

[FR Doc. E9-9368 Filed 4-23-09; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 52**

[EPA-R05-OAR-2008-0683; FRL-8895-8]

Approval and Promulgation of Air Quality Implementation Plans; Wisconsin; Finding of Attainment for 1-Hour Ozone for the Milwaukee-Racine, WI Area**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Direct final rule.

SUMMARY: EPA is approving a July 28, 2008, request from the Wisconsin Department of Natural Resources (WDNR) that EPA find that the Milwaukee-Racine, Wisconsin (WI) nonattainment area has attained the revoked 1-hour ozone National Ambient Air Quality Standard (NAAQS).

DATES: This direct final rule will be effective June 23, 2009, unless EPA receives adverse comments by May 26, 2009. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R05-OAR-2008-0683, by one of the following methods:

1. *http://www.regulations.gov*: Follow the on-line instructions for submitting comments.

2. *E-mail*: mooney.john@epa.gov.

3. *Fax*: (312) 692-2551.

4. *Mail*: John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.

5. *Hand Delivery*: John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA-R05-OAR-2008-0683. EPA's policy is that all comments received will be included in the public

docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov> your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <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 Gilberto Alvarez, Environmental Scientist, at (312) 886-6143 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Gilberto Alvarez, Environmental Scientist, Criteria Pollutant Section, Air Programs Branch (AR-18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-6143, alvarez.gilberto@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:

- I. What Is EPA Approving?
- II. What Is the Background for This Action?
- III. What Is the Impact of a December 22, 2006, United States Court of Appeals Decision Regarding EPA's Phase 1 Ozone Implementation Rule on This Rule?
- IV. Attainment Finding
- V. What Action Is EPA Taking?
- VI. Statutory and Executive Order Reviews

I. What Is EPA Approving?

EPA is approving a July 28, 2008, request from WDNR that EPA find that the Milwaukee-Racine, WI nonattainment area attained the revoked 1-hour ozone NAAQS.

II. What Is the Background for This Action?

Under section 107(d)(1)(C) of the Clean Air Act (CAA), the Milwaukee-Racine, WI area was designated nonattainment for the 1-hour ozone NAAQS by operation of law upon enactment of the 1990 CAA amendments. Under section 181(a) of the CAA, each ozone area designated nonattainment under section 107(d) was also classified by operation of law as "marginal," "moderate," "serious," "severe-15," "severe-17," or "extreme," depending on the severity of the area's air quality problem and the number of years needed to reach attainment from the 1990 CAA amendments. These nonattainment designations and classifications were codified in Title 40 of the Code of Federal Regulations (CFR) Part 81 (see 56 FR 56994, November 6, 1991).

The ozone design value for an area, which characterizes the severity of the air quality problem, is represented by the highest ozone design value at any of the individual ozone monitoring sites in the area. Table 1 in section 181(a) of the CAA provides the design value ranges for each nonattainment classification. Ozone nonattainment areas with design values between 0.190 parts per million (ppm) and 0.280 ppm for the three-year period, 1987-1989, were classified as severe-17. Because the Milwaukee-Racine, WI area's 1988 ozone design value fell between 0.190 and 0.280 ppm, this area was classified as severe-17 nonattainment for the 1-hour ozone NAAQS. Under section 182(c) of the CAA, states containing areas that were classified as severe-17 nonattainment were required to submit State Implementation Plans (SIPs) to provide for certain emission controls, to show progress toward attainment, and to

provide for attainment of the ozone NAAQS as expeditiously as practicable, but no later than November 15, 2007.

In 1997, EPA adopted a new 8-hour ozone NAAQS. The implementation rule for the standard, referred to as the Phase 1 Implementation Rule, was published on April 30, 2004 (69 FR 23951). More detail on this rule and how it pertains to this action is provided below.

III. What Is the Impact of a December 22, 2006, United States Court of Appeals Decision Regarding EPA's Phase 1 Ozone Implementation Rule on This Rule?

