short Appx. 32-41].
[7] 73 FR 23111 (April 29, 2008) [Required Short Appx 42-48].

Statement of Issues Presented

I. Many of the Clean Air Act's detailed technical requirements are achieved under the "implementation plan" of a state, federal, or tribal government: State Implementation Plan (SIP), Federal Implementation Plan (FIP), and Tribal Implementation Plan (TIP). The Act also contains specific provisions for "redesignating" lands to "Class I" status, which triggers the most stringent air emission regulations. Under Sections 164(c) and (e) of the Act, "redesignation" must be part of the "applicable [implementation] plan." May EPA under Sections 164(c) and (e) and Section 301(d) of the Act redesignate tribal lands to Class I status by using the combination of a SIP and FIP, instead of using solely a TIP?

II. Assuming Section 301(d)(4) of the Act allows EPA to substitute federal regulations in the place of a TIP to redesignate tribal lands to Class I status, EPA must then "directly administer" those substituted regulations. May EPA satisfy its duty to "directly administer" TIP-substituted regulations by (1) unilaterally inserting *federal* regulations into a state's SIP, but (2) authorizing the state and a tribal government to jointly administer the unilaterally inserted federal regulations?

Statement of the Case

I. Nature of the Case

Petitioner, State of Michigan, Michigan Department of Environmental Quality ("Michigan" or "State"), seeks to reverse final administrative actions of the EPA issued under Sections 110, 301, and 164 of the CAA.[8] Michigan challenges EPA's approval of the Forest County Potawatomi Community's ("FCPC's") request to redesignate certain tribal lands in Northern Wisconsin from Class II to Class I status under the CAA.[9] Class I status triggers the most restrictive air pollution control regulations and under new EPA policy applies to facilities located within a 300-kilometer (186-mile) radius surrounding the Class I area.[10] This 300-kilometer zone of application for the Class I regulations reaches far into Michigan.

Michigan also challenges the two EPA final actions companion to the principal EPA final action under review here. These companion EPA final actions "resolved" separate disputes by Michigan and Wisconsin, related to the FCPC's Class I redesignation request.[11]

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[8] 42 U.S.C. §§ 7410, 7601, and 7474. *See*, 73 FR 23086, 23101 (April 29, 2008).
[9] "Approval of Promulgation of Air Quality Implementation Plans; Wisconsin; Redesignation of the Forest County Potawatomi Community Reservation to a PSD Class I Area." 73 FR 23086 (April 29, 2008). [Required Short Appx 1-31.]
[10] 40 C.F.R. Part 51, Appendix W. *See*, 70 FR 68218, 68237 (6.1 Discussion, c.; *see* last sentence) (November 9, 2005).
[11] *See*, 73 FR 23107 and 23111 (April 29, 2008). [Required Short Appx 32-41 and 42-48.]

EPA's final actions approving the FCPC's Class I redesignation request are procedurally improper and do not substantively comply with the CAA. EPA's final actions create fundamental functional deficiencies and unworkable complications impermissibly frustrating Michigan's ability to administer its CAA programs within its borders. For example, EPA's final action confuses and confounds whether EPA, Wisconsin, or the FCPC is the enforcing authority for the new Class I area. Also, the allowable limits for certain critically important air pollution emission limits unique to Class I areas, called "Air Quality Related Values" ("AQRVs"), are not clearly established; and the process for determining AQRV compliance is not clarified. Also, EPA's actions effectively approve provisions that arbitrarily and capriciously – without any scientific basis attributable to air pollution control – exclude portions of Wisconsin (but not Michigan) from the more restrictive air pollution emission "increment level" Class I regulations.

II. Course of Proceedings

On February 14, 1995, the FCPC submitted its formal request for Class I redesignation to EPA's Region 5 office. The FCPC's redesignation request proposes to reclassify as Class I those FCPC parcels of 80 acres or more located in Forest County, Wisconsin. [12] [Appx 226-638.]

[12] *See*, 40 C.F.R. § 52.2581(f) (list of 47 separate parcels contained in FCPC Class I area).

On June 8, 1995, the Governors of Wisconsin and Michigan sent a joint letter to EPA objecting to EPA's proposal to grant the FCPC's request for redesignation and requesting dispute resolution. [Appx 639-640.]

At various times from 1995 until 2006, either formal dispute resolution activity under Section 164(e)[13] or other negotiations between Michigan, Wisconsin, and the FCPC were undertaken. [Appx 639-697.]

On several dates during July, September, and October 1999, the FCPC, Wisconsin, and EPA all signed a "Class I Final Agreement" that resolved the dispute between the FCPC and Wisconsin that was submitted to formal dispute under Section 164(e). [Appx 668-677.] The dispute between the FCPC and Michigan was never resolved by agreement.

On December 18, 2006, EPA published a notice, requesting comments on a proposed rule by which EPA would promulgate a Federal Implementation Plan (FIP) if it approves FCPC's Class I redesignation request. [Appx 679-688.]

During 2007 EPA received comments from Michigan [Appx 689-694], Wisconsin [Appx 695-697], and the FCPC, among many others [Appx 724-725].

III. Disposition Below

On April 29, 2008, EPA issued as a "Final Rule" its "Approval of Promulgation of Air Quality Implementation Plans; Wisconsin; Redesignation of

[13] 42 U.S.C. § 7474(e).

the Forest County Potawatomi Community Reservation to a PSD Class I Area." [Required Short Appx 1-31; and Appx 698-713.] Michigan challenges this principal final administrative action.

Also on April 29, 2008, EPA issued a companion announcement entitled "Redesignation of the Forest County Potawatomi Community Reservation to a PSD Class I Area; Dispute Resolution with the State of Michigan." [Required Short Appx. 32-41; and Appx 714-718.] In it, EPA states that it "resolved the [Michigan] dispute by rejecting the state's suggestion to deny the [FCPC] redesignation." [Required Short Appx 40; and Appx 718.] Michigan also challenges this companion EPA final administrative action.

Also on April 29, 2008, EPA issued a companion announcement entitled "Redesignation of the Forest County Potawatomi Community Reservation to a PSD Class I Area; Dispute Resolution with the State of Wisconsin" [Required Short Appx 42-48; and Appx 719-722.] Michigan also challenges this companion EPA final administrative action.

Statement of Facts

I. Statutory Framework

A. The Act's National Ambient Air Quality Standards ("NAAQS")[14], Implementation Plan, and PSD Provisions

The CAA[15] provides for the control of air pollutants from sources within the United States "to promote the public health and welfare and the productive capacity of its population."[16] Congress authorized EPA to administer the CAA.[17] The "centerpiece" of the Act is the requirement that EPA establish "national ambient air quality standards," or NAAQS. The NAAQS "'define [the] levels of air quality that must be achieved to protect public health and welfare.'"[18]

The NAAQS are to be achieved by state, federal, and tribal governments regulating "stationary sources"[19] that emit air pollution, such as factories and power plants, through, *as respectively applicable*, a state, federal, or tribal

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[14] *Sierra Club v. Costle*, 657 F.2d 298, 315 (D.C. Cir., 1980).
[15] 42 U.S.C. §§ 7401-7671q.
[16] CAA Section 101(b)(1); 42 U.S.C. § 7401(b)(1).
[17] *See*, CAA Sections 301(a)(1) and 302(a); 42 U.S.C. §§ 7601(a)(1) and 7602(a).
[18] *Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. 461, 469 (2004) (*quoting* R. Belden, Clean Air Act 6 (2001)). EPA has established NAAQS for six air pollutants: particulate matter, sulfur dioxide, carbon monoxide, nitrogen dioxide, ozone and lead. 40 C.F.R. §§ 50.4-12 (2004). In addition, oxides of nitrogen and volatile organic compounds combine in the presence of sunlight to form ozone, and they are regulated as precursors of ozone. *See, e.g.*, 42 U.S.C. § 7511a(b) (requiring reductions in emissions of volatile organic compounds and oxides of nitrogen to attain the NAAQS for ozone).
[19] Generally, "mobile sources" of air pollution, *e.g.*, motor vehicles, are regulated directly by the federal government. *See*, CAA Title 2; 42 U.S.C. §§ 7521-7590.

"applicable implementation plan," as defined in Section 302(q).[20] Under this definition there are three types of implementation plans, each promulgated and issued under three distinct administrative processes[21]: State Implementation Plans (SIPs) are issued under Section 110[22]; Federal Implementation Plans (FIPs) are issued under Section 110(c)[23]; and Tribal Implementation Plans (TIPs) are issued under Section 301(d)[24].

