

■ 3. Table Four, in Paragraph 20 of § 706.2, is amended by adding, in numerical order, the following entry for USS GREEN BAY (LPD 20):

**§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.**

\* \* \* \* \*

Vessel	Number	Angle in degrees of task lights off vertical as viewed from directly ahead of astern
USS GREEN BAY.	LPD 20 .....	10

■ 4. Table Five of § 706.2 is amended by adding, in numerical order, the following entry for USS GREEN BAY:

**§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.**

\* \* \* \* \*

TABLE FIVE

Vessel	No.	Masthead lights not over all other lights and obstructions. Annex 1, sec. 2(f)	Forward masthead light not in forward quarter of ship. Annex 1, sec. 3(a)	After masthead light less than 1/2 ship's length aft of forward masthead light. Annex 1, sec. 3(a)	Percentage horizontal separation attained
USS GREENBAY .....	LPD 20 .....			X	70.9

Approved: April 29, 2008.  
**M. Robb Hyde,**  
*Commander, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law).*  
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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 52 and 81**

[EPA-R05-OAR-2007-0957; FRL-8568-2]

**Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Wisconsin; Redesignation of Kewaunee County to Attainment for Ozone**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** On June 12, 2007, the Wisconsin Department of Natural Resources (WDNR) submitted a request to redesignate Kewaunee County to attainment of the 8-hour ozone standard. EPA proposed to approve this submission on December 11, 2007. EPA provided a 30-day review and comment period. The comment period closed on January 10, 2008. EPA received comments from the Sierra Club and the Door County Corporation Counsel. EPA is approving Wisconsin's request and the associated maintenance plan for continuing to attain the standard. As

part of this action, EPA is making a determination that Kewaunee County has attained the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS). This determination is based on complete, quality-assured ambient air quality monitoring data for the 2004-2006 ozone seasons that demonstrate that the 8-hour ozone NAAQS has been attained in Kewaunee County. Monitoring data for 2007 continue to show monitored attainment of the NAAQS. EPA is approving the maintenance plan for Kewaunee County and is redesignating Kewaunee County to attainment. Finally, EPA is approving, for purposes of transportation conformity, Wisconsin's 2012 and 2018 Motor Vehicle Emission Budgets (MVEBs) for Kewaunee County. **DATES:** This final rule is effective May 21, 2008.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA R05 OAR 2007-0957. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Environmental Protection Agency,

Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Kathleen D'Agostino, Environmental Engineer, at (312) 886-1767 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** Kathleen D'Agostino, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR 18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886 1767, [dagostino.kathleen@epa.gov](mailto:dagostino.kathleen@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

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- I. What is the background for this rule?
- II. What comments did we receive on the proposed action?
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**I. What is the background for this Rule?**

On July 18, 1997 (62 FR 38856), EPA promulgated an 8-hour ozone standard of 0.08 parts per million (ppm). EPA published a final rule designating and classifying areas under the 1997 8-hour ozone NAAQS on April 30, 2004 (69 FR 23857).

On March 12, 2008, EPA Administrator Stephen L. Johnson signed a rule promulgating a more

stringent 8-hour ozone standard of 0.075 ppm. This rule was published in the **Federal Register** on March 27, 2008 (73 FR 16436). EPA will designate nonattainment areas under the 2008 8-hour ozone standard in 2010. This rule only addresses the status of Kewaunee County with respect to the 1997 8-hour ozone standard.

The background for today's actions with respect to the 1997 ozone standard is discussed in detail in EPA's December 11, 2007, proposal (72 FR 70255). In that rulemaking, we noted that, under EPA regulations at 40 CFR part 50, the 8-hour ozone standard is attained when the 3-year average of the annual fourth-highest daily maximum 8-hour average ozone concentrations is less than or equal to 0.08 ppm. (See 69 FR 23857 (April 30, 2004) for further information). The data completeness requirement is met when the average percent of days with valid ambient monitoring data is greater than 90%, and no single year has less than 75% data completeness, as determined in accordance with Appendix I of Part 50.

Under the Clean Air Act (CAA), EPA may redesignate nonattainment areas to attainment if sufficient complete, quality-assured data are available to determine that the area has attained the standard and that it meets the other CAA redesignation requirements in section 107(d)(3)(E).

On June 12, 2007, the WDNR submitted a request to redesignate Kewaunee County to attainment of the 8-hour ozone standard. The request included three years of complete, quality-assured data for the period of 2004 through 2006, indicating the 8-hour NAAQS for ozone had been achieved. The December 11, 2007, proposed rule provides a detailed discussion of how Wisconsin met this and other CAA requirements.

