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VIA ELECTRONIC MAIL, FACSIMILE and INTERNET

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Re: Comments of Sierra Club on the Proposed Redesignation of Kewaunee County from Nonattainment to Attainment of the 8-hour National Ambient Air Quality Standard for Ozone

These comments are submitted on behalf of the Sierra Club and its approximately 13,000 members in Wisconsin. Sierra Club is concerned about air quality in Wisconsin, especially the nonattainment areas in the eastern and southeastern portions of the state. EPA proposes to redesignate Kewaunee County, Wisconsin, as attaining the 8-hour ozone standard. However, the proposal does not meet the standards of the Clean Air Act for the reasons set forth below.

1. **The Redesignation Request Violates Clean Air Act § 107(d)(3)(E):**

To approve a redesignation request the EPA must make the following findings:

- The area has attained the national ambient air quality standard;
- The area has a fully-approved state implementation plan;
- That improvements in air quality is due to the permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plant and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;
- The Administrator has approved a maintenance plan meeting the requirements of 42 U.S.C. § 7505a; and
- The area has met all requirements applicable to the area under 42 U.S.C. § 7410 and Subchapter I, Part D of the Clean Air Act.

42 U.S.C. § 7407(d)(3)(E).

a) The area will not have an approved state implementation plan, pursuant to Clean Air Act §§ 110 and Subchapter I, part D, when the Administrator considers the redesignation request.

1) The Act explicitly requires the SIP to mandate Reasonably Available Control Technology (RACT) for all VOC sources within the nonattainment area, including each category of VOC sources covered by Control Technique Guideline (CTG) documents. 42 U.S.C. §7502(c)(1), 7511a(b)(2). Wisconsin has not demonstrated that the SIP meets this requirement. Examples of VOC source categories covered by EPA-issued CTG documents, include, but are not limited to: aerospace, synthetic organic compound manufacturing, reactor and distillations processes, shipbuilding, wood furniture, large petroleum dry cleaners, air oxidation processes in synthetic organic chemical manufacturing industries, equipment leaks from natural gas/gasoline processing plants, and a number of others. The statute requires RACT for each category of VOC sources covered by CTG documents.

2) Wisconsin has not revised or updated any of its existing VOC RACT rules since the area was designated as nonattainment. While some RACT rules for VOC were promulgated for the 1-hour ozone standard, it is Sierra Club's understanding that Wisconsin has not reviewed them after the 8-hour nonattainment designation to determine whether they are still valid and

sufficiently stringent under the 8-hour standard. There have been significant improvements in VOC controls developed over the past decade as demonstrated by the new controls in place in other nonattainment areas, such as the South Coast Air Quality Management District in California. These controls include new measures for fuels, paints, and other consumer products.

3) Wisconsin's NOx RACT rule is not final. While it has been adopted under state law, it is Sierra Club's understanding that the RACT rules have not yet been approved by U.S. EPA into the Wisconsin SIP. Therefore, the proposal to redesignate Kewaunee County does not meet 42 U.S.C. § 7407(d)(3).

4) Wisconsin does not have a fully-approved SIP in place because it has failed to submit a nonattainment SIP for the existing 8-hour ozone standard. This plan was due on June 15, 2007. Not only was it not submitted by Wisconsin before the deadline, but it is Sierra Club's understanding that Wisconsin has not even prepared a nonattainment SIP submittal. Unless Wisconsin has a fully approved nonattainment SIP in place for 8-hour ozone, the Administrator is prohibited from approving Wisconsin's redesignation request.

5) Clean Air Mercury Rule: Wisconsin has not submitted a SIP program to control mercury. Wisconsin's SIP is required to include provisions to limit emissions of mercury. This has not been done, which means that Wisconsin's SIP is incomplete and EPA cannot redesignate any area as in attainment.

6) Failure to ensure adequate funding and personnel. 42 U.S.C. § 7410 (a)(2)(E). The state lacks adequate funding and personnel to provide a user-friendly website for its permits, to respond to EPA comments regarding PSD permits, and maintain organized files accessible to the public. These shortcomings were identified by EPA as part of its review of the state's PSD program in 2006. Until the funding and resource issues are resolved, DNR may not approve the redesignation.

7) Wisconsin has no contingency measures specified should Kewaunee County not attain the 8-hour standard in the future. Instead, Wisconsin proposes to "evaluate the sufficiency of control measures that have already been promulgated, but not

fully implemented at the time of the violation, to return the area to attainment" and then, at an unspecified future time "determine[] that additional [unspecified] measures are necessary to return the area to attainment… from the list…." See WDNR Response to Comments. This is insufficient to satisfy 42 U.S.C. § 7407(d)(3).