States and local governments have the primary responsibility for air pollution prevention and control.[25] Section 110(a)(1) of the Act requires each state to adopt and submit for EPA approval an implementation plan "which provides for implementation, maintenance, and enforcement of" the NAAQS within such state.[26] States satisfy this burden by submitting to EPA for approval proposed SIPs that provide for the attainment of the NAAQS.[27] SIPs must include "enforceable emissions limitations and other control measures, means, or techniques . . . as may

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[20] 42 U.S.C. § 7602(q).
[21] *Arizona v. United States Envt'l Protection Agency*, 151 F.3d 1205, 1212-1213 (C.A. 9, 1998), amended by 170 F.3d 870 (C.A. 9, 1999). (Reprinted as amended at 1998 U.S. App. LEXIS 35314 (C.A. 9, Feb. 24, 1999).)
[22] 42 U.S.C. § 7410.
[23] 42 U.S.C. § 7410(c).
[24] 42 U.S.C. § 7601(d).
[25] 42 U.S.C. § 7401(a)(3).
[26] 42 U.S.C. § 7410(a)(1).
[27] 42 U.S.C. § 7410.

be necessary or appropriate" to meet the NAAQS, as well as a program for enforcing such measures.[28]

The CAA further provides that areas satisfying certain NAAQS are considered to be areas in "attainment" of NAAQS, and are regulated under the Act's Prevention of Significant Deterioration ("PSD") Program. Areas not satisfying NAAQS are considered NAAQS "nonattainment" areas, and are regulated under the Nonattainment New Source Review requirements. The subject tribal land areas are presently satisfying the NAAQS and therefore are presently "attainment" areas regulated by NAAQS under the PSD Program.

The PSD regulations prevent significant deterioration of air quality in NAAQS "attainment" areas by allowing only specified "incremental" increases in air pollutants, even if larger increases would not result in "nonattainment" of the NAAQS. These allowable increases are commonly called the PSD "increment level" regulations. Also, under the Act's PSD provisions, no major air polluting facility may be constructed unless it can meet an emission limit that reflects the "best available control technology" ("BACT").[29]

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[28] 42 U.S.C. § 7410(a)(2)(A).
[29] 42 U.S.C. § 7475(a)(4); *Alaska Dep't of Envt'l Conservation v. EPA*, 540 U.S. at 470-473.

Each state's implementation plan (SIP) to achieve the NAAQS is required to include permit provisions to administer both the PSD and Nonattainment New Source Review requirements.[30]

Section 111 of the Act helps states achieve the NAAQS through EPA's promulgation of "new source performance standards" (NSPS) for industry categories.[31] The NSPS are national, technology-based standards that establish a minimum level of emission limitations regardless of whether a source is located in an attainment or a nonattainment area.

As stated, CAA Section 110 gives states the duty of developing, subject to EPA approval, implementation plans (SIPs) to achieve the NAAQS.[32] States determine (and enforce primarily through their SIP programs) the "specific, source-by-source emission limitations which are necessary if the national [NAAQS] standards [EPA] has set are to be met. . . . [S]o long as the ultimate effect of a States' choice of emission limitations is compliance with the national standards for ambient air," each state is free to select the "mix of emission limitations it deems best suited to its particular situation."[33] *Accordingly, Michigan's SIP containing its*

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[30] 42 U.S.C. §§ 7471, 7512a. The PSD and Nonattainment New Source Review requirements are collectively referred to as "New Source Review." *New York v. EPA*, 413 F.3d 3, 12-13 (D.C. Cir., 2005).
[31] 42 U.S.C. § 7411.
[32] 42 U.S.C. § 7410. *Engine Mfrs Ass'n v. EPA*, 88 F.3d 1075, 1078-1079 (D.C. Cir., 1996).
[33] *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975).

CAA permitting, monitoring, and enforcement programs is the operational "body and soul" by which Michigan implements the CAA, accomplishes the Act's air pollution prevention and control goals, and fulfills the Act's overall purposes.[34]

Other provisions in the Act to satisfy the NAAQS are also required to be in a state's implementation plan (SIP). Section 112 establishes a two-phase approach to limit the emission of hazardous air pollutants ("HAPs") for which EPA has not established a NAAQS.[35] The first phase is a technology-based program that requires the use of "maximum achievable control technology" (MACT) for categories and subcategories of sources that emit HAPs.[36] In the second phase – which occurs within eight years after the MACT standards are promulgated – EPA is required to evaluate whether "residual risks" remain after implementation of the MACT standards that warrant more stringent requirements in order "to provide an ample margin of safety to protect public health . . . or to prevent . . . an adverse environmental effect."[37]

The PSD and Nonattainment New Source Review programs set forth procedures for the preconstruction review and permitting of new and modified

[34] 40 C.F.R. Part 52, Subpart X [Michigan SIP]; 40 C.F.R. §§ 52.1170-1190.
[35] 42 U.S.C. §§ 7412(d) and (f).
[36] 42 U.S.C. § 7412(d). The MACT standards are based on the emission limitation achieved by the best performing sources in a category. *Id.*
[37] 42 U.S.C. § 7412(f)(2)(A).

"major stationary sources"[38] of air pollutants to meet emission limits that reflect the state-of-the-art in air pollution control. New major sources in attainment and nonattainment areas are required to go through a detailed preconstruction permitting process and must meet emission standards based on the best available control technology (BACT) and the lowest achievable emission rate ("LAER"), respectively.[39] New major sources in nonattainment areas must also obtain offsetting emission reductions from existing sources in the same area so that air quality can continue to improve and eventually achieve the NAAQS.[40]

Satisfying the NAAQS is mandatory and the Act also contains powerful incentives to ensure the states achieve the NAAQS. Eighteen months after EPA determines that a state has failed to implement an approved part of its SIP, the agency is required to impose one of two types of sanctions if the deficiency has not been corrected.[41] Sanctions include a loss of highway funding or a requirement that the ratios of emission offsets for new sources in nonattainment areas shall be at least two to one. If the state fails to correct the deficiency within another six months, the emission offset sanction must be imposed.[42]

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[38] Large industrial sources which emit or have the potential to emit 250 tons per year (TPY) or more of a regulated air pollutant (100 tpy or more if the source falls in one of 28 specified categories). *See*, 40 C.F.R. § 52.21(b).
[39] 42 U.S.C. §§ 7475(a), 7503(a).
[40] 42 U.S.C. § 7503(a)(c).
[41] 42 U.S.C. § 7509(a).
[42] 42 U.S.C. § 7509(b).

B. The Act's Class I, II, III, and Class Redesignation Provisions

Under Section 162 all land areas are designated as Class I, II, or III.[43] The default standard designation is Class II.[44] The Class I designation is reserved for certain international and national parks and wilderness areas and certain preexisting Class I areas.[45] Class I status triggers the most restrictive NAAQS regulations.[46]

Under Section 164, a state or tribe may request EPA to approve the redesignation of land from the standard Class II to Class I status.[47] Section 164(e)[48] requires EPA to approve the redesignation of state or tribal lands only as part of either a SIP or TIP; whichever is correspondingly the "applicable plan."[49]

The Act has specific, additional provisions for the redesignation of tribal lands from Class II to Class I status. Section 301(d)(1) authorizes EPA "to treat Indian tribes as states."[50] These provisions are generally referred to as the "tribes as states" ("TAS") provisions of the Act. Section 301(d)(2) directs EPA to identify

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[43] 42 U.S.C. § 7472.
[44] 42 U.S.C. § 7472(b).
[45] 42 U.S.C. § 7472(a).
[46] 42 U.S.C. § 7473(b).
[47] 42 U.S.C. § 7474.
[48] 42 U.S.C. § 7474(e).
[49] 42 U.S.C. §§ 7474, 7410(c). *Arizona v. United States Envt'l Protection Agency*, 151 F.3d at 1212. ("When approving a redesignation request, EPA must promulgate the redesignation as part of an 'applicable plan'.")
[50] 42 U.S.C. § 7601(d)(1).

those CAA provisions "for which it is appropriate to treat Indian Tribes as states."[51] Sections 301(d)(3) and (4) state[52]:

> (3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.
>
> (4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator *will directly administer such provisions* so as to achieve the appropriate purpose.

On February 12, 1998, EPA issued its "Tribal Authority Rule" or "TAR."[53] The TAR, among other matters, lists certain CAA provisions and implementing regulations for which "[t]ribes will *not* be treated as states."[54] *Importantly*, this TAR list identifies "submittal deadlines," "sanctions," "notice," "judicial review," and other "procedures" for approval or disapproval of [TIPs][55], as implementation plan provisions for which tribes will not be treated as states.[56] *Importantly*, this TAR list does *not* include the Act's Section 164 *redesignation* provisions as provisions for which tribes will not be treated as states. The TAR also states[57]:

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[51] 42 U.S.C. § 7601(d)(2).
[52] 42 U.S.C. § 7601(d)(3)(4) (emphasis added).
[53] 63 FR 7254 (February 12, 1998); *See*, 40 C.F.R. Parts 9, 35, 49, 50, and 81.
[54] 40 C.F.R. § 49.4 (emphasis added).
[55] *See*, CAA § 301(d)(3); 42 U.S.C. § 7601(d)(3).
[56] 40 C.F.R. § 49.4
[57] 40 C.F.R. § 49.11(a) (emphasis added).

> 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 sections 301(a) and *301(d)(4)*:
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> (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.