On December 22, 2006, the U.S. Court of Appeals for the District of Columbia Circuit vacated EPA's Phase 1 Implementation Rule for the 8-hour Ozone Standard. (69 FR 23951, April 30, 2004). *South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882 (DC Cir. 2006). On June 8, 2007, in *South Coast Air Quality Management Dist. v. EPA*, Docket No. 04 1201, in response to several petitions for rehearing, the DC. Circuit clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. Therefore, the Phase 1 Rule provisions related to classifications for areas currently classified under subpart 2 of Title I, part D of the CAA as 8-hour nonattainment areas, the 8-hour attainment dates, and the timing for emissions reductions

needed for attainment of the 8-hour ozone NAAQS, remain effective. The June 8th decision left intact the Court's rejection of EPA's reasons for implementing the 8-hour standard in certain nonattainment areas under subpart 1 in lieu of subpart 2. By limiting the vacatur, the Court let stand EPA's revocation of the 1-hour standard and those anti-backsliding provisions of the Phase 1 Rule that had not been successfully challenged. The June 8th decision reaffirmed the December 22, 2006, decision that EPA had improperly failed to retain four measures required for 1-hour nonattainment areas under the anti-backsliding provisions of the regulations: (1) Nonattainment area New Source Review (NSR) requirements based on an area's 1-hour nonattainment classification; (2) Section 185 penalty fees for 1-hour severe or extreme nonattainment areas; (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the CAA, contingent on an area not making reasonable further progress toward attainment of the 1-hour NAAQS, or for failure to attain that NAAQS; and (4) certain transportation conformity requirements for certain types of federal actions. The June 8th decision clarified that the Court's reference to conformity requirements was limited to requiring the continued use of 1-hour motor vehicle emissions budgets until 8-hour budgets were available for 8-hour conformity determinations.

For the reasons set forth in the proposal, EPA does not believe that the Court's rulings alter any requirements relevant to this redesignation action so as to preclude redesignation. EPA believes that the Court's December 22, 2006, and June 8, 2007, decisions impose no impediment to moving forward with redesignation of this area to attainment, because even in light of the Court's decisions, redesignation is appropriate under the relevant redesignation provisions of the CAA and longstanding policies regarding redesignation requests.

With respect to the requirement for transportation conformity under the 1-hour standard, the Court in its June 8th decision clarified that for those areas with 1-hour motor vehicle emissions budgets in their maintenance plans, anti-backsliding requires only that those 1-hour budgets must be used for 8-hour conformity determinations until replaced by 8-hour budgets. To meet this requirement, conformity determinations in such areas must comply with the applicable requirements of EPA's conformity regulations at 40 CFR part 93.

## II. What Comments Did We Receive on the Proposed Action?

EPA provided a 30-day review and comment period. The comment period closed on January 10, 2008. EPA received comments from Sierra Club and the Door County Corporation Counsel. A summary of the comments received, and EPA's responses, follow.

(1) *Comment:* Sections 172(c)(1) and 182(b)(2) of the CAA require the SIP to mandate Reasonably Available Control Technology (RACT) for all volatile organic compound (VOC) sources within the nonattainment area. Wisconsin has not demonstrated that the SIP meets this requirement. While Wisconsin promulgated some VOC RACT rules for the 1-hour ozone standard, the State has not reviewed them to determine whether they are still valid and sufficiently stringent under the 8-hour standard.

*Response:* Under EPA's longstanding interpretation of section 107(d)(3)(E) of the CAA, to qualify for redesignation, states requesting redesignation to attainment must meet only the relevant SIP requirements that came due prior to the submittal of a complete redesignation request. September 4, 1992, Calcagni memorandum ("Procedures for Processing Requests to Redesignate Areas to Attainment," Memorandum from John Calcagni, Director, Air Quality Management Division). See also Michael Shapiro Memorandum, September 17, 1993, and 60 FR 12459, 12465-12466 (March 7, 1995) (Redesignation of Detroit-Ann Arbor). See *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004), which upheld this interpretation. See, e.g. also 68 FR 25418, 25424, 25427 (May 12, 2003) (redesignation of St. Louis).

Kewaunee County was not classified under subpart 2 of the CAA and thus was not subject to the section 182 RACT requirement. The applicable part D, subpart 1, SIP requirements for Kewaunee County are contained in sections 172(c)(1)-(9). The commenter specifically cites section 172(c)(1), which requires reasonably available control measures (RACT). For purposes of redesignation, a state must meet all requirements of section 110 and part D that were applicable prior to submittal of the complete redesignation request. The State of Wisconsin submitted a complete ozone redesignation request for Kewaunee County prior to the deadline for submissions required under section 172(c)(1)-(9); therefore, these submissions are not applicable requirements for purposes of redesignation.

Moreover, where EPA determines that an area is attaining the standard, since the requirement for submission of an attainment demonstration is suspended, and RACM is a component of an attainment demonstration, the requirement for submission of RACM is suspended. 40 CFR 51.918, 70 FR 71645–71646 (November 29, 2005), General Preamble 57 FR 13498 (April 16, 1992).

The commenter also cites section 182(b)(2) of the CAA, which requires RACT in areas classified as moderate or above. At the time the redesignation request was submitted, Kewaunee County was not classified under subpart 2 of the CAA and, therefore, was not subject to section 182(b)(2), which only applies to areas classified as moderate or above under subpart 2 of the CAA.

