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

OCT 20 1999

REPLY TO THE ATTENTION OF:
(AR-18J)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

George Meyer
Wisconsin Department of Natural Resources
P.O. Box 7921
101 South Webster Street
Madison, Wisconsin 53707-7921

Dear Mr. Meyer

This letter is in regards to the Class I Final Agreement between the State of Wisconsin and the Forest County Potawatomi (FCP) Community. On October 12, 1999, Francis X. Lyons, United States Environmental Protection Agency (USEPA) Regional Administrator, signed the Final Agreement recognizing the agreement reached between the State and the FCP on issues identified during the dispute resolution sessions. I am enclosing Wisconsin's official signed copy of the agreement. A signed copy will also be sent to the FCP, a photocopy will be sent to Triangle Associates, Inc., and a signed copy will be kept in our files on the redesignation.

Although the agreement is signed, by its terms it does not become effective unless and until USEPA grants the FCP request for redesignation. The USEPA expects to publish a decision on the redesignation request and the dispute resolutions in the **Federal Register** within the next 6 months.

I wish to thank you and your staff for all of your efforts in reaching this agreement. If you have any questions, please feel free to contact me.

Sincerely yours,

Stephen Rothblatt, Lead
EPA Dispute Resolution Team

Enclosure

cc: Tommy Thompson, Governor
State of Wisconsin

Harold Frank, Vice Chairman
Forest County Potawatomi Executive Council

Marty Burkholder
Wisconsin Department of Natural Resources

CLASS I FINAL AGREEMENT

Between The State of Wisconsin and
The Forest County Potawatomi Community

Recognized by the United States Environmental Protection Agency

Concerning

Class I Designation of the Forest County Potawatomi Reservation under the Clean Air Act

Purpose

This Final Agreement between the State of Wisconsin and the Forest County Potawatomi Community resolves fully the dispute between the State and the Tribe concerning the June 29, 1995 proposed approval of the Forest County Potawatomi Reservation to Class I status by the United States Environmental Protection Agency. The State of Wisconsin initiated the dispute on June 8, 1995 under Section 164(e) of the Clean Air Act. This Final Agreement is also intended to clarify and expand the Agreement in Principle (attachment A) signed by the State of Wisconsin, Forest County Potawatomi Community and United States Environmental Protection Agency on February 3, 1999. Together, both the Agreement in Principle and this Final Agreement provide the framework for establishing State, Tribal, and Federal implementation of Class I status for the Potawatomi Reservation. The Final Agreement is a package representing a balance of elements to fully resolve issues identified during the dispute resolution sessions. As a package, the Final Agreement and Agreement in Principle should be viewed as a whole.

I. Definitions

1. "Air Quality Related Value" or "AQRV" means, for the Tribal Class I area, the resources or properties within the exterior boundaries of the reservation that could be adversely affected by air pollution. See Section IV for additional details.

2. "BACT" means Best Available Control Technology or a level of emissions control generally used by industry as determined by the State and defined under the Clean Air Act and State regulations.

3. "Class I" means the PSD classification for an area having the smallest air quality increments and allowing only a small degree of air quality deterioration.

4. "MACT" means Maximum Achievable Control Technology or a level of emissions control based on the average emission limitation achieved by the best performing 12 percent of existing sources as determined by the USEPA and defined under the Clean Air Act.

5. "Major Source" means any newly constructed stationary source or modification to an existing source classified in one of 28 source categories (listed in Section 169 of the Clean Air Act) and having the potential to emit 100 tons per year or more of any pollutant under the Act. The term also applies to any other newly constructed source or modification to an existing source that has the potential to emit 250 tons per year or more of any pollutant regulated by the Act.

6. "PSD" means the Prevention of Significant Deterioration program of the federal Clean Air Act as promulgated in 40 CFR Part 52.21 and 51.166.

7. "Parties" or "Party" singularly means the Forest County Potawatomi Community and the State of Wisconsin.