II. Procedural Background

On December 7, 1993, the FCPC submitted to EPA an initial request to redesignate under the CAA the subject tribal lands from Class II to Class I status. [Appx 223-225.]

On February 14, 1995, the FCPC submitted its formal request for Class I redesignation to EPA's Region 5 office. The FCPC's redesignation request proposes to reclassify as Class I those FCPC parcels of 80 acres or more located in Forest County, Wisconsin.[58] [Appx 226-638.]

On June 29, 1995, the EPA issued a Notice of Proposed Rulemaking that proposed approval and sought public comment on the FCPC's redesignation request. [Appx 641-643.]

[58] *See*, 40 C.F.R. § 52.2581(f) (list of 47 separate parcels contained in FCPC Class I area).

On July 16, and September 11, 1997, Wisconsin invoked the CAA's Section 164(e)[59] redesignation dispute resolution process. [Appx 645 and 657.]

On August 8, 1997 and September 9, 1997, the state of Wisconsin submitted comments to EPA's June 29, 1995 Notice of Proposed Rulemaking. Wisconsin objected to the proposed redesignation. [Appx 646-656.]

On September 15, 1997, the State of Michigan submitted comments to EPA's June 29, 1995 Notice of Proposed Rulemaking. Michigan also objected to the proposed redesignation. [Appx 660-667.]

On December 22, 1999, Michigan invoked the CAA's Section 164(e) redesignation dispute resolution process. [Appx 678.]

On October 12, 1999, EPA formally recognized an agreement between Wisconsin and the FCPC that resulted from the CAA Section 164(e) dispute resolution process. The agreement is titled: " Class I Final Agreement." [Appx 668-677.] Michigan did not actively participate in the dispute resolution process resulting in the agreement between Wisconsin and the FCPC.

From December, 1999, and until February, 2001, Michigan and the FCPC actively engaged in dispute resolution negotiations. This process did not produce an agreement resolving the dispute between Michigan and the FCPC.

[59] 42 U.S.C. § 7474(e).

On December 18, 2006, EPA published a notice requesting comments on a proposed rule, stating[60]: "EPA is proposing that it will promulgate a Federal Implementation Plan (FIP) if it approves FCP Community's request and this action proposes potential codification language. This FIP will be implemented by EPA unless or until it is replaced by a Tribal Implementation Plan (TIP)." [Appx 679-680.]

On April 26, 2007, Michigan submitted its comments in response to EPA's December 18, 2006 notice and request for comments. [Appx 689-694.]

On April 27, 2007, Wisconsin submitted its comments in response to EPA's December 18, 2006 notice and request for comments. [Appx 695-697.]

On April 27, 2007, the FCPC submitted its comments in response to EPA's December 18, 2006 notice and request for comments. [*See*, Appx 724-725 (Item Nos. 6-9, 15-17, and 24).]

On April 29, 2008, EPA issued the three final administrative actions being challenged by Petitioner Michigan. These three final EPA actions are identified in Statement of the Case, III. Disposition Below (above, at pages 6-7).

[60] 71 FR 75694 (December 18, 2006).

Summary of Argument

There are two principal arguments supporting Michigan's request for relief. The first principal argument is that, under CAA Sections 164(c) and (e), 301(d), and related regulations, EPA's redesignation of the FCPC lands to Class I is invalid because it was not made part of a prerequisite "applicable implementation plan" – for an Indian tribe, a TIP – and as a result fails *procedurally and substantively* to satisfy the Act. The second principal argument is that EPA's redesignation of the FCPC lands to Class I status (even if properly exempted from the TIP prerequisite) is otherwise invalid because the redesignated Class I area will not be "directly administered" by the EPA as part of a FIP, as required under Section 301(d)(4).[61] Also, EPA's actions create a Class I regulatory management that is legally, substantively, and functionally improper and unworkable.

Both principal arguments are based on the position that the master documents, implementing the CAA's virtual ocean of detailed technical requirements, are the "implementation plans" of state, federal, and tribal governments; respectively, SIPs, FIPs, and TIPs.[62] These CAA "implementation plans" contain the permitting, monitoring, and enforcement programs that functionally accomplish many of the Act's numerous and detailed technical

[61] 42 U.S.C. § 7601(d)(4) (emphasis added).
[62] 42 U.S.C. § 7474(e). *Arizona v. United States Envt'l Protection Agency*, 151 F.3d at 1212.

requirements, thereby fulfilling the overall congressional purposes of the Act. Accordingly, CAA "implementation plans" must be promulgated and administered in strict compliance with the procedural provisions of the Act. These procedural provisions are crafted to *substantively* create the legally valid and functionally workable implementation plans necessary to accomplish the Act's specific requirements, and to fulfill Congress's overall goals of air pollution prevention and control.

Also, the "redesignation" of lands from Class II to Class I status under the CAA triggers extensive changes to the permitting, monitoring, and enforcement programs within implementation plans. Therefore, it is likewise true that the *redesignation* of any lands (including tribal lands) to Class I status under the Act must be accomplished in strict compliance with the Act's procedural provisions for redesignation, including those procedural provisions uniquely applicable to the redesignation of tribal lands. These redesignation procedural provisions are likewise crafted to *substantively* create legally valid and functionally workable Class I areas.

Under Michigan's first principal argument, the Class I redesignation is invalid because it was not made part of an "applicable implementation plan" – for an Indian tribe, a TIP – and as a result fails *procedurally and substantively* to

satisfy the Act, and is functionally unworkable. Accordingly, pursuant to Section 164(b)(2), the EPA actions are invalid.[63]

Under Section 164(c), tribal lands "may be redesignated only by the appropriate [tribal government and] *shall be subject in all respect* to the provisions of subsection (e)." (Emphasis added.) "[W]hen approving a redesignation request, EPA must promulgate the redesignation as part of an 'applicable plan'."[64] Accordingly, when redesignating the FCPC's lands, the redesignation must be made part of a TIP.[65]

Moreover, a TIP is still required despite the Section 301(d) "tribes as states" ("TAS") provisions that allows EPA to treat tribes the same as states under the CAA, but also allows EPA to determine in any case "that the treatment of Indian tribes *as identical* to States is inappropriate or administratively infeasible."[66] And a TIP is still required despite the "Tribal Authority Rule" ("TAR") that lists the CAA provisions for which tribes will *not* be treated as states.[67] *Importantly*, the TAR lists only "submitted deadline," "sanctions," "notice," "judicial review," and other "procedures for approval or disapproval if [TIPs].[68] The TAR does not

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[63] 42 U.S.C. § 7474(b)(2).
[64] *Arizona v. United States Envt'l Protection Agency*, 151 F.3d at 1212.
[65] *Id.*
[66] 42 U.S.C. §§ 7601, 7601(d)(4) (emphasis added).
[67] 40 C.F.R. §§ 49.4 and 49.11. *See*, 63 FR 7254 (February 12, 1998).
[68] *See*, CAA § 301(d)(3); 42 U.S.C. § 7601(d)(3).

exempt the prerequisite that a TIP exist in order to redesignate land to Class I under the Act.

Importantly, the combined TAS statutory provisions and TAR regulatory provisions do not create *carte blanche* authority to circumvent the Act's critically important "applicable implementation plan" provisions in Sections 110 and 164. Also, the TAR notably does not exclude the *redesignation provisions* at Sections 164(c) and (e) from those Act provisions for which Indian tribes "have the same rights and responsibilities as states."[69] Accordingly, under the Act, *redesignation* of tribal land does not escape the statutory prerequisite of being part of a TIP. The TAS and TAR provisions allow only that EPA may approve a TIP in a manner other than "identical" to approval of a SIP for a state. Accordingly, under the TAS and TAR provisions some or even many procedures for approving TIPs may be modified or excused. However, the fundamental requirement that a TIP be promulgated *as a prerequisite* to a redesignation of tribal lands cannot be circumvented. Therefore, the TAS and TAR provisions do not constitute *carte blanche* authority for total circumvention of the Act's "applicable [implementation] plan" prerequisite in Section 164(c) for accomplishing a redesignation of tribal lands under Section 164(e).

[69] 40 C.F.R. §§ 49.1 and 49.4.

In the present matter, EPA altogether dispensed with the Section 164(e) TIP prerequisite, and instead approved the FCPC's Class I redesignation by unilaterally *amending the text of Wisconsin's SIP* (though EPA proclaims its actions are somehow amendments to an "existing FIP"[70]). EPA's confounding actions – conflating the roles of SIPs, TIPs, and FIPs – is procedurally improper and creates a legally and functionally confused and unworkable redesignation and body of Class I area regulation changes.

EPA's actions (1) impermissibly render unclear whether Wisconsin, EPA, or the FCPC are the enforcing legal authority for the Class I area; (2) impermissibly confuse whether and which different categories of Class I regulations apply to which areas within Michigan and Wisconsin; and (3) arbitrarily and capriciously create different emission limits and enforcement mechanisms and permitting procedures that Michigan and Wisconsin are to separately follow in order to operate their respective air programs within their state borders. The EPA did not approve the FCPC Class I redesignation as part of a TIP, despite a TIP being a procedurally foundational prerequisite under the Act. EPA should have disapproved the FCPC's redesignation request pursuant to Section 164(b)(2).[71] Instead, EPA approved a legally impermissible redesignation and functionally unworkable Class I area. Accordingly, the EPA redesignation approval is invalid.