8) Wisconsin does not have a fully approved SIP because it has not yet complied with the Credible Evidence Rule. 62 Fed. Reg. 8314.

b) The reductions are not due to enforceable and permanent measures.

Redesignation is only appropriate if the EPA Administrator determines that the improvement in air quality, between designation as nonattainment and the petition for redesignation as attainment, "is due to permanent and enforceable reductions in emission resulting…" 42 U.S.C. § 7407(d)(3)(E)(iii). Wisconsin's request for redesignation does not make this showing. Instead, it shows a calculated reduction, which is neither real nor permanent and enforceable.

Wisconsin's redesignation request purports to show a decrease in actual emissions, through permanent and enforceable measures, between 2002 (a year of nonattainment) to 2005 (a year of purportedly "clean data"), claiming that "Wisconsin has documented specific permanent and enforceable programs responsible for emission reductions over this time period." Wisconsin relies upon a number of claimed emission reductions between 2002 and 2005. However, these claimed reductions appear to be either a result of a different metric to calculate emissions in 2002 versus 2005, or due to unenforceable and non-permanent reductions.

1) In Appendix 4 there were different emission factors applied in 2002 and 2005, or a different method of calculating emissions was used, with 2005 emission factors or methods generally resulting in lower emissions than the factors or methods applied in 2002. For example, the emission factors for fuel combustion in 2005 are much lower than the factors used to calculate 2002 emissions. While emission factors may have been updated to be more accurate, the mere updating of emission factors fromyou're year to another does not result in lower emissions. If Wisconsin is to demonstrate that emissions actually decreases between 2002 and 2005, it must do so with an apples-to-apples comparison. Specifically, the same emission factor must be applied in both reference years if Wisconsin is to show a "decrease."

2) The reduction in emissions between 2002 and 2005-- to the extent it exists if the same emission factor is applied in both years—is due to non-

permanent and non-enforceable variables. For example, emissions from point sources and nonpoint sources in Appendix 4 are calculated based on variables such as vehicle miles traveled, amount of fuel combusted, and county employment. These variables directly effect the emissions from year to year, but are neither permanent nor enforceable. Indeed, EPA commented on a similar point to the Wisconsin DNR when it noted that local traffic congestion controls are not enforceable and cannot be relied upon by Wisconsin in the redesignation request. Therefore, Wisconsin's submission does not demonstrate that any such decreases are due to permanent and enforceable reductions.

3) One of the most significant sources of ozone-causing pollution is fossil-fueled electricity generation. Wisconsin DNR calculates NOx emission reductions for these units from 1995 through 2005. *See* Appendix 5. However, this determination of reduced emissions is not based on enforceable reductions. Rather, it is based on a comparison of historical actual emissions. For example, Wisconsin compares the actual emissions in 1995 to the actual emissions in 2005. The problem with this comparison is that the actual emissions in 2005 are not the "enforceable" emission rates from the sources and do not represent a permanent and enforceable reduction. The "enforceable" emission rates are those that are required by regulation or permit limit (i.e., the potential to emit). Reductions due to unenforceable decreases in operating time and/or voluntary reductions in emission rates are not sufficient to satisfy 42 U.S.C. § 7407(d)(3)(E)(iii).[1] Because the sources could have emitted significantly more in 2005, and could in the future, these facilities' actual emissions cannot be used to show a permanent and enforceable reduction between 1995/2002 and 2005. The failure to rely on enforceable emission rates is unlawful and arbitrary.

4) As noted above, EPA has not adopted Wisconsin's RACT rules for electric generating units into the Wisconsin SIP. Nevertheless, Wisconsin's redesignation submission assumes that RACT rules for NOx are in place in the future as part of the demonstration that the purported historical improvement in ozone concentrations is due to enforceable reductions in emissions. This reliance on future regulations as a basis for a historical improvement in air quality is unlawful and arbitrary.[2] Moreover, even if

[1] Since some voluntary reductions result in credits that can be used in future years, this could actually result in increased emissions in future years when those credits are used.