8. "Potawatomi Reservation" or "Reservation" or "Class I area" means the 10,818 acres of Potawatomi Tribal land located in Forest County, Wisconsin, proposed as Class I by the USEPA on June 29, 1995 under the federal Clean Air Act PSD program.

9. "State" means the State of Wisconsin.

10. "Tribe" means the Forest County Potawatomi Community (Crandon, Wisconsin).

11. "USEPA" or "EPA" means the United States Environmental Protection Agency.

II. PSD Class I Increments

With respect to Class I increments and increment consumption, the parties agree that:

1. All major sources located within a ten (10) mile radius of the Reservation will be subject to the increment analysis and consumption requirements applicable to the Reservation as a Class I area, subject to appropriate federal and state law.

2. All major sources located outside a ten (10) mile radius of the Reservation will be subject to the increment analysis and consumption requirements applicable to the Reservation as a Class II area, subject to appropriate federal and state law.

3. Within six months after this agreement becomes effective, the parties will develop a final map that identifies the ten mile radius from the proposed Class I area.

III. Notification

A. For all PSD major source permit applications for sources located within a sixty-two (62) mile radius of the Reservation, the State agrees to provide the following notifications to the Tribe:

1. Notice of the PSD permit application within thirty (30) days of receiving the application. Notice shall be made to the Tribe by submitting a copy of the permit application.

2. Copies of correspondence with the PSD permit applicant regarding air quality permitting requirements including but not limited to monitoring and modeling requirements and the completeness determination.

3. Notice of any public comment periods or public hearings regarding a PSD permit at least thirty (30) days in advance of such hearing. A copy of the preliminary determination of permit approval shall be directed from the State to the Tribe on the same day as such notice is directed to the applicant.

B. Whenever notification is required under the terms of this agreement, it shall be directed to the following contacts and addresses listed below. Either of the parties or USEPA can change its contact or address as necessary by sending such change in writing to the other contacts. Each of the parties and USEPA are responsible for ensuring that its contact and address information is current and accurate.

1. As to the Forest County Potawatomi:
Christine Hansen
Forest County Potawatomi Community
P.O. Box 340
Crandon, WI 54520

2. As to the State of Wisconsin:
Director, Bureau of Air Management
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-7921

3. As to the United States Protection Agency:
Chief, Air Programs Branch (AR-18J)
U.S. Environmental Protection Agency – Region 5
77 West Jackson Boulevard
Chicago, IL 60604

IV. Air Quality Related Values

A. For establishing AQRVs for the Reservation and their threshold effects levels, and to evaluate the effects of air emissions on AQRVs, the State and the Tribe agree to the following:

1. The Tribe, as Class I land manager of the Reservation, has defined the following existing AQRVs: aquatic systems and water quality. The Tribe has identified that acidic deposition and metals deposition (including mercury) have the potential to adversely affect these AQRVs. To date, data collection efforts by the Tribe have focused on acidic deposition and metals deposition (including mercury). The existing AQRVs (aquatic systems and water quality) are recognized and acknowledged by the State.

2. Threshold effects levels for aquatic systems and water quality have not been established. In the interim period (up to 2 years) until adoption of threshold effects levels for aquatic systems and water quality, the Scientific Review Panel has the authority to determine if adverse impacts may potentially occur to these identified AQRVs.

3. The State will have the opportunity to review new and modified AQRVs and threshold effects levels. If the State does not agree with the AQRV or its threshold effects, the State may request Scientific Review Panel (SRP) dispute resolution under Section VI.

4. AQRVs and threshold effects levels may be added or changed only every ten (10) years after the date this agreement is signed. However, if a party believes that "substantial harm" will occur to a resource on the Reservation and such harm cannot be addressed without adoption of an AQRV or addition/revision of a threshold effects levels, the process as listed in Sections IV.A.1 and IV.A.3., may be used to adopt a new AQRV or modify an existing AQRV or threshold effects level. "Substantial harm" shall be that level of harm to a resource that is considerable in importance, value, degree, amount, or extent.