[70] 73 FR 23086, 23095 (April 29, 2008). [Required Short Appx 18.]
[71] 42 U.S.C. § 7474(b)(2).

Under Michigan's second principal argument, the Class I redesignation is invalid and impermissible under the Act for being legally, substantively, and functionally improper and unworkable.

Again, under the Act's so-called "TAS" provisions, Section 301(d)(1) provides that EPA "is authorized to treat Indian Tribes as States." This language initially requires an Indian tribe to develop a TIP (as a state must develop a SIP) if the tribe wants to implement or enforce any CAA regulations. However, Section 301(d)(4) states that if EPA determines in any case "that the treatment of Indian tribes *as identical* to states is inappropriate or administratively infeasible," the EPA "*will directly administer* such provisions."[72] This language requires that if a TIP is completely infeasible under Section 301(d)(4), only a properly promulgated and "directly administered" FIP can substitute as the prerequisite Section 164(e) "applicable plan" to accomplish redesignation under Section 164(c).

In the present matter, however, EPA chose to conflate and confuse the SIP, FIP, and TIP requirements by *unilaterally modifying the text of Wisconsin's SIP* – while claiming its actions to be "an amendment to an existing FIP for Wisconsin Indian country, rather than the promulgation of a new FIP."[73] EPA, likely, attempts this fiction in order to avoid undertaking the work necessary to legally promulgate a proper FIP. *Importantly*, EPA has previously promulgated and

[72] 42 U.S.C. § 7601(d)(4) (emphasis added).
[73] 73 FR 23086, 23095 (April 29, 2008). [Required Short Appx 18.]

codified FIPs for (at least) forty-five (45) separate Indian tribes or Indian government associations, and has already codified its preparation to promulgate FIPs for tribal lands nationwide.[74] The EPA in this matter, however, simply chose to abandon the Act's FIP requirement that it had recognized and satisfied many times previously.

EPA did not approve the FCPC Class I redesignation as part of a FIP (nor, as discussed, as part of a TIP), as required by the Act. Instead, EPA's actions constitute and create a legally, substantively, and functionally improper and unworkable body of Class I area regulations. Accordingly, the EPA Class I redesignation approval is invalid.

[74] *See*, 40 C.F.R., Part 49, Subparts C-M.

Argument

I. EPA did not comply with Sections 164(c) and (e) and Section 301(d) of the Act when it approved the redesignation of Indian tribal lands to Class I status using the combination of a SIP and FIP, instead of using solely a TIP.

A. Standard of Review

Judicial review of EPA's final administrative actions requires a determination of whether the agency's actions were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" under Section 706(a)(2) of the Administrative Procedures Act ("APA").[75]

The present issue of whether the CAA authorizes EPA to redesignate the FCPC's tribal lands to Class I status in the manner undertaken by EPA is a legal question of statutory interpretation. "Under [APA Section] 706(2)(C) [the Court] must 'set aside agency action' that is 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.' This standard requires the application of *Chevron*. . . ."[76] Under *Chevron*,[77] the Court first asks "whether Congress has directly spoken to the precise question at issue."[78] If Congress has done so, the

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[75] 5 U.S.C. § 706(a)(2). *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 3-5 (D.C. Cir., 1987).
[76] *Northwest Envt'l Advocates v. EPA*, 537 F.3d 1006, 1014 (9th Cir., 2008).
[77] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See, Food and Drug Admin v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (analysis of agency's construction of a statute it administers is governed by *Chevron*).
[78] *Chevron*, 467 U.S. at 842.

Court "must give effect to the unambiguously expressed intent of Congress."[79] In determining whether Congress has specifically addressed the question at issue, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[80] "Agency action is 'not in accordance with the law' when it is in conflict with the language of the statute *relied upon by the agency*."[81]

If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[82] "An agency's decision is 'arbitrary and capricious' when 'the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'"[83]

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[79] *Chevron*, 467 U.S. at 843.
[80] *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).
[81] *City of Cleveland v. Ohio*, 508 F.3d 827, 838 (C.A. 6, 2007) (emphasis added).
[82] *Chevron*, 467 U.S. at 843.
[83] *Id.* (*quoting Motor Vehicles Mfrs Ass'n v. State Farm Mutual Auto Ins Co.*, 463 U.S. 29, 43; 103 S. Ct. 2856; 77 L. Ed. 2d 443 (1983)).

B. Discussion

1. EPA's Class I redesignation approval does not comply with the Act's procedural requirement that Class I redesignation of Indian tribal lands be made solely part of a TIP to be administered by the tribal government (rather than part of a SIP or FIP).

The CAA contains several provisions that directly, or by connected statutory requisite, provide that redesignation of tribal lands must be solely part of a TIP and that a SIP and/or FIP combination is no substitute for this TIP requirement. EPA's own administrative rules support this interpretation of the Act. Discussed below are CAA Sections 164(c) and (e), and 301(d)(1)-(4); and related regulations at 40 C.F.R. §§ 49.1 and 49.11.

Section 164(c) provides (emphasis added):

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

Section 164(e) provides (emphasis added):

> **(e) Resolution of disputes between State and Indian Tribes.** If any State affected by the redesignation of an area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area . . . the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. . . . If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, *shall become part of the applicable plan and shall be enforceable as part of such plan*.

This language requires that a redesignation of tribal lands resulting from a Section 164(e) dispute resolution process "shall become part of the applicable plan and shall be enforceable as part of such plan." However, EPA's actions conflate the use of SIPs, FIPs, and TIPs, confusing which is the "applicable implementation plan," and causing there to be no one implementation plan fully and properly "applicable" to the FCPC lands at issue.

Prior to the present EPA final actions, Wisconsin's SIP[84] explicitly did not apply to the subject FCPC lands. EPA had previously approved the PSD program[85] in Wisconsin's SIP "for all sources in Wisconsin *except for sources located in tribal lands and other sources that require permits issued by EPA*."[86] Also, EPA acknowledges that its present final actions do not create (and were not intended to create) a TIP. EPA proclaims that the codification of "the Forest County Potawatomi Class I area is an amendment to an existing FIP for Wisconsin Indian country, rather than the promulgation of a new FIP."[87] However, EPA's

[84] 40 C.F.R. Part 52, Subpart YY [Wisconsin SIP]; 40 C.F.R. §§ 52.2569-2589.
[85] The PSD program is explained in Statement of Facts, I. Statutory Framework (above, at pages 10-13).
[86] 40 C.F.R. § 52.2581. *See,* 73 FR 23086, 23095 (April 29, 2008) (emphasis added).
[87] 73 FR 23086, 23095 (April 29, 2008).)

final administrative actions in fact explicitly do modify *Wisconsin's SIP*,[88] and do not modify any existing EPA-promulgated FIP.[89]

EPA's actions unilaterally enlarge the area of application of the Wisconsin SIP to include the same 47 separate FCPC parcels of land that were previously explicitly excluded from being part of the Wisconsin SIP application area.[90] Discussed below, in the second principal argument, is the impermissibility and resulting unworkable complications of EPA adding the FCPC's tribal lands to the lands applicable under the Wisconsin's SIP. However, for the present argument, the important fact is that EPA admits the FCPC's Class I redesignation was approved without being part of a TIP.

Section 301(d) of the Act provides[91]:

> **(d) Tribal authority.**
>
> (1) Subject to the provisions of paragraph (2), the Administrator –
>
> (A) is authorized to treat Indian tribes as States under this Act . . . .
>
> (2) The Administrator shall promulgate regulations within 18 months after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990], specifying those provisions of this Act for which it is appropriate to treat Indian tribes as States. *Such treatment shall be authorized only if –*
>
> * * *

[88] 40 C.F.R. § 52.2581. *See*, 73 FR 23086, 23101 (April 29, 2008).
[89] *See*, 42 U.S.C. § 7410(c) (EPA promulgation of FIPs).
[90] 40 C.F.R. § 52.2581. *See*, 73 FR 23086, 23101 (April 29, 2008) .
[91] 42 U.S.C. §7601(d) (emphases added).

> (C) the Indian tribe is reasonably expected to be capable, in the judgment of the Administrator, of carrying out the functions to be exercised in a manner *consistent with the terms and purposes of this Act and all applicable regulations*.
>
> (3) The Administrator may promulgate regulations which establish the elements of tribal implementation plans and procedures for approval or disapproval of tribal implementation plans and portions thereof.
>
> (4) In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will *directly administer such provisions* so as to achieve the appropriate purpose.