It should be noted that the Court's ruling in *South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882 vacated the portion of EPA's Phase 1 8-hour Ozone Implementation Rule that classified certain areas under Subpart 1. In response to this vacatur, EPA is in the process of developing a rule that will classify the areas that were initially classified under subpart 1. EPA believes that, since EPA has not yet determined these new classifications and requirements, redesignation can now go forward. This belief is based upon: (1) EPA's longstanding policy of evaluating requirements in accordance with the requirements due at the time the request is submitted; and, (2) consideration of the inequity of applying retroactively any requirements that might in the future be applied.

(2) *Comment:* Wisconsin's Oxides of Nitrogen (NO<sub>x</sub>) RACT rules have not yet been approved by EPA into the Wisconsin SIP. Therefore, Wisconsin does not meet the requirement to have a fully approved SIP.

*Response:* Under section 182(f) of the CAA, NO<sub>x</sub> RACT is required in areas classified as moderate or above under subpart 2 of the CAA. As discussed in greater detail above, Kewaunee County was not classified under subpart 2 of the CAA and thus is not subject to the requirements of section 182(f).

(3) *Comment:* Wisconsin does not have a fully approved SIP because it has failed to submit the nonattainment SIP for the 8-hour ozone standard, which was due June 15, 2007. Unless Wisconsin has a fully approved nonattainment SIP in place for 8-hour ozone, the Administrator is prohibited from approving Wisconsin's redesignation request.

*Response:* As discussed above, it is EPA's longstanding interpretation of section 107(d)(3)(E) of the CAA that, to

qualify for redesignation, states requesting redesignation to attainment must meet only the relevant SIP requirements that came due prior to the submittal of a complete redesignation request. Applicable requirements of the CAA that come due subsequent to the state's submittal of a complete request remain applicable until a redesignation to attainment is approved, but are not required as a prerequisite to redesignation. See section 175A(c) of the CAA. *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004). See also 68 FR 25424, 25427 (May 12, 2003) (redesignation of the St. Louis/East St. Louis area to attainment of the 1 hour ozone NAAQS).

The State of Wisconsin submitted a complete ozone redesignation request for Kewaunee County prior to the deadline for submission of an attainment demonstration; therefore, an attainment demonstration is not an applicable requirement for purposes of redesignation. Moreover, where EPA determines that an area is attaining the standard, an attainment demonstration is not an applicable requirement for purposes of redesignation, since attainment has already been reached. "Procedures for Processing Requests to Redesignate Areas to Attainment," from John Calcagni, Director, Air Quality Management Division, to Regional Air Division Directors, September 4, 1992 and General Preamble 57 FR 13564 (April 16, 1992). See also 40 CFR 51.918.

(4) *Comment:* Wisconsin has not submitted a SIP to control mercury. Therefore, Wisconsin's SIP is incomplete and EPA cannot redesignate any area as in attainment.

*Response:* EPA promulgated the Clean Air Mercury Rule under section 111(d) of the CAA. Therefore, the submission of a plan to control mercury is not required under subpart 1 as part of an ozone SIP, and is irrelevant to the approval of an ozone redesignation. Wisconsin has met all currently applicable SIP requirements for purposes of redesignation for Kewaunee County under Section 110 and part D of the CAA, as required by section 107(d)(3)(E)(v) of the CAA.

(5) *Comment:* Wisconsin lacks adequate funding and personnel to provide a user-friendly Web site for its permits, to respond to EPA comments regarding Prevention of Significant Deterioration (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 resources issues

are resolved, EPA may not approve the redesignation.

*Response:* EPA approved Wisconsin's PSD program on May 27, 1999 (64 FR 28745). EPA may rely on prior SIP approvals in approving a redesignation request. See Calcagni Memorandum, page 3, *Southwestern Pennsylvania Growth Alliance v. Browner*, 144 F.3d 984,989–990 (6th Cir. 1998), *Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001). The review to which the commenter refers was part of the national NSR Program Evaluation Project. These permit program reviews were intended to highlight the positive aspects of a state's air permitting program and to foster quality improvements in the program. In that report, EPA highlighted many program strengths, including "a good modeling program, a good public comment process, and overall clear and well-organized permits." The report goes on to find that WDNR maintains a Web site containing all permit actions, has consistently logged Best Available Control (BACT) and Lowest Achievable Emission Rate (LAER) determinations into the RACT/BACT/LAER/ Clearinghouse, has a program for improving the quality and issuance of permits and works with EPA to ensure decisions for determinations are made based on EPA policy. In the report, EPA found a few areas which could be improved. EPA suggested that WDNR could be more prompt in sending applications for PSD projects, improve its permit tracking system and be more prompt in responding to permit comments before the final permit is issued. EPA did not find Wisconsin's PSD SIP to be deficient, and believes that Wisconsin has adequate personnel and funding to carry out its plan. Section 110(a)(2)(E).