[2] Wisconsin DNR also points to "Measures in addition to Clean Air Act Requirements" in support of its showing required under 42 U.S.C. § 7407(d)(3)(E)(iii). Many, if not all of these measures occurred after the claimed attainment demonstration years. For example, ultra-low sulfur diesel rules began having an effect, at the earliest, starting in October, 2006, the clean air nonroad diesel rules are being phased in currently, and the mobile source air

future reductions in emissions could be used to make the demonstration in 42 U.S.C. § 7407(d)(3)(E)(iii), Wisconsin's reliance on RACT rules is nevertheless unlawful and arbitrary because the RACT rules are not final. *See Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001) (remanding designation approval because failure to include final RACT rules).

c) The maintenance plan is deficient.

1) Failure to include all SIP measures: Clean Air Act § 175A(d) requires that the maintenance plan submitted by Wisconsin "include a requirement that the State will implement all measures with respect to the control of the air pollutant concerned which were contained in the State implementation plan for the area before designation of the area as an attainment area." 42 U.S.C. § 7505a(d). Such "measures" include the New Source Review program, including the definition of a major source and major modification subject to the program, the requirement to comply with lowest achievable emission rates, the requirement to demonstrate that the benefits of the project outweigh the costs, and the requirement to off-set new and increased emissions. These measures, contained in Wis. Admin. Code ch. NR 408, are not included in the maintenance plan being proposed by the Department. As EPA has explained "[T]he State will be expected to maintain its implemented control strategy despite redesignation to attainment, unless such measures are shown to be unnecessary for maintenance or are replaced with measures that achieve equivalent reductions." However, upon redesignation, Kewaunee County sources would no longer be subject to Wis. Admin. Code ch. NR 408—effectively removing the sources from the control strategy. This is unlawful and redesignation cannot be approved unless and until Wis. Admin. Code ch. NR 408 is redrafted such that it continues to apply in Kewaunee County after redesignation.

2) The United States Court of Appeals for the District of Columbia held in *South Coast Air Quality Management District v. Environmental Protection Agency*, 472 F.3d 882 (D.C. Cir. 2006) (hereinafter "SCAQMD"), that controls established in an area under the 1-hour ozone standard, including New Source Review requirements, must remain in place pursuant to the anti-backsliding provision, Clean Air Act § 172(e), 42 U.S.C. § 7502(e). *Id.* at 900-02. The court held that anything "designed to constrain ozone levels is a 'control'," pursuant to the anti-

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toxics rule, CAIR, and BART are not effective yet. None of these regulations could have resulted in the reduction in ozone between 2002 and 2005 (to the extent there was a reduction).

backsliding provision in § 172(e), and cannot be relaxed even when an area is reclassified as a lower non-attainment designation. *Id.* at 902. The existing nonattainment NSR program in effect for Kewaunee County Wisconsin is a "control," which cannot be relaxed. The redesignation would result in the nonattainment NSR provisions no longer applying to Kewaunee County sources—which is an unlawful relaxation of "controls" established in nonattainment areas of Wisconsin. This violates the anti-backsliding provision in § 172(e). EPA cannot approve the proposed redesitnation until Wis. Admin. Code ch. NR 408 is revised to ensure that it continues to apply to sources in Kewaunee County, which was designated as nonattainment for one hour ozone under the 1990 Amendments to the Clean Air Act.

3) Failure to conduct modeling to demonstrate maintenance: Wisconsin's plan does not demonstrate maintenance for ten years as required by sections 107(d)(3)(E)(iv) and 175A of the Act. EPA rules explicitly require maintenance demonstrations to be supported by modeling. 40 C.F.R. §§51.112. See also 65 Fed. Reg. at 6711 (rejecting use of rollback analysis for making attainment and nonattainment predictions). Until Wisconsin conducts such a modeling demonstration, it cannot approve the maintenance plan.

4) As noted above, because of the way that Wis. Admin. Code ch. NR 408 is drafted, it would not apply to Kewaunee County after redesignation. Therefore, the proposal to redesignate Kewaunee County is effectively a proposal to remove the NSR provisions *(inter alia*: higher threshold for major sources, BACT instead of LAER, benefits outweigh costs, and no offsets) also violates Section 110(l), 42 U.S.C. § 7410(l). This provision states that "the Administrator may not approve a revision of a plan if the revision would interfere with any reasonable applicable requirement concerning attainment and reasonable further progress … or any other applicable requirement of this chapter." *Id.* Creating large loopholes that increase the major source threshold, lower the control technology requirements, and removing the offset requirements all will result in increased air pollution and interfere with both attainment and reasonable further progress.

Thank you for considering these comments. Please contact us if you have any questions about these comments.

Sincerely,

Bruce Nilles

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