"[T]he words of [Section 301(d)] must be read in their context and with a view to their place in the overall statutory scheme."[92] Section 301(d)(1) explicitly states that EPA may treat an Indian tribe as a state. This is the initial TAS provision. Section 301(d)(2) then requires EPA to identify those provisions of the Act for which such TAS treatment is appropriate. *Importantly*, Congress took the time in Subsection 301(d)(3) to explicitly address TIPs. Congress considered the Act's TIP provisions to be of special import among the virtually countless other provisions contained in the Act that EPA could determine were appropriate for TAS treatment. By crafting Section 301(d)(3) Congress addressed TIPs *with equal importance* as SIPs and FIPs.

[92] *Davis v. Michigan Dep't of Treasury*, 489 U.S.at 809.

Congress provided, in Section 301(d)(3), that EPA could promulgate TIP procedures to allow Indian Tribes to obtain TIP approval to administer provisions of the Act, just the same as Congress provided that states and the federal government must have an approved SIP or FIP, respectively, to administer the Act. This requirement of a TIP for tribal CAA administration tracks with implementation plans being of the highest importance – the master documents – that ensure, even for actions under Section 301(d)(4), that the CAA will "achieve the appropriate purpose."[93]

In general terms, implementation plans must provide for three critical components: (1) a body of regulations that satisfy CAA emission limit requirements; (2) an enforcing entity comprised of the personnel and equipment necessary to administer the regulations; and (3) verified legal authority to enforce the implementation plan within all land areas to which the implementation plan applies. More precisely, the Act states that implementation plans are to contain "enforceable emission limitations[,] . . . provide for establishment and operation of appropriate devices, methods, systems and procedures necessary to [] monitor, compile, and analyze data on ambient air quality[,] . . . include a program to provide for the enforcement of the [emission limitations] and regulations of the

[93] 42 U.S.C. § 7601(d)(4).

modification and construction of any stationary [air pollution] source."[94] The Act's full listing of requirements for implementation plans is prohibitively extensive to reproduce here, and is found at Section 110(a)(2).[95]

CAA implementation plans are elaborate, highly technical, and detailed documents that go through exhaustive, provision-by-provision, submittal-and-approval promulgation procedures. Implementation plans, once initially approved by EPA, remain under virtually continual review for updating to remain in compliance with new EPA emission standards or other requirements that necessitate modification to EPA-approved implementation plans.[96]

Section 301(d)(4) is to be read considering the Act's overall statutory scheme and purpose. Section 301(d)(4) provides only that Indian Tribes need not be treated "as identical to States" in certain limited ways. These words do not allow EPA to ignore the Act's other specific language. Sections 164(c) and (e) explicitly state that redesignation of tribal reservation land must be implemented "only by the appropriate Indian governing body," and must part of the "applicable plan," being a TIP. Sections 301(d)(1)-(3) allow EPA to "establish the elements of tribal implantation plans and procedures for [TIP] approval or disapproval," to enable Indians Tribe through TIPs to administer provisions of the Act.

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[94] 42 U.S.C. §§ 7410(a)(2)(A)-(C).
[95] 42 U.S.C. § 7410(a)(2).
[96] *See*, CAA sections 110(c) and (k)(5); 42 U.S.C. § 7410(c) and (k)(5).

Sections 301(d)(3) and (4) are independent provisions of the Act. Section 301(d)(4) allows only for non-"identical" treatment regarding the Act's provisions. Section 301(d)(4) is not *carte blanche* authority to completely circumvent the Sections 164(c) and (e) and Section 301(d)(3) requirements for redesignation as part of a TIP for tribal lands. Congress crafted these provisions to explicitly ensure that CAA implementation plans, being critically important to accomplishing the Act's purpose of pollution prevention and control, were properly promulgated and approved with respect to tribal lands. EPA's own administrative rules support this reading of the Act.

40 C.F.R. Part 49 explicitly addresses "Tribal Clean Air Act Authority." It identifies those CAA provisions with which Tribes are to comply (and need not comply) *even when applying Section 301(d)(4)*[97]:

> **§ 49.1 – Program overview.**
>
> (a) The regulations in this part identify those provisions of the Clean Air Act (Act) for which Indian tribes are or may be treated in the same manner as states. In general, these regulations authorize eligible tribes to have *the same rights and responsibilities as states under the Clean Air Act and authorize EPA approval of tribal air quality programs meeting the applicable minimum requirements of the Act*.
>
> (b) Nothing in this part shall prevent an Indian tribe from establishing additional or more stringent air quality protection requirements *not inconsistent with the Act*.

[97] 40 C.F.R. §§ 49.1, 49.4, 49.11 (emphases added). The complete list of CAA provisions for which "[t]ribes will not be treated as states" is at 40 C.F.R. § 49.4.

* * *

§ 49.4 Clean Air Act provisions for which it is *not* appropriate to treat tribes in the same manner as states.

Tribes will *not* be treated as states with respect to the following provisions of the Clean Air Act and any implementing regulations thereunder:

(a) Specific plan *submittal and implementation deadlines* for NAAQS-related requirements, including but not limited to such deadlines in sections 110(a)(1), 172(a)(2), 182, 187, 189, and 191 of the Act.

(b) The specific *deadlines associated with the review and revision* of implementation plans related to major fuel burning sources in section 124 of the Act.

(c) The mandatory *imposition of sanctions* under section 179 of the Act because of a failure to submit an implementation plan or required plan element by a specific deadline, or the submittal of an incomplete or disapproved plan or element.

(d) The provisions of section 110(c)(1) of the Act [regarding a state's duty to "adopt and submit" a SIP].

*** * ***

§ 49.11 Actions under section 301(d)(4) authority.

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 sections 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.*

These regulatory provisions evidence that EPA itself, except for its recent actions at issue here, interprets the Act to require an Indian Tribe to satisfy at least the Act's minimum requirements for air programs, even for actions under the "infeasibility" provisions in Section 301(d)(4). *Importantly*, the exhaustive list in 40 C.F.R. § 49.11 does not include Sections 164(C) and (E) (which explicitly address the *redesignation* of tribal lands) as provisions for which it is *not* appropriate to treat tribes as states. This supports the fact that EPA interprets the Act to require treating Indian Tribes *as identical to a state* with regarding the Act's *redesignation* provisions. Accordingly, redesignation can only occur under an "appropriate" implementation plan, and for an Indian Tribe, that is a TIP. The extensive work necessary to promulgate a TIP (or instead, if allowed, a FIP, as discussed below) may explain why EPA has taken the confounding actions of redesignating the FCPC's lands by unilaterally modifying the text of Wisconsin's SIP, while proclaiming that instead its actions were modifying an "existing FIP."

The position that a TIP (and only a TIP – not a FIP and/or SIP) is required to accomplish a tribal land Class I redesignation is supported by *Administrator, State of Arizona v. United States EPA*,[98] the only reported case addressing TIPs and tribal land redesignation. The court in *Arizona v. United States EPA* ruled that SIPs, FIPs, and TIPs are the "applicable [implementation] plans" required for,

[98] *Arizona v. United States Envt'l Protection Agency*, 151 F.3d at 1212-1213.

respectively, state, federal, and tribal governments to accomplish a Class I redesignation. The *Arizona* Court explicitly stated the Act "dictate[s] that the applicable plan for an Indian Tribe is a Tribal Implementation Plan (TIP), not a FIP. 42 U.S.C. § 7601."[99]

The EPA's subsequent passage of its TAR regulations[100] cannot defeat the Act's provisions requiring that tribal land redesignation be part of – exclusively – a TIP. Again, Section 301(d)(4) is not *carte blanche* authority for complete circumvention of the Section 164(c) and (e) and Section 301(d)(3) redesignation and TIP requirements for tribal lands. The FCPC redesignation does not satisfy the procedural requirements of the Act, and therefore should be disapproved pursuant to Section 164(b)(2). Also, C.F.R. § 52.21(g)(1), that provides a TIP may be approved by EPA "as a revision to the applicable [SIP]," is a rule not consistent with the Act, and its promulgation was beyond the authority granted EPA under the Act.

[99] *Id*. at 1212.
[100] 63 FR 7254 (February 12, 1998). *See*, 40 Parts 9, 35, 49, 50, and 81.

2. EPA's Class I redesignation approval, without a FIP, fails to comply with the Act's substantive requirements that the "applicable implementation plan" contain all three requisite components: (1) emission limits; (2) enforcement personnel, equipment, and procedures; and (3) legal authority to enforce the implementation plan within those lands to which it applies.

Again, the Act states that implementation plans are to [1] contain "enforceable emission limitations[,] . . . [2] provide for establishment and operation of appropriate devices, methods, systems and procedures necessary to [] monitor, compile, and analyze data on ambient air quality[and ,] . . . [3] include a program to provide for the enforcement of the [emission limitations] and regulations of the modification and construction of any stationary [air pollution] source."[101] These extensive implementation plan requirements are what ensure the Act's purpose of air pollution prevention and control is realized. However, by not requiring a TIP as the "applicable implementation plan" for this tribal land redesignation, EPA's Class I creation fails to satisfy at least two of the three fundamental categories of implementation plan requirements. The full listing of the Act's extensive fundamental technical requirements for implementation plans is found at Section 110(a)(2).[102]

[101] 42 U.S.C. § 7410(a)(2)(A)-(C).
[102] 42 U.S.C. § 7410(a)(2).