(6) *Comment:* Wisconsin has not specified contingency measures 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 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. \* \* \*"

*Response:* Wisconsin has included a list of potential contingency measures in its maintenance plan. These include: reduced VOC content in the Architectural, Industrial and Maintenance coatings rule and/or commercial and consumer products rule and/or federal vehicle toxics rule and broadening the application of the NO<sub>x</sub>

RACT program. Wisconsin has specified the triggering event as a violation and has committed to implement appropriate contingency measures within eighteen months. Thus, the state has identified a schedule and procedure for adoption and implementation, and a time limit for action by the State. Because it is not possible, however, to determine what control measure will be most appropriate and effective should a contingency measure be triggered at some point in the future, Wisconsin is not limited to selecting measures only from its list. If a contingency measure is triggered, the State can adopt a contingency measure from this list or choose another contingency measure which has been determined to be effective.

A state can choose as its contingency measure any adopted but not fully implemented control measure providing that it is not included in the calculation of the maintenance inventory. The emissions reductions from these programs are real, not considered in maintenance plan emissions budgets, and can be achieved more quickly since the state has already gone through the adoption process. Wisconsin goes beyond this minimal requirement by committing to evaluate the sufficiency of these control measures to return the area to attainment. To prohibit a state from using any control measure adopted prior to the actual triggering of a contingency measure would only penalize states that are proactive in addressing anticipated air quality problems. EPA's approval of measures that have already been adopted has been upheld in the analogous context of section 172(c)(9) contingency measures. *Louisiana Environmental Action Network v. EPA*, 382 F.3d 575 (Fifth Cir. 2004). EPA concludes that there is adequate assurance that the State will promptly correct a violation of the NAAQs that occurs after redesignation. Section 175A and section 107(d)(3)(E).

(7) *Comment*: Wisconsin does not have a fully approved SIP because it has not yet complied with the Credible Evidence Rule (62 FR 8314).

*Response*: Wisconsin's SIP is consistent with the Credible Evidence Rule. Specifically, Wisconsin rule NR439.06 states, "Notwithstanding the compliance determination methods which the owner or operator of a source is authorized to use under this chapter, the department may use any relevant information or appropriate method to determine a source's compliance with applicable emission limitations." This rule was approved by EPA on August 15, 1994 (59 FR 41709) with respect to VOCs, and on May 27, 1999 (64 FR

28745) with respect to all pollutants. Further, credible evidence requirements for a state are not linked with a particular nonattainment area's designation and classification in that state. EPA believes that the requirements linked with a particular nonattainment area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. The credible evidence SIP submittal requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area in the state. 61 FR 53174-53176 (October 10, 1996), 61 FR 20458 (May 7, 1996); 60 FR 62748 (December 7, 1995), 65 FR 37890 (June 19, 2000), 66 FR 50399 (October 19, 2001). Section 110 elements not linked to the area's nonattainment status are not applicable for purposes of redesignation.

(8) *Comment*: To qualify for redesignation, section 107(d)(3)(E)(iii) of the CAA requires that the improvement in air quality be "due to permanent and enforceable reductions in emissions \* \* \*." Wisconsin's request for redesignation does not make this showing, instead, it shows a calculated reduction, which is neither real nor permanent and enforceable.

*Response*: Wisconsin has calculated the change in emissions between 2002, one of the years used to designate the area as nonattainment, and 2005, one of the years Kewaunee County monitored attainment. See Tables 3, 4 and 5 at 72 FR 70262. The reduction in emissions and the corresponding improvement in air quality over this time period can be attributed to a number of permanent and enforceable regulatory control measures that Kewaunee County and upwind areas have implemented in recent years. Kewaunee County is impacted by the transport of ozone and ozone precursors from upwind areas. Therefore, local controls as well as controls implemented in upwind areas are relevant to the improvement in air quality in Kewaunee County.

Wisconsin adopted NO<sub>x</sub> controls for large existing sources and established emissions standards for new sources as part of its rate of progress plan under the 1-hour ozone standard. Reductions in VOC and NO<sub>x</sub> emissions have occurred statewide and in upwind areas as a result of federal emission control measures, with additional emission reductions expected to occur in the future. Federal emission control measures include: Maximum Achievable Control Technology Standards, the National Low Emission Vehicle (NLEV) program, Tier 2 emission standards for vehicles,

gasoline sulfur limits, low sulfur diesel fuel standards, and heavy-duty diesel engine standards. On October 27, 1998 (63 FR 57356), EPA issued a NO<sub>x</sub> SIP call requiring the District of Columbia and 22 states to reduce emissions of NO<sub>x</sub>. In Michigan, Illinois, and Indiana alone, the NO<sub>x</sub> SIP call has been responsible for a reduction in ozone season NO<sub>x</sub> emissions in excess of 196,400 tons between 2000 and 2004. The reduction in NO<sub>x</sub> emissions has resulted in lower concentrations of transported ozone entering Kewaunee County.

(9) *Comment*: Wisconsin's redesignation request purports to show a decrease in actual emissions, through permanent and enforceable measures, between 2002 and 2005, claiming that "Wisconsin has documented specific permanent and enforceable programs responsible for emission reductions over this time period." The emission 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." 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 affect the emissions from year to year, but are neither permanent nor enforceable. Therefore, Wisconsin's submission does not demonstrate that any such decreases are due to permanent and enforceable reductions.