On December 22, 2006, in *South Coast Air Quality Management Dist. v. EPA*, the U.S. Court of Appeals for the District of Columbia Circuit (the court) vacated the Phase 1 Implementation Rule for the 1997 8-hour ozone NAAQS (69 FR 23951, April 30, 2004). 472 F.3d 882 (D.C. Cir. 2006). On June 8, 2007, in response to several petitions for rehearing, the court clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. *Id.*, Docket No. 04–1201. With respect to the challenges to the anti-backsliding provisions of the rule, the court vacated three provisions that would have allowed states to remove from the SIP or to not adopt three 1-hour obligations once the 1-hour ozone NAAQS was revoked to transition to the implementation of the 8-hour ozone NAAQS: (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 that fail to attain the 1-hour ozone NAAQS by the 1-hour attainment date; and (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the CAA, on the contingency of an area not making reasonable further progress toward attainment of the 1-hour ozone NAAQS or for failure to attain the 1-hour ozone NAAQS. The court clarified that 1-hour conformity determinations are not required for anti-backsliding purposes.

The provisions in 40 CFR 51.905(a)–(c) concerning anti-backsliding remain in effect and areas must continue to meet those requirements. However, the three provisions noted above, which are specified in 40 CFR 51.905(e), were vacated by the court. As a result, states must continue to meet: (1) The obligations for 1-hour NSR; (2) 1-hour contingency measures; and, (3) for severe and extreme areas, the obligations related to a section 185 fee program. Currently, EPA is developing two proposed rules to address the court's vacatur and remand with respect to these three requirements. We address below how the 1-hour obligations that currently continue to apply under EPA's anti-backsliding rule (as interpreted by the court) apply where EPA has made a determination that the area attained the 1-hour ozone NAAQS by its attainment date.

Therefore, of the three provisions vacated by the court, today's action

addresses two of them using existing policy: Section 185 penalty fees and contingency measures. The third issue, NSR requirements, will be addressed in a separate agency rulemaking which is currently under development.

IV. Attainment Finding

In 1991, the Milwaukee-Racine, WI area was classified as severe-17 for the 1-hour ozone NAAQS. The area consists of the following counties: Milwaukee, Waukesha, Washington, Ozaukee, Kenosha, and Racine.

An area is considered to have attained the 1-hour ozone NAAQS if there are no violations of the standard, as determined in accordance with the regulation codified at 40 CFR 50.9, based on three consecutive calendar years of complete, quality-assured monitoring data. A violation occurs when the ozone air quality monitoring data show greater than one (1.0) average expected exceedance per year at any site in the area. An exceedance occurs when the maximum hourly ozone concentration during any day exceeds 0.124 ppm. The data should be collected and quality-assured in accordance with 40 CFR part 58, and recorded in the Air Quality System so that they are available to the public for review.

The finding of attainment for the Milwaukee-Racine, WI area is based on an analysis of 1-hour ozone air quality data from three separate three-year periods including 2003–2005, 2004–2006, and 2005–2007. Table 1 below summarizes these data.

TABLE 1—1-HOUR OZONE VIOLATION ASSESSMENT AT MONITORING SITES IN THE MILWAUKEE-RACINE, WI AREA (2003–2007)

Site code	County	Site	Number 2003–2005 exceedances	Number 2004–2006 exceedances	Number 2005–2007 exceedances	In violation?
55–059–0019	Kenosha	Pleasant Prairie	0	0	0	No.
55–079–0010	Milwaukee	16th St Health Center	^a 0	0	0	No.
55–079–0026	Milwaukee	SER–HQ	1	1	1	No.
55–079–0041	Milwaukee	UWM North	2	2	2	No.
55–079–0044	Milwaukee	Appleton Avenue	0	^(b)	^(b)	No.
55–079–0085	Milwaukee	Bayside	2	2	2	No.
55–089–0008	Ozaukee	Grafton	1	1	1	No.
55–089–0009	Ozaukee	Harrington Beach	2	1	1	No.
55–101–0017	Racine	Racine	0	0	0	No.
55–131–0009	Washington	Slinger	0	0	0	No.
55–133–0017	Waukesha	Carroll College	0	^(c)	^(c)	No.
55–133–0027	Waukesha	Cleveland Avenue	^(d)	0	0	No.

Notes:

^a Data completeness at 55–079–0010 in 2003 was 62%. This does not meet US EPA's 75% completeness criterion. Hence, the 3rd high ozone value was used to determine the design value for 2003–2005. That value is 0.097 ppm.

^b The ozone monitor at Appleton Avenue in Milwaukee (55–079–0044) was removed from service after the 2005 monitoring season. Therefore a violation determination can be made only for the period 2003–2005.

^c The Carroll College site (55–133–0017) was shut down after the 2005 ozone monitoring season because the building where the monitor was located was razed.

^d Ozone monitoring at the Cleveland Avenue site (55–133–0027) began in 2004. A violation assessment cannot be completed for 2003–2005 due to the lack of data.

Based on ambient ozone season (April–October) 1-hour ozone air quality data for these three-year periods, EPA is approving a request to find that the Milwaukee-Racine, WI area attained the 1-hour ozone NAAQS prior to its attainment deadline of November 15, 2007. An analysis of preliminary, non-quality assured data for 2008 indicates that the area continues to attain the 1-hour ozone NAAQS.

V. What Action Is EPA Taking?

EPA is approving a July 28, 2008 request from WDNR that EPA find that the Milwaukee-Racine, WI nonattainment area attained the revoked 1-hour ozone NAAQS. Under Section 181(b)(2) of the CAA, EPA must determine whether ozone nonattainment areas have attained the ozone NAAQS by their attainment date. This determination must be based on the area's design value as of the attainment date.¹

Because the area has attained the 1-hour ozone NAAQS by the applicable attainment date, it is not subject to the requirement to implement contingency measures for failure to attain the standard by its attainment date. Since the area has met its attainment deadline, even if the area subsequently lapses into nonattainment, it would not be required to implement the contingency measures for failure to attain the standard by its attainment date.

If a severe or extreme 1-hour ozone nonattainment area attains by its attainment date, it would not be required to implement the section 185 penalty fees program. Section 185(a) of the CAA states that a severe or extreme ozone nonattainment area must implement a program to impose fees on certain stationary sources of air pollution if the area "has failed to attain the national primary ambient air quality standard for ozone by the applicable attainment date." Consequently, if such an area has attained the standard by its applicable attainment date, even if it subsequently lapses into nonattainment, the area would not be required to implement the section 185 penalty fees program. Because EPA finds that the

area has attained the 1-hour ozone NAAQS by its applicable attainment date, we also find that the area is not subject to the imposition of the section 185 penalty fees.

We are publishing this action without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the state plan if relevant adverse written comments are filed. This rule will be effective June 23, 2009 without further notice unless we receive relevant adverse written comments by May 26, 2009. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. The EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. If we do not receive any comments, this action will be effective June 23, 2009.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA 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 CAA. Accordingly, this action merely 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 CAA; 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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 23, 2009. 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of

¹ EPA remains obligated under section 181(b)(2) to determine whether an area attained the 1-hour ozone NAAQS by its attainment date. However, after the revocation of the 1-hour ozone NAAQS, EPA is no longer obligated to reclassify an area to a higher classification for the 1-hour ozone NAAQS based upon a determination that the area failed to attain the 1-hour ozone NAAQS by the area's attainment date for the 1-hour ozone NAAQS. (40 CFR section 51.905(e)(2)(i)(B)). Thus, even if we make a finding that an area has failed to attain the 1-hour ozone NAAQS by its attainment date, the area would not be reclassified to a higher classification.

proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone.

Dated: April 9, 2009.

Bharat Mathur,

Acting Regional Administrator, Region 5.

■ 40 CFR part 52 is 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 (v) to read as follows:

§ 52.2585 Control Strategy: Ozone.

* * * * *

(v) On July 28, 2008, the Wisconsin Department of Natural Resources requested that EPA find that the Milwaukee-Racine, WI nonattainment area, attained the revoked 1-hour ozone National Ambient Air Quality Standard (NAAQS). After review of this submission, EPA approves this request.

[FR Doc. E9-9364 Filed 4-23-09; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA-HQ-OPP-2008-0526; FRL-8411-9]

Penoxsulam; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of penoxsulam in or on almond hulls; grape; nut, tree, group 14; and pistachio. Dow AgroSciences, LLC., requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective April 24, 2009. Objections and requests for hearings must be received on or before

June 23, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA-HQ-OPP-2008-0526. All documents in the docket are listed in the docket index available at <http://www.regulations.gov>. Although listed in the index, some information is not publicly available, e.g., 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 in the electronic docket at <http://www.regulations.gov>, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305-5805.

FOR FURTHER INFORMATION CONTACT:

Philip V. Errico, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 305-6663; e-mail address: errico.philip@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining

whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing electronically available documents at <http://www.regulations.gov>, you may access this **Federal Register** document electronically through the EPA Internet under the “**Federal Register**” listings at <http://www.epa.gov/fedrgstr>. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR cite at <http://www.gpoaccess.gov/ecfr>.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA-HQ-OPP-2008-0526 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before June 23, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA-HQ-OPP-2008-0526, by one of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- **Mail:** Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.
- **Delivery:** OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S-4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through