Importantly, EPA has indicated (but not confirmed) that the FCPC will act as the entity administering the Class I area within the tribal lands, as a "non-Federal" Land Manager.[103] This supposedly satisfies the third implementation plan requirement – the legal authority to enforce the implementation plan within those lands to which it applies. However, without the redesignation being made part of a TIP clearly to be administered by the FCPC, the resulting tribal Class I area is not part of any "applicable plan" that contains the first two "applicable implementation plan" requirements: (1) "enforceable emission limitations" and (2) enforcement personnel, equipment, and procedures "necessary to [] monitor, compile, and analyze data on ambient air quality." In fact, it is entirely unclear if the FCPC can properly act as the Land Manager of this Class I area to satisfy even the first "applicable implementation plan" requirements.

The uncertainties of this Class I situation are further complicated by the fact that there are emission limits unique to Class I areas – "Air Quality Related Values" ("AQRVs") – that the FCPC ostensibly would enforce as the non-Tribal Land Manager of the Class I area. However, the FCPC has clearly identified its

[103] *See* 73 FR 23086, 23091 (April 29, 2008) ("the [FCPC] would be the appropriate land manager") [Required Short Appx 12]; *compared with* 73 FR 23086, 23093 (the Tribe and Wisconsin would resolve permitting deputes under their 1999 "Class I Final Agreement") [Required Short Appx 16]; *compared with* August 7, 2008 letter to Newton from Hellwig [Appx 723], and October 22, 2008 letter to Hellwig from Newton [Appx 726-727].

AQRVs. The EPA claims the AQRVs are "mercury deposition and acid rain."[104] However, the FCPC has stated the AQRVs are "aquatic systems and water quality."[105] Moreover, the FCPC has not promulgated (much less obtained EPA approval) of the procedures for enforcing these AQRVs with respect to emitting facilities in Michigan. This quite dramatically complicates how the CAA is to operate in this Class I setting given that failure to satisfy AQRV requirements "might pose an additional restriction on the sitting *(sic)* of large projects."[106]

All this uncertainty resulting from the lack of the requisite TIP is the antithesis of the Act's goal (and requirements) that "applicable implementation plans" (and therefore Class I redesignations) contain clear, exacting, and thorough contents so that the Act's purpose of preventing and controlling air pollution is realized.

The second primary argument below addresses similar but more confounding complications created by EPA's claim that its actions modifying the text of the Wisconsin SIP are instead modifications to "an existing FIP." This EPA claim is confounding because *no such FIP document has ever been promulgated under the Act's FIP requirements at Section 110(c).*[107] In any event, the complications discussed below are more confounding, and are likewise the

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[104] *See*, 73 FR 23086, 23091 (April 29, 2008).
[105] *See*, Class I Final Agreement, IV. Air Quality Related Values A.1. [Appx 670].
[106] 73 FR 23086, 23091 (April 29, 2008).
[107] 42 U.S.C. § 7410(c).

antithesis of the Act's specific requirements regarding "applicable implementation plans" (and Class I "redesignations"), and frustrate realization of the Act's overall goal of preventing and controlling air pollution.

II. EPA did not satisfy its duty under Section 301(d)(4) of the Act to "directly administer" any TIP-substitute regulations when it (1) unilaterally inserted the *federal* PSD regulations into Wisconsin's SIP, but (2) authorized Wisconsin and the Forest County Potawatomi Community ("FCPC") to jointly administer the unilaterally inserted federal regulations.

A. Standard of Review

The standard of review is the same as stated in Argument I; A. Standard of Review (above, at pages 26-27).

B. Discussion

As discussed previously, Section 301(d)(4) is not sufficient authority to fully circumvent the Act's redesignation requirements (in Sections 164(c) and (e)) and the "tribal implantation plans" requirements (in Section 301(d)(3)) which together require that Class I redesignation of tribal lands be solely part of a TIP. Even if it were, Section 301(d)(4) provides further that EPA "will directly administer" any redesignation and implementation plan provisions deemed under Section 301(d)(4) to be "inappropriate or administratively infeasible" to require of an Indian Tribe. Accordingly, only under a properly promulgated FIP can EPA "directly administer" the redesignation and TIP provisions in Sections 164(c) and (e) and Section 301(d)(3). However, no such FIP exists, and EPA's proclamation that the

federal PSD provisions it unilaterally inserted into Wisconsin's SIP, is somehow "an amendment to an existing FIP,"[108] does not make it so.

Moreover, the procedural improprieties of EPA's unilateral imposition of CAA permitting and enforcement requirements concomitantly create legally impermissible and functionally unworkable complications for Michigan's CAA permitting and enforcement programs.

1. The federal Prevention of Significant Deterioration ("PSD") provisions inserted into the text of Wisconsin's SIP is not concomitantly "an amendment to an existing FIP" as EPA claims it to be; and given that no TIP exists, the EPA's approval of redesignation of the FCPC's tribal lands is invalid.

EPA has stated unequivocally that under the TAR provisions, either a TIP or FIP is required to validly redesignate the FCPC's tribal lands[109]:

> Therefore, the TAR established two possible routes for the codification of a Class I redesignation on Tribal lands: (1) A TIP, if one has been developed by the Tribe and approved by EPA; and (2) A FIP, if a TIP did not exist and a FIP was necessary to protect air quality.

It is undisputed that no TIP exists applicable to the FCPC's subject tribal lands in Wisconsin. Accordingly, a FIP is needed to validly accomplish redesignation of the FCPC's tribal lands (but only if the TAS and TAR provisions

[108] 73 FR 23086, 23095 (April 29, 2008).
[109] 73 FR 23086, 23094 (April 29, 2008) and 71 FR 75694, 75698 (December 18, 2006).

are deemed to exempt the need for a TIP). However, as explained below, no valid FIP exists (notwithstanding EPA's claims to the contrary).

Section 110(c) of the Act provides the very limited gap-filling role of FIPs.[110] EPA is authorized to promulgate a FIP only if EPA "finds that a State has failed to make a required [SIP] submission or finds that the [SIP] or [SIP] revision submitted by the State does not satisfy the [applicable] minimum criteria . . . or disapproves a [SIP] submission in whole or in part."[111] Moreover, a FIP cannot be promulgated if the errant state corrects the SIP deficiency before a curative FIP is promulgated.[112]

As relevant here, EPA has never made any such finding of SIP failure by Wisconsin nor disapproved any SIP submission from Wisconsin. On this basis alone EPA's claims to the existence of a valid FIP are discredited. Moreover, EPA makes the rather impossible claim that "the Forest County Potawatomi Class I area is an amendment to an existing FIP for Wisconsin Indian country, rather than the promulgation of a new FIP."[113]

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[110] 42 U.S.C. § 7410(c).
[111] *Id.*
[112] *Id.*
[113] 73 FR 23086, 23095 (April 29, 2008).

For EPA's position to be legally valid, several constructs would have to be accepted as legally valid. First, the federal PSD Program regulations[114] would have to be deemed an overarching "omnipresent" FIP effective continually and nationwide since originally promulgated in 1980. Next, this *federal* PSD Program would have to be deemed validly inserted into the text of the Wisconsin SIP as, somehow, "an amendment to" the ostensible "omnipresent" FIP, and to sit alongside Wisconsin's existing valid EPA-approved *state* PSD rule and program. Next, despite the ostensible "omnipresent" FIP being, by its FIP status, *federally implemented* (and applicable only to the FCPC lands and federal lands within Wisconsin) it would also be, somehow, *state implemented* being part of the text of the *state implemented* Wisconsin SIP (applicable to all other lands within Wisconsin). This ostensible "omnipresent" FIP would somehow have to retain an independent *federally implemented* FIP status while ignoring that its legal existence is in the text of the Wisconsin SIP that can only be a functions of *state implementation authority*. These impossible legal constructs impermissibly distort the limited gap-filling role of FIPs and the relationship between SIPs and FIPs under the Act.

These legal constructs are likewise impossible under EPA's own language that the ostensible "omnipresent" federal PSD FIP provisions "are hereby

[114] 42 C.F.R. § 52.21. (The PSD program is explained in Statement of Facts, I. Statutory Framework (above, at pages 10-13)).

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."[115] It is not possible to consider the federal PSD Program provisions (at 40 C.F.R. § 52.21) to be a FIP of any kind, much less to be both "part of the applicable [SIP] for the State of Wisconsin" to be implemented by the State, and somehow be concomitantly part of "an existing FIP" to be implemented by EPA. The EPA actions redesignating the FCPC lands as Class I are legally invalid.

2. By not complying with the Act's redesignation and implementation plan provisions, and instead fashioning the strained legal constructs discussed, EPA's actions subject Michigan's air pollution programs to numerous complications and unworkable conflicts.