*Response*: It is not necessary for every change in emissions between the nonattainment year and the attainment year to be permanent and enforceable. Rather, it is necessary for the improvement in air quality to be reasonably attributable to permanent and enforceable reductions in emissions. As discussed above, Kewaunee County and upwind areas have implemented a number of permanent and enforceable regulatory control measures which have reduced emissions and resulted in a corresponding improvement in air quality. Wisconsin adopted NO<sub>x</sub> controls for large existing sources and established emissions standards for new sources as part of its rate of progress plan under the 1-hour ozone standard. Reductions in VOC and NO<sub>x</sub> emissions have occurred statewide and in upwind areas as a result of federal emission control measures, with additional emission reductions expected to occur in the future. Federal emission control measures include: Maximum Achievable Control Technology Standards, the NLEV program, Tier 2

emission standards for vehicles, gasoline sulfur limits, low sulfur diesel fuel standards, and heavy-duty diesel engine standards. On October 27, 1998 (63 FR 57356), EPA issued a NO<sub>x</sub> SIP call requiring the District of Columbia and 22 states to reduce emissions of NO<sub>x</sub>. In Michigan, Illinois, and Indiana alone, the NO<sub>x</sub> SIP call has been responsible for a reduction in ozone season NO<sub>x</sub> emissions in excess of 196,400 tons between 2000 and 2004.

Further, Wisconsin has followed EPA guidance in development of inventories for 2002 and 2005. For the nonroad sector, the same version of the National Mobile Inventory Model (NMIM) was run for both years. The reduction in emissions from 2002–2005 is the result of fleet turnover and emissions controls, not differences in methodology. With respect to the onroad sector, MOBILE6.2.03 was run for both years, with an increase in vehicle miles traveled between 2002 and 2005. The reduction in emissions is due to federal motor vehicle control programs and fleet turnover, not differences in methodology. With respect to area sources, Wisconsin used appropriate emission calculation methodologies. While there were some minor changes in emissions factors or throughput for some area source categories, these were minor and did not greatly affect the overall inventory. Wisconsin did not claim area source emission reductions between 2002 and 2005. Point source methodology remained consistent between the 2002 and 2005 inventories. Point source emissions were estimated by collecting process-level information for each facility. Typically throughput information was multiplied by an emission factor for that process. Emission factor sources included mass balance, stack testing, continuous emissions monitors, engineering judgment and EPA's Factor Information Retrieval database.

(10) *Comment:* In Appendix 4, there were different emission factors applied in 2002 and 2005, or a different method for 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 from one year to another does not result in lower emissions. If Wisconsin is to demonstrate that emissions actually decreased between 2002 and 2005, the same emission factor must be applied in both reference years.

*Response:* Wisconsin followed EPA guidance in development of inventories for 2002 and 2005. For the nonroad sector, the same version of NMIM was run for both years. The reduction in emissions from 2002–2005 is the result of fleet turnover and federal motor vehicle control programs, not differences in methodology. With respect to the onroad sector, MOBILE6.2.03 was run for both years, with an increase in vehicle miles traveled between 2002 and 2005. The reduction in emissions can be attributed to federal motor vehicle control programs and fleet turnover, not differences in methodology. Point source methodology also remained consistent between the 2002 and 2005 inventories. While there were some minor changes in emissions factors or throughput for some area source categories, these were minor and did not greatly affect the overall inventory. Wisconsin did not claim area source emission reductions between 2002 and 2005. The emission factors for the area source fuel combustion category did change, as the commentor stated. This category is such a small portion of the entire inventory, however, that these tiny differences are irrelevant. In 2005, the area source fuel combustion category represents 0.08% of the VOC inventory for Kewaunee County and 2.6% of the NO<sub>x</sub> inventory. Between 2002 and 2005, emissions from the fuel combustion category decreased by 0.054 tons per day for VOC and increased by 0.011 tons per day for NO<sub>x</sub>. We do not believe that the difference in emissions calculation methodology in any way affects Wisconsin's demonstration that the improvement in air quality in Kewaunee County was due to a permanent and enforceable reduction in emissions.

(11) *Comment:* One of the most significant sources of ozone-causing pollution is fossil fueled electricity generation. The WDNR calculates NO<sub>x</sub> emission reductions for these units based on a comparison of historical actual emissions. Actual emissions in 2005 are not the enforceable emission rates and do not represent a permanent and enforceable reduction. 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 2002 and 2005. The failure to rely on enforceable emission rates is unlawful and arbitrary.

*Response:* There are no fossil fueled electricity generation units in Kewaunee County. Therefore, emissions from these facilities were not included or considered as part of the maintenance

plan inventory for Kewaunee County. It should be noted, however, that the NO<sub>x</sub> SIP call issued by EPA on October 27, 1998, required the District of Columbia and 22 states to reduce emissions of NO<sub>x</sub>. In Michigan, Illinois, and Indiana alone, the NO<sub>x</sub> SIP call has been responsible for a reduction in ozone season NO<sub>x</sub> emissions in excess of 196,400 tons between 2000 and 2004. These emission reductions are primarily in the fossil fueled electricity generation sector. This reduction in NO<sub>x</sub> emissions has resulted in a reduction of ozone and ozone precursors being transported into Kewaunee County.

(12) *Comment:* 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 NO<sub>x</sub> 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. Even if future reductions in emissions could be used to make the demonstration under section 107(d)(3)(E)(iii), Wisconsin's reliance on RACT rules is unlawful and arbitrary because the RACT rules are not final.

*Response:* Wisconsin has adopted NO<sub>x</sub> RACT rules which are currently under review by EPA. These rules apply to the Milwaukee-Racine and Sheboygan nonattainment areas and will result in future upwind reductions in emissions. While Wisconsin included these rules in the discussion of permanent and enforceable control measures, WDNR did not, in fact, take credit for these projected NO<sub>x</sub> RACT reductions in demonstrating a permanent and enforceable reduction in emissions between the years 2002 and 2005 and EPA is not relying on them as a basis for finding that this criterion for redesignation has been met.

(13) *Comment:* Section 175A(d) of the CAA requires that the maintenance plan "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." Such measures include the New Source Review (NSR) program. These measures, contained in Wisconsin Administrative Code NR 408, are not included in the maintenance plan being proposed by the Department. As EPA has explained, "the 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 rule NR 408, effectively removing sources from the control strategy. This is unlawful and redesignation cannot be approved unless and until rule NR 408 is redrafted such that it continues to apply in Kewaunee County after redesignation.

*Response:* As clearly stated in EPA's October 14, 1994, policy memorandum from Mary D. Nichols entitled "Part D New Source Review (part D NSR) Requirements for Areas Requesting Redesignation to Attainment," "EPA believes it is reasonable to interpret "measure," as used in section 175A(d), not to include part D NSR." Congress used the undefined term "measure" differently in different provisions of the Act, which indicates that the term is susceptible to more than one interpretation and that EPA has the discretion to interpret it in a reasonable manner in the context of section 175A. See *Greenbaum v. United States EPA*, 370 F. 3d 527, 535–38 (6th Cir. 2004). (Court finds persuasive EPA's argument that the very nature of the NSR permit program supports its interpretation that it is not intended to be a contingency measure pursuant to section 175A(d).) It is reasonable to interpret "measure" to exclude part D NSR in this context because PSD, a program that is the corollary of part D NSR for attainment areas, goes into effect in lieu of part D NSR upon redesignation. PSD requires that new sources demonstrate that their construction will not increase ambient concentrations significantly and will not result in concentrations above the air quality standard. The State has demonstrated that the area will be able to maintain the standard without Part D NSR in effect, and the State's PSD program will become effective in the area upon redesignation to attainment. See the rationale set forth at length in the Nichols Memorandum. See also the discussions of why full approval and retention of NSR is not required in redesignation actions in the following redesignation rulemakings: 60 FR 12459, 12467–12468 (March 7, 1995) (Redesignation of Detroit, MI); 61 FR 20458, 20469–20470 (May 7, 1996) levels (Cleveland-Akron-Lorain, OH); 66 FR 53665, 53669 (October 23, 2001) (Louisville, KY); 61 FR 31831, 31836–31837 (June 21, 1996) (Grand Rapids, MI).

(14) *Comment:* The United States Court of Appeals for the District of

Columbia held in *South Coast Air Quality Management District v. Environmental Protection Agency*, that controls established in an area under the 1-hour ozone standard, including NSR requirements, must remain in place pursuant to the anti-backsliding provision of section 172(e) of the CAA. The court held that anything "designed to constrain ozone levels is a 'control' pursuant to the anti-backsliding provisions in section 172(e), and cannot be relaxed even when an area is reclassified as a lower nonattainment designation." 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. This is an unlawful relaxation of "controls" established in nonattainment areas of Wisconsin. This violates the anti-backsliding provision in section 172(e). EPA cannot approve the redesignation until Rule NR 408 is revised to ensure that it continues to apply to sources in Kewaunee County, which was designated as nonattainment for 1-hour ozone under the 1990 Amendments to the CAA.

*Response:* The Kewaunee County area is an attainment area subject to a CAA section 175A maintenance plan under the 1-hour standard. The anti-backsliding issues before the DC Circuit concerned whether an area designated nonattainment could rely on a less stringent nonattainment NSR program for the 8-hour standard instead of the more stringent program that had applied to the nonattainment area based on its 1-hour nonattainment classification. The issue before the court did not concern whether an area designated attainment is required to implement a nonattainment NSR review program. Sections 161 and 172(b) of the CAA make clear that areas not designated nonattainment are subject to the PSD program, not the NSR program that applies in nonattainment areas.

(15) *Comment:* EPA rules explicitly require maintenance demonstrations to be supported by modeling (40 CFR 51.112 and 65 FR 6711). Until Wisconsin conducts such a modeling demonstration, EPA cannot approve the maintenance plan.