B. For purposes of demonstrating adverse impacts to AQRVs by major PSD sources located within a sixty-two (62) mile radius of the Reservation and permitted by the State, the Tribe and the State agree to the following:

1. The Tribe is responsible for performing any AQRV effects analysis. The Tribe will conduct the AQRV analysis for major PSD sources located within a sixty-two (62) mile radius of the Reservation that may affect the designated AQRVs.

2. The State may require PSD permit applicants to perform AQRV analyses under Chapter NR 405, Wisconsin Administrative Code. Sources will be required to provide all information necessary to the Tribe or State as applicable for the purposes of conducting or reviewing an AQRV impact analysis.

3. An AQRV adverse impact analysis conducted by the source (if required under section IV.B.2.) shall be submitted to the State as a part of a complete permit application under State law.

4. Sources will only be required to meet the AQRVs current at the time a permit application is filed.

C. The following AQRV impact determination notification and communication procedures will apply:

1. Within 30 days of the Tribe's receipt from the State of a PSD permit application, the Tribe will provide comments to the State on potentially affected AQRVs and analysis methods.

2. The Tribe will prepare and submit to the State an AQRV analysis no later than seventy-five (75) days after the State receives a complete permit application under State law. The analysis will include any finding of adverse impacts to AQRVs.

3. Either party that disagrees with an AQRV analysis and the effects of PSD source emissions on an AQRV may request an SRP review under Section VI.

V. BACT/MACT Review

For new sources (including non-PSD sources), the State and the Tribe agree to the following:

1. The State will provide the Tribe the opportunity to review State BACT/MACT determinations for all sources that are within: a) ten (10) miles of the Reservation; or b) sixty-two (62) miles of the Reservation and have a modeled impact on Reservation air resources exceeding 1 microgram per cubic meter for a 24-hour period.

2. If the Tribe does not agree with the State BACT/MACT determination, the Tribe may request dispute resolution only under section VI, subject to permit issuance requirements under State law (Section 285.61 and 285.62, Wisconsin Stats.).

VI. Scientific Review Panel (SRP) and Dispute Resolution Procedures

The State and the Tribe agree to the following dispute resolution provisions:

1. A Scientific Review Panel (SRP) will be established, upon the formal request of either party, to resolve any scientific and technical disputes between the State and the Tribe relating to AQRVs under Section IV and BACT/MACT determinations under Section V and to coordinate and develop research and data collection efforts.

2. The SRP will be composed of one scientist selected by the State and one scientist selected by the Tribe. If necessary, a third scientist mutually selected by the State and the Tribe may be added to the SRP upon the formal request of either party.

3. All scientific and technical disputes between the State and the Tribe will be resolved through the SRP process and the decision of the SRP will be considered as final for the purposes of this agreement. If the SRP process cannot resolve a scientific or technical dispute related to PSD permit issuance, then either original party may seek dispute resolution under Section 164(e) of the Clean Air Act.

4. For legal and policy issues related to PSD permit issuance, the parties will attempt, in a good faith manner, to resolve the issues on a government-to-government basis prior to requesting a Section 164(e) review under the Clean Air Act. Section 164(e) is only available for resolution of disputes if a PSD permit is proposed by the State to be issued.

5. Every effort will be made by both parties to resolve any disputes in a good faith manner as expeditiously as possible.

6. The State will not issue any permit under this agreement until all issues related to the permit are resolved subject to permit issuance time period requirements under State law (Section 285.61 and 285.62, Wisconsin Stats.).

VII. Tribal Authority Rule

The State will support Treatment as State (TAS) status under the Clean Air Act Tribal Authority Rule (40 CFR Parts 9, 35, 49, 50, and 81) for the Tribe if the Tribe chooses to apply for such a status from USEPA. The State agrees to provide technical assistance in Tribal Implementation Plan (TIP) development and with the TAS application procedure.