As discussed in the Statement of Facts, I. Statutory Framework (above, at pages 8-13), Michigan's SIP,[116] which contains its CAA permitting, monitoring, and enforcement programs, is the operational "body and soul" by which Michigan implements the CAA and accomplishes the Act's air pollution prevention and control purposes. Michigan's numerous air permitting, monitoring, and enforcement programs constitute an extensive bureaucracy employing scores of individuals reviewing a continuum of permit applications, and monitoring and enforcing on-site emitting-source activities; all of which often invoke complex

[115] 40 C.F.R. § 52.2581(e) (emphasis added).
[116] 40 C.F.R. Part 52, Subpart X [Michigan SIP]; 40 C.F.R. §§ 52.1170-1190.

legal and scientifically technical disputes regarding, for example: (1) allowable PSD criteria pollutant or other pollutant emission limits; (2) "best available" versus "maximum achievable" air pollution control technology (including economic implication analysis) versus the "lowest achievable emission rate" control technology; and (3) appropriate (long and short range) sampling and ambient air pollution transport modeling designs, techniques, and computer programs (*e.g.* AERMOD versus CALPUFF[117]).

The Act explicitly provides that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments . . . ."[118] Consistent with this, the Act also, as discussed, allows EPA to promulgate a FIP only in very limited circumstances, and only to "gap-fill" to cure an EPA finding of a SIP failure. This limited EPA authority to promulgate a FIP is what protects states from what EPA has done in this case – the unilateral imposition of new CAA permitting, monitoring, and enforcement requirements creating legally impermissible and functionally unworkable complications for a state's CAA permitting, monitoring, and enforcement programs. In this case, the impositions on Michigan's CAA permitting, monitoring, and enforcement programs resulting from EPA's actions create a scenario whereby Michigan cannot determine for itself or explain to its citizen-applicants, and other permit-holders,

[117] 40 C.F.R. Part 51, Appendix W.
[118] CAA Section 101(a)(3); 42 U.S.C. § 7401(a)(3).

what additional emission limits or other requirements now apply. This impossible situation now exists for the extimated 78 permit applicants and permit-holders for the "major source" facilities throughout large areas of Michigan located within the 300-kilometer FCPC Class I zone of applicability.

The list of complications and unworkable conflicts imposed into Michigan's CAA permitting, monitoring, and enforcement programs by EPA's actions include:

a. Imposition of unknown Air Quality Related Values ("AQRVs") emission limits related to "mercury deposition and acid rain."

The EPA's redesignation of the FCPC's tribal lands to Class I triggers not only more restrictive PSD criteria pollutant "increment levels" but also allows for, under CAA Section 164(e), regulations to address "air quality related values" ("AQRVs").[119] The AQRV's for this FCPC Class I area have been identified conflictingly as both "mercury deposition and acid rain"[120] and as "aquatic systems and water quality."[121] Likewise, the FCPC has apparently not promulgated the enforcement quantification levels for these AQRVs. Moreover, it is not at all clear, as discussed below, whether the EPA (as a "Federal Land Manager") or the FCPC (as a "non-federal Land Manager") will act as the Class I legal authority. As

[119] 41 U.S.C. § 7474(e). *See also*, Federal Land Managers' Air Quality Related Values Workgroup (FLAG), Draft Phase I Report, U.S. Forest Service, Air Quality Program (October 1999).
[120] *See*, 73 FR 23086, 23091 (April 29, 2008).
[121] *See*, Class I Final Agreement, IV. Air Quality Related Values A.1. [Appx 670].

a result, Michigan's air programs would be at a loss to know or explain these new requirements to air permit applicants and permit-holders. Without knowing what the requirements are, or the enforcing authority, applicants cannot determine their options and Michigan's many air programs are impermissibly frustrated.

b. Imposition of more restrictive PSD criteria pollutant "increment levels" and unknown AQRV emission limits over an unknown geographic area (*i.e.*, the new 300-kilometer or the prior 100-kilometer application radius policy).

As discussed, the EPA action would trigger imposition of the more restrictive Class I PSD increment levels and the unknown AQRV limits. The geographic area over which these emission limits apply is also unknown.

There is no promulgated regulation identifying the specific radial distance surrounding Class I areas within which emitting facilities must analyze for the more restrictive Class I PSD criteria pollutant "increment levels," as part of the permitting process. The application regulation requires only a showing that the proposed emission "would not cause or contribute" to a violation of the NAAQS or exceed applicable PSD "increment levels."[122] However, until recently, EPA policy and practice established a minimum 100-kilometer (62-mile) radius for the Class I "increment levels analysis." This distance was related to the capability of air transport computer models (*e.g.*, AERMOD) to reliably identify the ambient air

[122] *See*, 40 C.F.R. § 51.166(k).

transport of pollutants.[123] However, EPA more recently has stated that a new air model, CALPUFF, was sufficiently reliable for Class I analysis "so long as the transport distance was limited to 300km."[124] EPA has accordingly commenced a new policy requiring an AQRV and PSD "increment levels analysis" in applications from all major emission sources located within *300 kilometers (186 miles)* of a Class I area[125]. The portions of Michigan within which major sources are subject to the more restrictive Class I increment levels and the FCPC's unknown AQRV emission limits now reaches to include virtually all of Michigan's Upper Peninsula and the more commercially active northwest quarter and shoreline of its Lower Peninsula. As discussed below, enforcement throughout large portions of Michigan of the Class I "increment levels" and the *unknown* AQRV emission limits, using *unknown* Class I review methods by *unconfirmed* enforcing authorities, would result in delays and permit denials beyond Michigan's ability to

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[123] *New Source Review Workshop Manual, Prevention of Significant Deterioration and Nonattainment Area Permitting* (EPA, Office of Air Quality Planning and Standards (Draft, October 1990)). "The meaning of the term 'may affect' [the Class I area] is interpreted by EPA policy to include all major sources or major modifications which propose to locate within 100 kilometers (km) of a Class I area."

[124] 70 FR 68218, 68237 (6.1 Discussion, c.; *see* last sentence) (November 9, 2005).

[125] July 22, 2008 (3:30 p.m.) telephone call between EPA Region 5 Acting Director, Cheryl Newton (and others), and Michigan's Air Quality Division Chief, G. Vinson Hellwig (and others). *Also,* the new 300-kilometer distance is referenced in recent "major source" permit applications: Consumers Energy Co. (Permit No. 347-07); Mid-Michigan Energy, LLC (Permit No. 297-07); and Wolverine Clean Energy Venture (Permit No. 317-07).

control, account for, predict, or manage. Such complications are unworkable and impermissibly frustrate Michigan's ability to properly implement its many CAA programs.

c. Imposition (arbitrarily and capriciously) on Michigan (and not Wisconsin) of the more restrictive Class I PSD criteria pollutant "increment levels" for reasons not scientifically based on air pollution prevention data, but rather in punitive response to Michigan's legal challenge to the Class I redesignation.

The FCPC and Wisconsin concluded their Section 164(e) dispute resolution process by the FCPC, Wisconsin, and EPA all signing a "Class I Final Agreement." [Appx 668-677.] Pursuant to Section 164(e), the terms of this agreement "shall become part of the applicable [implementation] plan and shall be enforceable as part of the plan." This Class I Final Agreement purports to limit to a 10-mile radius the area within which the Class I "increment level" regulations would apply, but only for emission sources within Wisconsin. This arbitrarily burdens only Michigan's CAA programs with the Class I "increment level" requirements. The Class I Final Agreement offers no air modeling or other scientific basis to support why the limited 10-mile radius for PSD "increment level" applies to exclude sources in Wisconsin only (but not Michigan) from the "increment level" requirements. Notably, this 10-mile radius distanced is suspect because it would exempt from the more restrictive Class I increment regulations the entire Green Bay corridor, which contains a very high concentration of commercial air

emissions. The Class I Final Agreement offers no legal authority in choosing *any* distance (much less a radial distance so short of the current EPA's policy distance of 300 kilometers (186 miles). This 10-mile radial distance is, moreover, arbitrary and capricious in that in applies only to sources in Wisconsin and not Michigan. There is no air pollution control purpose supporting such a distinction.

d. Imposition of unknown enforcement methods by an unknown (FCPC and/or Wisconsin and/or EPA) authority.

The Class I Final Agreement describes its method for resolving PSD and AQRV permit issuance disputes. Fundamentally, the method is to establish a "Scientific Review Panel" each separate time there are disputed permit emission limits. Each such panel would be composed of one "scientist" chosen by the FCPC and one "scientist" chosen by Wisconsin. If needed a third "scientist" is mutually selected. This panel's purpose is to resolve "[a]ll scientific and technical disputes," including AQRV and BACT/MACT pollution control technology issues. These are core CAA permitting issues. If no resolution is accomplished, either the FCPC or Wisconsin could invoke the CAA Section 164(e) dispute resolution process.