*Response:* A maintenance demonstration need not be based on modeling. See *Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001), *Sierra Club v. EPA*, 375 F. 3d 537 (7th Cir. 2004). See also 66 FR 53094, 53099–53100 (October 19, 2001), 68 FR 25413, 25430–25432 (May 12, 2003). 40 CFR 51.112 provides in relevant part that "[e]ach plan must

demonstrate that the measures, rules and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements." Both the language and the context of this regulation indicate that it applies to attainment demonstrations, and not to stand-alone maintenance plans submitted under CAA section 175A. There is no reference in the regulation to modeling requirements applicable to a section 175A plan revision for the sole purpose of providing maintenance and not attainment. EPA policy and longstanding practice allows States to demonstrate maintenance by preparing an attainment emissions inventory corresponding to the period during which the area monitored attainment, and to project maintenance by showing that future emissions are projected to remain below this level for the next ten years. See Calcagni memo. Holding emissions at or below the level of attainment is adequate to reasonably assure continued maintenance of the standard. See 65 FR 37879, 37888 (June 19, 2000). Moreover, since EPA has determined that the area is in actual attainment of the 8-hour ozone standard, the requirement for submission of an attainment demonstration is no longer applicable. 40 CFR 51.918. Furthermore, regional modeling performed by the Lake Michigan Air Directors Consortium to support attainment planning efforts for the states of Wisconsin, Illinois, Indiana, Michigan and Ohio shows continued attainment of the NAAQS in Kewaunee County in 2009, 2012 and 2018. See "Regional Air Quality Analyses for Ozone, PM2.5, and Regional Haze: Final Technical Support Document," dated April 25, 2008.

(16) *Comment:* Because NR 408 would not apply to Kewaunee County after redesignation, the proposal to redesignate Kewaunee County is effectively a proposal to remove the NSR provisions. This violates section 110(l) of the CAA which 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." Increasing the major source threshold, lowering 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.

*Response:* Section 110(l) provides that the Administrator shall not approve a SIP revision "if the revision would

interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this Act.” Kewaunee County is monitoring attainment of the NAAQS and, thus, there is no need for “reasonable further progress” toward attainment. Furthermore, Wisconsin is not revising the applicability or terms of its NSR program. It is true that certain requirements of the Clean Air Act and the Wisconsin SIP (such as NSR) do not apply in attainment areas. However, EPA does not believe that fact means that a decision to redesignate an area as attainment is “interfering” with attainment or with requirements that apply only to nonattainment areas. For the reasons set forth above and in the proposal, EPA believes that Wisconsin’s maintenance plan is adequate to maintain attainment for at least 10 years, and therefore concludes that this action will not interfere with attainment or reasonable further progress, or any other applicable CAA requirement.

(17) *Comment:* The commenter states that he does not oppose the Kewaunee County redesignation, but makes the following points. Upwind sources of ozone and its precursors cause or contribute significantly to downwind (e.g. Door County) non-compliance with NAAQS. Local and long-range transport of ozone and its precursors have and will continue to preclude downwind attainment of the NAAQS. The overarching goal is to reduce emissions so that the NAAQS are universally met. Reducing emissions upwind is the only means to decrease concentrations downwind. The commenter suggests that rather than focusing on redesignation, EPA should find the upwind sources that cause or contribute significantly to downwind non-compliance with ozone standards, regulate emissions from upwind regions to address the issue of transport and allow downwind areas a fair opportunity to achieve compliance, and place a moratorium on upwind sources being deemed to have attained the NAAQS if impacted downwind areas continue to show monitored nonattainment of the NAAQS.

*Response:* This rule is a redesignation action that is designed to determine whether an area has met the requirements for redesignation to attainment. Considerations of how to address issues of transport from upwind areas are not related to the current redesignation action. As noted in the proposal, section 110(a)(2)(D) of the CAA, which requires that SIPs contain certain measures to prevent sources in a state from significantly contributing to

air quality problems in another state, continues to apply to the state regardless of the attainment designation of an area. The requirements of section 110(a)(2)(D) are not linked with a particular nonattainment area’s designation and classification in that state. Therefore, these requirements are not applicable for purposes of redesignation. See 65 FR 37890 (June 19, 2000), 66 FR 50399 (October 19, 2001) and 68 FR 25418, 25426–25427 (May 12, 2003).

That being said, however, EPA has long recognized that ozone transport is a problem affecting many portions of the eastern United States. The Lake Michigan region both receives high levels of transported ozone and ozone precursors from upwind source areas and contributes to the high levels of ozone and ozone precursors affecting downwind receptor areas. Downwind shoreline areas around Lake Michigan are affected by both regional transport of ozone and subregional transport from major urban areas in the Lake Michigan region.

Considerable progress has been made in reducing transported pollution. EPA promulgated and States have implemented the NO<sub>x</sub> SIP call, which has significantly reduced NO<sub>x</sub> emissions throughout the eastern half of the United States. In Michigan, Illinois, and Indiana alone, the NO<sub>x</sub> SIP call has been responsible for a reduction in ozone season NO<sub>x</sub> emissions in excess of 196,400 tons between 2000 and 2004. Other federal measures including the NLEV program, Tier 2 emission standards for vehicles, gasoline sulfur limits, low sulfur diesel fuel standards, and heavy-duty diesel engine standards continue to be implemented and will result in reductions in upwind emissions. In addition, EPA finalized the Clean Air Interstate Rule (CAIR) on May 12, 2005. CAIR is designed to achieve large reductions of Sulfur Dioxide (SO<sub>2</sub>) and/or NO<sub>x</sub> emissions across 28 eastern states and the District of Columbia and specifically addresses the transported pollution from upwind states that affects downwind air quality problems. (Illinois, Indiana, Wisconsin and Michigan are all subject to CAIR.) SO<sub>2</sub> and NO<sub>x</sub> contribute to the formation of fine particles and NO<sub>x</sub> contributes to the formation of ground-level ozone.

### III. What Action Is EPA Taking?

EPA is taking several related actions for Kewaunee County. First, EPA is making a determination that Kewaunee County has attained the 1997 8-hour ozone NAAQS. EPA is also determining that Kewaunee County has met the

requirements for redesignation under section 107(d)(3)(E) of the CAA, and EPA is, therefore, approving the State’s request to change the legal designation of Kewaunee County from nonattainment to attainment of the 8-hour ozone NAAQS. Further, EPA is approving as meeting the requirements of CAA section 175A Wisconsin’s maintenance plan SIP revision for Kewaunee County (such approval being one of the CAA criteria for redesignation to attainment status. Section 107(d)(3)(E)(iv)). Finally, for Kewaunee County, EPA is approving the 2012 MVEBs of 0.43 tpd of VOC and 0.80 tpd of NO<sub>x</sub> and 2018 MVEBs of 0.32 tpd of VOC and 0.47 tpd of NO<sub>x</sub>.

In accordance with 5 U.S.C. 553(d), EPA finds there is good cause for these actions to become effective immediately upon publication. This is because a delayed effective date is unnecessary due to the nature of a redesignation to attainment, which relieves the area from certain CAA requirements that would otherwise apply to it. The immediate effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rulemaking actions may become effective less than 30 days after publication if the rule “grants or recognizes an exemption or relieves a restriction,” and section 553(d)(3) which allows an effective date less than 30 days after publication “as otherwise provided by the agency for good cause found and published with the rule.” The purpose of the 30-day waiting period prescribed in section 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Today’s rule, however, does not create any new regulatory requirements such that affected parties would need time to prepare before the rule takes effect. Rather, today’s rule relieves the State of planning requirements for this 8-hour ozone nonattainment area. For these reasons, EPA finds good cause under 5 U.S.C. 553(d)(3) for these actions to become effective on the date of publication of these actions.

### IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely affects the status of a geographical area and

approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
  - Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
  - Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
  - Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
  - Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
  - Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
  - Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
  - Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
  - Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).
- In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is

not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 21, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### List of Subjects

##### 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen oxides, Ozone, Volatile organic compounds.

##### 40 CFR Part 81

Air pollution control, Environmental protection, National parks, Wilderness areas.

Dated: May 12, 2008.

**Bharat Mathur,**

*Acting Regional Administrator, Region 5.*

■ 40 CFR Parts 52 and 81 are amended as follows:

#### PART 52—[AMENDED]

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

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

#### Subpart YY—Wisconsin

■ 2. Section 52.2585 is amended by adding paragraph (u) to read as follows:

##### § 52.2585 Control strategy: Ozone.

\* \* \* \* \*

(u) Approval—On June 12, 2007, Wisconsin submitted a request to redesignate Kewaunee County to attainment of the 8-hour ozone standard. As part of the redesignation request, the State submitted an ozone maintenance plan as required by section 175A of the Clean Air Act. Part of the section 175A maintenance plan includes a contingency plan. The ozone maintenance plan establishes 2012 motor vehicle emissions budgets for Kewaunee County of 0.43 tons per day of volatile organic compounds (VOC) and 0.80 tons per day of nitrogen oxides (NO<sub>x</sub>) and 2018 motor vehicle emissions budgets for Kewaunee County of 0.32 tons per day of VOCs and 0.47 tons per day of NO<sub>x</sub>.

#### PART 81—[AMENDED]

■ 3. The authority citation for part 81 continues to read as follows:

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

■ 4. Section 81.350 is amended by revising the entry for Kewaunee County, WI: Kewaunee County in the table entitled “Wisconsin—Ozone (8-Hour Standard)” to read as follows:

##### § 81.350 Wisconsin.

\* \* \* \* \*

WISCONSIN—OZONE (8-HOUR STANDARD)

Designated area	Designation <sup>a</sup>		Classification	
	Date <sup>1</sup>	Type	Date <sup>1</sup>	Type
* * *	*	*	*	*
Kewaunee County, WI: Kewaunee County.	5/21/08	Attainment.		
* * *	*	*	*	*

<sup>a</sup> Includes Indian Country located in each county or area, except as otherwise specified.

<sup>1</sup> This date is June 15, 2004, unless otherwise noted.

[FR Doc. E8-11295 Filed 5-20-08; 8:45 am]

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