VIII. Changes To The Agreement

This agreement may be revised upon mutual consent of both parties. Any party requesting a change shall do so in writing to the other party. All changes shall be signed by both parties and attached to the original and official copies of the agreement.

IX. Implementation

Every effort will be made by both parties to implement this agreement to the fullest extent possible. If it is necessary to further define the roles and responsibilities to this agreement, both the State and the Tribe agree to work cooperatively in a good faith manner to develop a plan to assist in the implementation of this agreement.

X. Severability

The provisions set out in this Final Agreement are not severable, unless by mutual agreement of the parties.

XI. Legal Challenges

With the understanding that the parties retain their rights to challenge a final agency action inconsistent with the dispute resolution final agreement and the redesignation rulemaking, both parties agree that they will not challenge the legality of the dispute resolution final agreement and the redesignation rulemaking.

XII. Termination

This Agreement may be terminated upon mutual agreement of the two parties. Any such request for termination shall be made in writing submitted to the other party and shall be effective upon the signature of such an agreement by both parties. In the event that one party materially breaches any of the terms of this Final Agreement, the parties will attempt to resolve it in a timely manner. If the parties cannot resolve the dispute, then the other party may terminate the agreement by submission of written notice of termination to the other party.

XIII. Disposition

There shall be two (2) originals of this agreement with one agreement kept by the Forest County Potawatomi Community and one agreement kept by the State of Wisconsin. There shall be one (1) official copy of the agreement that shall be kept by the United States Environmental Protection Agency.

XIV. Effective Date

Unless otherwise specified within the agreement, the effective date of this agreement shall be upon such time that the two parties and USEPA sign the agreement, and the Potawatomi Reservation receives final approval for Clean Air Act Class I designation with publication in the Federal Register as a final rule.

XV. Execution Of Agreement

Each of the signatories hereto represent that they have full authority to execute this Final Agreement on behalf of their respective party. The parties agree that the terms of this Final Agreement shall be binding upon the representatives and successors in interest. This agreement in no way waves the sovereignty of any of the parties.

FOR THE FOREST COUNTY POTAWATOMI COMMUNITY

Harold Frank, Vice Chairman of Executive Council — Date: 7-27-99

FOR THE STATE OF WISCONSIN

Tommy G. Thompson, Governor — Date: 9-2-99

RECOGNIZED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Francis X. Lyons, Regional Administrator
Region 5 — Date: 10/12/99

ORIGINAL

Negotiations Concept and Agreement in Principle
February 3, 1999

The State of Wisconsin requested dispute resolution under Section 164 (e) of the Clean Air Act (CAA) related to the Forest County Potawatomi (FCP) Community Class I redesignation. A series of meetings were held on September 2, 1998, November 16, 1998, December 22, 1998 and February 3, 1999. The parties to the negotiations were the Forest County Potawatomi Community and the State of Wisconsin. The U.S. Environmental Protection Agency convened and actively participated in the proceedings pursuant to its responsibilities under CAA section 164(e). The parties to the dispute resolution reached an agreement in principle for review by their respective boards and authorities. The State of Michigan chose not to participate in the dispute resolution.

The agreement in principle is a package representing a balance of elements to resolve issues identified during the dispute resolution sessions under section 164(e) of the Clean Air Act. As a package, the agreement in principle should be reviewed as a whole.

The designated negotiators for the parties, the Forest County Potawatomi Community and the State of Wisconsin, agree to these general concepts to take back to their respective boards and governing bodies. The representative for U.S. EPA agrees to these general concepts and will recommend Agency approval. The main concepts include:

1) **Class I designation for all Potawatomi lands in application for redesignation:**
   a) With respect to Class I increment analysis within a "geographic area of influence", which has been identified as a ten-mile radius, a draft map was presented by the State of Wisconsin at the February 3, 1999 meeting in Carter, Wisconsin.
   b) All major Clean Air Act PSD new or modified sources located within the ten-mile radius will be subject to the requirements of 40 CFR 52.21/Chapter NR 405, Prevention of Significant Deterioration, Wisconsin Administrative Code, applicable to the reservation as a Class I area. PSD sources located outside the ten-mile radius will be subject to the increment requirements of Chapter NR 405 applicable to the reservation as a Class II area.
   c) For all PSD permit applications located within a sixty-two mile (100km) radius of the reservation, the State will provide the following notifications to the Tribe:
      - Notice of the proposed PSD permit within 30 days after receiving a permit application. Notice shall be made to the Tribe by submitting a copy of the permit application.
      - Copies of correspondence with the PSD permit applicant regarding air quality permitting requirements including but not limited to monitoring and modeling requirements.
      - Notice of any public hearings regarding a PSD permit at least 30 days in advance of such hearing. A copy of the preliminary determination of permit approval shall be directed from the State to the Tribe on the same day as such notice is directed to the applicant.

Negotiations Concept and Agreement in Principle
February 3, 1999

2) **Air Quality Related Values (AQRVs) and Mercury**
   a) The Tribe has designated the following AQRVs: aquatic systems and water quality.
   b) A Scientific Review Panel (SRP) will be established to evaluate and develop AQRVs and effects thresholds, and if necessary to resolve disputes between the Tribe and State. The SRP will be composed of one DNR scientist and one FCP scientist. If the two scientists do not agree on the matters before them, a third mutually agreed upon scientist will be used to resolve the dispute.
   c) AQRVs may be added or changed every 10 years after the date the final agreement is signed.
   d) If a party believes that "substantial harm" will occur to a resource and such harm cannot be addressed without adoption of an AQRV before the 10 year review period, the SRP can establish a new AQRV or modify an existing AQRV if it determines that "substantial harm" has or may occur.
   e) A permit applicant is only required to meet the AQRV requirements current at the time an application is filed.
   f) FCP is invited to participate on the stakeholder board to examine and work to decrease mercury deposition in the State of Wisconsin.

3) **Enhanced BACT/MACT review**
   a) The Tribe will have the opportunity to review BACT/MACT determinations for sources located within sixty-two miles of the reservation and that have a modeled impact on Tribal air resources that exceed either a 1 microgram per cubic meter for a 24-hour period, or are otherwise determined by the SRP to have a potentially adverse impact under the AQRV analysis described under paragraph 2. The determinations will be subject to dispute resolution within permit issuance time period requirements under state law (Section 285.61 and 285.62, Wisconsin Stats.).
   b) These determinations are subject, if necessary, to the SRP process.

4) **Dispute Resolution Provision**
   a) Technical or scientific disputes would be resolved through the SRP process (see 2(b)).
   b) The parties agree to discuss disputed legal and policy issues and try, in a good faith manner, to resolve them on a government-to-governement basis prior to requesting a Section 164(e) review.
   c) If the SRP process cannot resolve the dispute, then either original party can seek dispute resolution under Section 164(e).

5) **Treatment as State Status (TAS)**
   a) The State of Wisconsin will support Treatment as State (TAS)/ Tribal Authority Rule (TAR) status for the Forest County Potawatomi Tribe under the Clean Air Act.

b) The State has offered to provide technical assistance in Tribal Implementation Plan (TIP) development and with the TAS application procedure.

The designated negotiators support this agreement in principle and will present it with their support to their respective boards and authorities for development of a final agreement.