The Class I Final Agreement purports to apply only within Wisconsin. But under Section 164(e) its provisions "shall become part of the applicable [implementation] plan and shall be enforceable as part of such plan." By this language of the Act, Class I disputes over permits for Michigan applicants will be

subject to the "Scientific Review Panel" process. This method of permit dispute resolution would trigger extensive delays to permit issuance or denial decisions; and could be used or otherwise consequently result in effectively rendering the permit process unavailable – due to a "chilling effect" from the very important unknowns it adds to the permitting process. But all this may depend on yet another unknown – whether the EPA (as a "Federal Land Manager") or the FCPC (as a "non-federal Land Manager") are the enforcing authority within this FCPC Class I area.

The Act states that a "Federal Land Manager" and [other] Federal officials [are] charged with direct responsibility for management of any lands within a Class I area. . . ."[126] However, EPA's actions do not charge a Federal Land Manager or other "Federal official" with "direct responsibility for management of [the] lands within [the FCPC] Class I area."

The only thing clear on this Class I "Land Manager" issue is that EPA itself is unable to confidently or consistently identify the Land Manager of the FCPC Class I area EPA created. On the one hand, EPA's primary "Final Rule" action approving the FCPC Class I redesignation explains[127]:

> In addition to the consultation undertaken by the FCP Community with Federal, State, and local agencies, the FCP Community consulted directly with the Bureau of Indian Affairs (BIA) regarding F[ederal

[126] CAA § 165(d)(2)(B); 42 U.S.C. § 7475(d)(2)(B).
[127] 73 FR 23086, 23091 (April 29, 2008) (emphasis added and footnote omitted).

>]L[and]M[anager] responsibilities. After those consultations, the BIA informed the FCP Community of that Agency's support of the Class I redesignation request and *that Agency's view that the Tribe would be the appropriate land manager for the lands subject to the designation request.*

Also, there are two final EPA actions (respectively resolving Michigan's and Wisconsin's Section 164(e) disputes[128]) companion to the EPA's primary final action; and in the Wisconsin dispute resolution final action, EPA states[129]:

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

These two statements suggest EPA recognizes the FCPC as the Class I authority, called a "non-federal" Class I Land Manager. However, on the other hand, EPA clarifies that while years ago it considered adopting regulations "regarding the roles and responsibilities of non-Federal class I area managers . . . no new regulations were established."[130] Even more exasperating is the following example of the very real unworkable complications EPA has created.

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[128] 73 FR 23107, 23111 (April 29, 2008).
[129] 73 FR 23111, 23114 (April 29, 2008) (emphasis added).
[130] 73 FR 223111, 23113 (April 29, 2008). *See*, 62 FR 33786 (June 23, 1997).

Pursuant to Class I regulations,[131] for years the EPA as policy and practice has accepted receipt of all requisite Michigan Class I permit applications at well-know and undisputed Land Manager addresses: (1) the U.S. Fish and Wildlife Service in Lakewood, Colorado for the Seney National Wildlife Refuge Class I area; and (2) the National Park Service in Fort Collins, Colorado for the Isle Royale National Park Class I area. However, the EPA presently has difficulty even identifying the Land Manager for its newly created FCPC Class I area. In a recent letter, Michigan's Department of Environmental Quality ("MDEQ"), attempting to initiate the process of meeting their new FCPC Class I area obligations, made a simple request of EPA[132]:

> [The MDEQ] has obligations under Title 40 of the Code of Federal Regulations, Part 51.166(P)(2) to notify Federal Land Managers of Class I areas of permit applications received for new and modified major sources wishing to locate within 100 kilometers of such areas.
>
> The MDEQ asks that the USEPA identify and provide the address for the Federal Land Manager responsible for the lands identified as redesignated in the April 29, 2008 Federal Register Notice.

In response, EPA avoids clarifying whether EPA, Wisconsin, or the FCPC is the enforcing authority (*federal*) "Land Manager" for the FCPC Class I area. Instead, EPA cites to a generic duty to send Class I area applications to EPA's "Administrator" at the EPA's Region 5 office in Chicago. However, the EPA's

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[131] 40 C.F.R. § 51.166.

[132] August 7, 2008, letter from Hellwig to Newton. [Appx 723.]

letter also states that the subject FCPC Class I area is a "non-federal Class I area."[133] The EPA also challenges the MDEQ's reliance on the 100-kilometer Class I distance, stating that EPA has not "specif[ied] a limitation on the geographic area within which [Class I] notice must be provided."[134]

Michigan has a duty to administer the new Class I duties triggered by EPA's redesignation approval actions. In order to do this, Michigan must first work to understand the implications to its many air pollution regulatory programs triggered by the new FCPC Class I area. Michigan must then properly address these implications by fashioning the requisite polices, procedures, equipment, and personnel to satisfy the new Class I duties. Michigan's initial letter to commence the process of understanding the new Class I implications served only to highlight that even the identity of the Class I enforcing authority is not clarified and that EPA apparently will be enforcing the 300-kilometer radial distance for the FCPC Class I area.

[133] October 22, 2008, letter from Newton to Hellwig. [Appx 726-727.]
[134] *Id.*

Conclusion

A stated "primary goal" of Congress in the CAA is to prevent and control air pollution by "promot[ing] reasonable federal, state, and local government actions, consistent with the provisions of th[e Act]".[135] The master documents that accomplish this prevention and control of air pollution are the "applicable implementation plans," of states, the federal government, and Indian tribal governments; respectively: SIPs, FIPs, and TIPs. These CAA implementation plans are elaborate and highly technical and detailed documents, as necessitated by the virtual ocean of requirements of the Act. So important are these master document implementation plans that Congress specifically addressed the procedures for approving and disapproving TIPs. Congress requires that a TIP be submitted and approved by EPA in order for Indian tribes to implement or administer any provisions of the CAA, including the Act's Class I redesignation provisions. In CAA § 301(d)(4)(a), Congress provided only that TIPs need not be approved procedurally "identical" to approval for SIPs.[136]

The three subject final agency actions by EPA do not satisfy the requirements of the Act for Class I redesignation of tribal lands, and therefore the FCPC Class I redesignation should be disapproved, pursuant to Section

[135] 42 U.S.C. § 7401(c).
[136] 42 U.S.C. § 7601(d)(4).

164(b)(2).[137] Also, 40 C.F.R. 52.21(g)(1), that provides a TIP may be approved "as a revision to the applicable [SIP]," is a rule not consistent with the Act, and its promulgation was beyond the authority granted EPA under the Act.

Also, CAA implementation plans are to contain [1] "enforceable emission limitations[,] . . . [2] provide [the] appropriate devices, methods, systems and procedures necessary to [] monitor, compile, and analyze data on ambient air quality [, and] . . . [3] include a program to providing for the enforcement of the [emission limitations] and regulations of the modification and construction of any stationary [air pollution] source."[138] The subject final agency actions by EPA did not satisfy these three fundamental procedural and substantive requirements of the Act. Instead, EPA's final actions created fundamental functional deficiencies and unworkable complications impermissibly frustrating Michigan's ability to administer its CAA programs. This reading of the Act's language is only more evident when Section 301(d)(4)[139] is read in context with Sections 110(a)(2),[140] 164(c), and (e), [141] and 301(d)(1)-(3),[142] and when reading Section 301(d)(4) in its place within the Act's overall statutory scheme.

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[137] 42 U.S.C. §7474(b)(2).
[138] 42 U.S.C. § 7410(a)(2).
[139] 42 U.S.C. § 7474(d)(4).
[140] 42 U.S.C. § 7410(a)(2).
[141] 42 U.S.C. § 7474(c) and (e).
[142] 42 U.S.C. § 7474(d)(1)-(3).

Accordingly, Michigan requests that all three EPA final agency actions under review, identified in the Jurisdictional Statement (at pages 1-2, above), be overruled and reversed; and the FCPC Class I redesignation be disapproved, pursuant to Section 164(b)(2). Also, 40 C.F.R. 52.21(g)(1) should be stricken for being promulgated beyond the EPA's authority under the Act.

Respectfully submitted,

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Certificate of Compliance with Type-Volume Limitations

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the text of this brief was prepared in Times New Roman 14 point font, and according to Microsoft Word's word count feature, consists of 12,791 words, excluding its tables of contents and authorities, statement supporting oral argument, and certificates of compliance and service.

/s/
John Fordell Leone

Verification that Compact Disk (CD) is Virus Free

Pursuant to Seventh Circuit Brief Filing Checklist, Item 21, I hereby verify that the CD being supplied contains the full contents of the Petitioner's Brief, Required Short Appendix, and Appendix, and does not contain any computer or other virus. (This office uses Symantec AntiVirus-program version 9.02.1000; version 04/24/2008 rev.2.)

/s/
John Fordell Leone

Affirmative Statement of Compliance with Appendix Requirements

Pursuant to Seventh Circuit Rule 30(d), I hereby state that all materials required by Rules 30(a) and (b) are included in Petitioner's Required Short Appendix or in the additional three-volume Petitioner's Appendix.

/s/
John Fordell Leone

Petitioner's Required Short Appendix

Table of Contents

Petitioner, pursuant to Federal Rule of Appellate Procedure (F.R.A.P.) 30, and Seventh Circuit Rule 30(a), supplies the following portions of the record below for inclusion in the Required Short Appendix: