

Appendix A

Request to Correct the Initial Designation Dates for the Milwaukee, Sheboygan, and Kenosha Nonattainment Areas for the 2015 Ozone NAAQS

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Background

In October 2015, the U.S. Environmental Protection Agency (EPA) revised the primary and secondary ozone National Ambient Air Quality Standards (NAAQS), setting a more stringent level of 70 ppb based on 8-hour average concentrations. This action initiated the process under the Clean Air Act (CAA) to designate areas of the country as nonattainment for this NAAQS. Under the CAA, ozone NAAQS nonattainment areas are subject to a five-step classification scheme (Marginal, Moderate, Serious, Severe, and Extreme). The CAA prescribes specific regulatory requirements for each level of classification, including the amount of time areas are afforded to attain the NAAQS. Areas that fail to attain by their prescribed attainment date are subject to reclassification to the next higher, more stringent classification.

On June 4, 2018, the EPA designated multiple 2015 ozone NAAQS nonattainment areas in Wisconsin, including a small portion of the Milwaukee area (the “Northern Milwaukee/Ozaukee Shoreline” area) and parts of Kenosha and Sheboygan counties (83 FR 25776). These areas were limited to narrow areas of these counties along the Lake Michigan shoreline. These areas were classified as Marginal nonattainment and had an initial designations date of August 3, 2018, the effective date of the final rule. Based on their designation as Marginal, these areas then had three years from that date (i.e., until August 3, 2021) to attain the NAAQS.

Three years later, on June 14, 2021, the EPA promulgated a rule that revised the 2015 ozone nonattainment areas in Wisconsin (86 FR 31438; hereinafter “Revised Designations Rule”). The Revised Designations Rule significantly expanded the areas as originally designated in 2018. The revised nonattainment areas maintained the same designation date, classification (Marginal), and attainment date of the original areas. Despite requests from the Wisconsin Department of Natural Resources (WDNR) and other Wisconsin stakeholders, the EPA did not offer an opportunity for public input before promulgating the Revised Designations Rule.

On August 13, 2021, Wisconsin submitted a petition to the EPA requesting reconsideration of the Revised Designations Rule. Among the issues raised in that petition was that the EPA had incorrectly calculated the operative designation dates for the revised nonattainment areas.

The newly revised Milwaukee, Sheboygan, and Kenosha nonattainment areas all failed to attain by their August 3, 2021, attainment date. On October 7, 2022, the EPA promulgated a rule reclassifying these areas to Moderate nonattainment, setting a new attainment date of August 3, 2024 (87 FR 60897). On December 17, 2024, these areas were subsequently reclassified to

Serious nonattainment (89 FR 101901). The final rule reclassifying these areas to Serious was challenged by Wisconsin in the U.S. Seventh Circuit Court of Appeals and is currently stayed.¹

EPA denied Wisconsin's petition for reconsideration of the Revised Designations Rule on November 19, 2025.

CAA Authority to Correct Area Designations

Section 110(k)(6) of the CAA provides, "Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public." 42 U.S.C. § 7410(k)(6).

The EPA has interpreted this provision as authorizing the agency to make corrections to a promulgated regulation when it is shown that (1) the EPA clearly erred in failing to consider or in inappropriately considering information made available to EPA at the time of the promulgation, or the information made available at the time of promulgation is subsequently demonstrated to have been clearly inadequate, and (2) other information persuasively supports a change in the regulation. See 70 FR 68339 at 68341. The EPA has used 110(k)(6) to revise nonattainment areas in the past,² and this provision would be an appropriate method by which to affect the designation date corrections requested by Wisconsin here.

As discussed below, the significant impact on Wisconsin sources resulting from the scope and magnitude of the revisions the EPA made in the Revised Designations Rule should have been apparent to the EPA at the time that rule was promulgated. If not, this information was subsequently made available to the EPA by Wisconsin in its petition for reconsideration. Under either scenario, this information persuasively supports a change in the designation and attainment dates for these areas using the authority the EPA is granted under Section 110(k)(6).

Discussion

As detailed in previous submissions, Wisconsin maintains that when the EPA revised Wisconsin's nonattainment areas in June 2021, the EPA should have reset the designation dates (and therefore, the attainment dates) of the affected areas. The EPA should correct the

¹ *State of Wisconsin v. EPA, et al.*, No. 25-1239 (7th Cir., Feb. 14, 2025).

² For example, the EPA used 110(k) to revise the Phoenix, AZ 1979 1-hour ozone NAAQS nonattainment area (70 FR 68339, Nov. 10, 2005); revise the Miami (Gila County), AZ 1971 SO₂ NAAQS area (72 FR 3061, Jan. 24, 2007); and revise the Seattle-Tacoma 1979 1-hour ozone NAAQS nonattainment area (57 FR 56762, Nov. 30, 1992).

designation and attainment dates of these areas to align with the effective date of the revised designations in these areas: July 14, 2021.

While the EPA has revised nonattainment boundaries in the past, the scope and magnitude of changes made to Wisconsin's areas in 2021 appear to be unprecedented. In the Revised Designations Rule, the EPA revised and enlarged all of Wisconsin's nonattainment areas, in some cases considerably (Figure A-1). The expansion was most significant in the Milwaukee area, where the original area, consisting of just two partial counties, was revised to include two complete counties (Milwaukee and Ozaukee) and large parts of three additional counties: Washington, Waukesha, and Racine (Figure A-2). Geographically, the EPA expanded the Milwaukee nonattainment area from 107 square miles to over 1,370 square miles – a nearly 1,200% increase. This is equivalent to adding an area the size of the cities of Indianapolis, Columbus, Louisville, and Kansas City – combined. This newly expanded area included nearly all of the City of Milwaukee, much of the region's population, and most regional economic and other anthropogenic activities. It also included vast tracts of farmland, and other rural areas with few sources of emissions. While EPA treated this massive geographic expansion as a mere "revision" to the existing nonattainment area, the unprecedented scope and magnitude of this change mean it should have been properly treated as a newly designated area.

Essentially overnight, most of the Milwaukee metropolitan area went from being in attainment to nonattainment, with no prior notice, no opportunity for public comment, and already three years behind the statutory schedule for newly designated nonattainment areas. As a result of the Revised Designations Rule, emission sources in these areas lost any opportunity to prepare for or act in advance of the nonattainment designation, such as adjusting operations, taking emissions limits, or generating emissions reduction credits.

Not only did EPA's redesignation action upend state and regional planning (e.g., Wisconsin had already submitted SIPs to comply with Marginal requirements for the original areas), the action also forced hundreds of emissions sources to reassess how they would comply with the expedited Marginal nonattainment requirements.

Compounding the impact of this change was the timing of the Revised Designations Rule. The newly revised areas were effective on July 14, 2021 – just 21 days before the Marginal attainment deadline of August 3, 2021. So, not only did substantial parts of the Milwaukee area (along with the more modestly expanded areas in Sheboygan and Kenosha counties) find themselves in nonattainment without prior warning, but these areas were placed in the impossible situation of having to attain the standard in just three weeks or be subject to the more stringent Moderate area requirements, including emissions control programs like NO_x and VOC RACT. As the EPA is aware, the areas were not able to meet the three-week compliance deadline.

Section 181(a)(1) of the CAA outlines the dates by which ozone nonattainment areas must attain the NAAQS. Specifically, ozone nonattainment areas classified as Marginal have three years from their designation date to attain, with an additional three years to attain if reclassified to

Moderate, three more years if reclassified to Serious, etc. See 42 USC 7511(a)(1). As described above, the Wisconsin nonattainment areas affected by the Revised Designations Rule should have appropriately been treated by the EPA as newly designated areas, due to the magnitude of the changes the EPA made to those areas. Just like any other newly designated areas for which the statute mandates three years to attain the NAAQS from their initial designations date, these areas in Wisconsin should have been afforded the full three years from the effective date of the revised designations to attain the NAAQS.

Instead, the unlawfully retroactive Revised Designations Rule denied Wisconsin and affected sources the three-year opportunity to address nonattainment concerns while at a Marginal classification before being reclassified to Moderate. This accelerated reclassification path is contrary to the plain language of 42 USC 7511(a)(1), conflicts with the intent of the CAA's stepped attainment process, and treats Wisconsin and its local areas unfairly in relation to other nonattainment areas across the country, which were afforded the full three years from their designation to attain the NAAQS, rather than the three weeks Wisconsin's areas received.

Not every minor adjustment or technical correction that the EPA might make to a nonattainment area (e.g., to add a small area that was inadvertently omitted when describing boundaries) might merit the resetting of designation dates.³ However, the revisions made to Wisconsin areas – especially Milwaukee – were far from insignificant. The scale of the EPA's revisions in Wisconsin, especially considering the corresponding regulatory and legal consequences, are more properly considered new areas, and therefore justify a correction to the designation dates as is requested here.

Request

Wisconsin requests that the EPA correct both the initial designation dates for the Milwaukee, Sheboygan, and Kenosha 2015 ozone NAAQS nonattainment areas from August 3, 2018, to July 14, 2021, as well as the subsequent attainment dates for those areas. Following the CAA-prescribed timelines, those revised attainment dates would be:

- Marginal: July 14, 2024
- Moderate: July 14, 2027
- Serious: July 14, 2030
- Severe: July 14, 2036
- Extreme: July 14, 2041

³ The EPA's technical correction to the Kenosha County, Wisconsin 2008 ozone NAAQS area designation (86 FR 25510; May 5, 2014) is an example of minor change in which a reevaluation of designation or attainment dates is likely not warranted.

These corrected dates should also apply to any areas that might be split from the Milwaukee, Sheboygan, or Kenosha 2015 ozone NAAQS nonattainment areas through EPA action on a CAA Section 107(d)(3)(D) request or other action having the same effect.⁴

Summary

The requested correction to designation dates is legally supported, would give Wisconsin and sources the full, statutorily-required time to plan for and implement the required emissions control programs associated with each classification, and would appropriately reverse the accelerated reclassification path these areas have been on since the EPA's June 2021 Revised Designations Rule.

⁴ Wisconsin is not requesting date changes for the Door County or Manitowoc County 2015 ozone NAAQS areas, since those areas already have been correctly redesignated to attainment.

Figure A-1: Wisconsin's original 2015 ozone NAAQS nonattainment areas (designated in 2018) compared to the revised areas (designated in 2021)

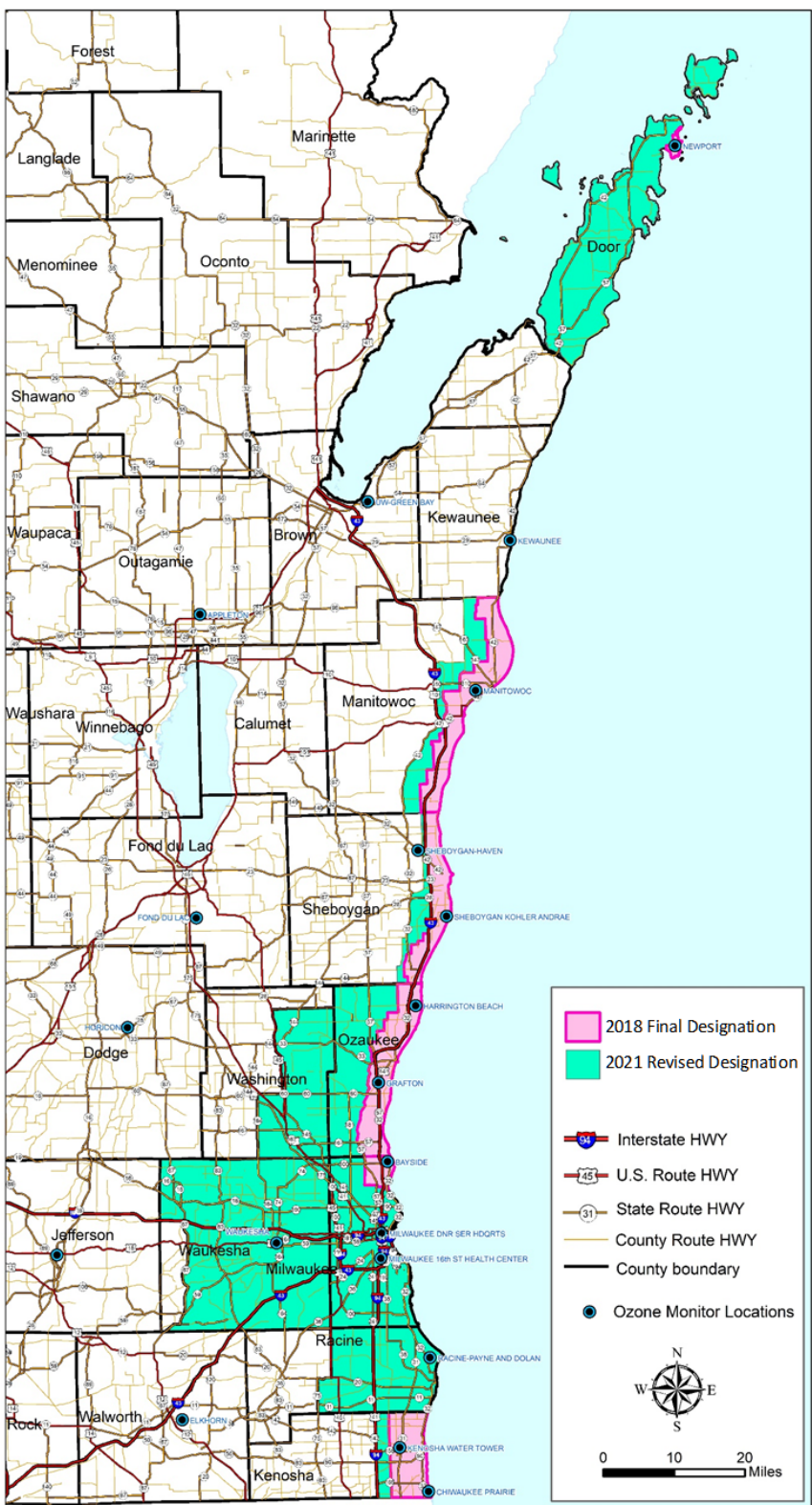


Figure A-2: The Milwaukee area's original 2015 ozone NAAQS nonattainment area (designated in 2018) compared to the revised area (designated in 2021)