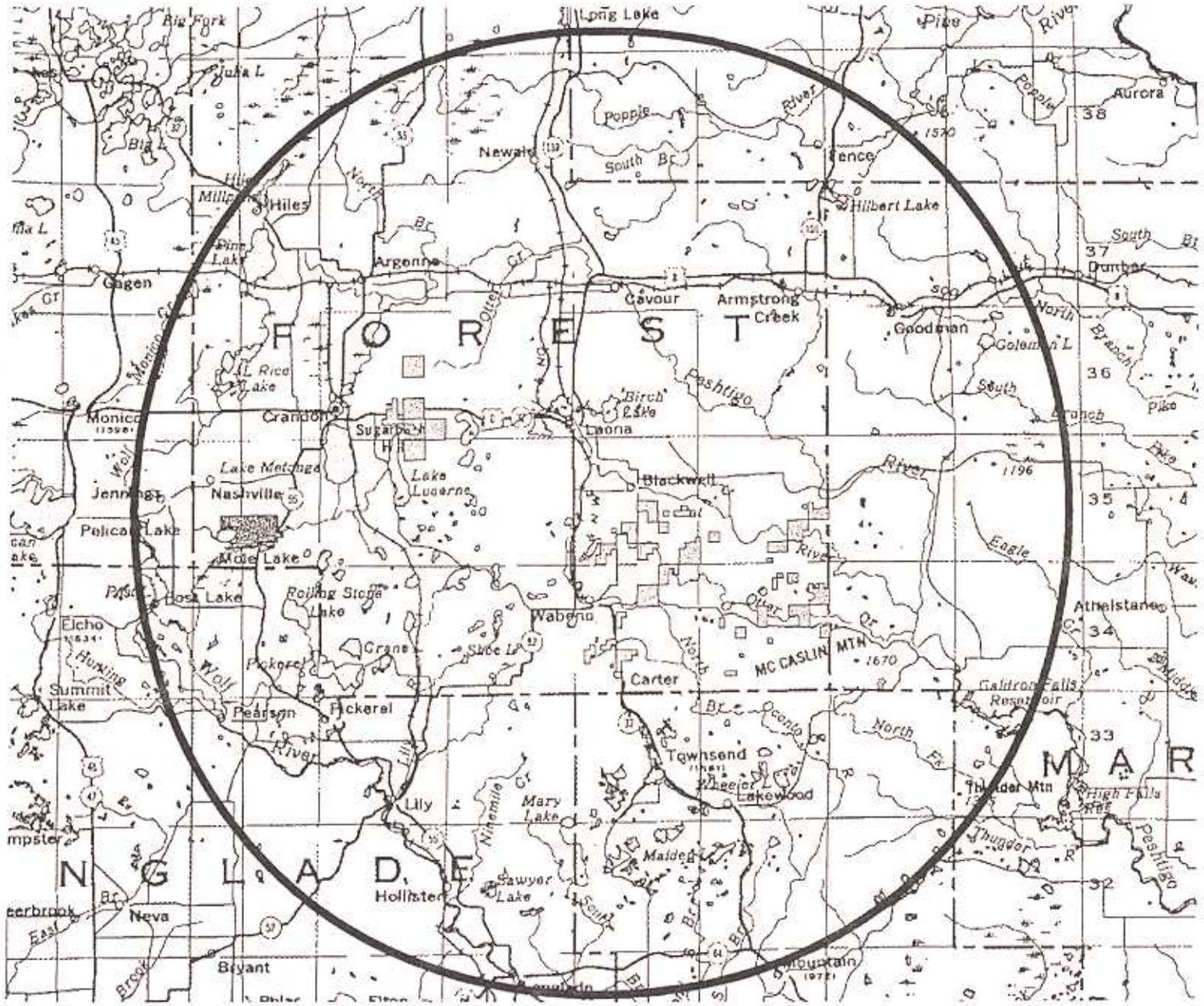
Joseph Young 2/3/99
Joseph Young
Forest County Potawatomi Community

George E. Meyer 2/3/99
George E. Meyer
State of Wisconsin

2/3/99
Stephen Rothblatt
US Environmental Protection Agency

Note to Sophie - after June 7th Drafting call we will revise final agreement + send that with our final (finished) report!

10 Mile Radius Surrounding Potawatomi Reservation in Wisconsin



Potawatomi Reservation

Mole Lake Reservation

N

Source: WDNR/AM Jan. 1999