

*Navigable waters* of the United States means "navigable waters" as defined in section 502(7) of the FWPCA, and includes:

(1) All navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub. L. 92-500), and tributaries of such waters;

(2) Interstate waters;

(3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and

(4) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

[EPA-HQ-OPP-2007-1170; FRL-8390-7]

### Modification of Pesticide Tolerance Revocation for Diazinon

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the pesticide tolerance regulation for diazinon by modifying the revocation of the tolerance for mushrooms. Pesticide tolerances are established under the Federal Food, Drug, and Cosmetic Act (FFDCA). This final rule resolves an objection filed by the American Mushroom Institute in response to a final rule on diazinon tolerances published on September 10, 2008, by granting the objection and modifying the revocation of the diazinon tolerance on mushrooms to expire on September 10, 2010.

**DATES:** This final rule is effective November 26, 2008.

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA-HQ-OPP-2007-1170. 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:** Jane Smith, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308-0048; fax number: (703) 308-8005; e-mail address: [smith.jane-scott@epa.gov](mailto:smith.jane-scott@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:

- 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 provides 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 40 CFR part 180 through the Government Printing Office's e-CFR site at <http://www.gpoaccess.gov/ecfr>.

## II. Prior Diazinon Tolerance Rulemaking

On May 21, 2008 (73 FR 29456) (FRL-8362-1), EPA proposed the revocation of the tolerance for residues of diazinon, (O, O-diethyl O-(6-methyl-2-(1-methylethyl)-4-pyrimidinyl]-phosphorothioate; CAS Reg. No. 333-41-5) in/on the food commodity mushroom at 0.75 parts per million (ppm) in 40 CFR 180.153(a) because a previous registration for the use of diazinon in mushroom houses had been canceled due in part to worker risk concerns.

The preamble of the proposed rule stated the following:

This proposed rule provides a comment period of 60 days for any person to state an interest in retaining a tolerance proposed for revocation. If EPA receives a comment within the 60-day period to that effect, EPA will not proceed to revoke the tolerance immediately.

Within the 60-day comment period, the American Mushroom Institute (AMI) submitted a comment in response to the proposed rule requesting the Agency retain the diazinon tolerance on mushrooms stating that AMI is working to submit a new registration reinstating the use of diazinon in mushroom houses. AMI also stated that diazinon remains a valuable and unique pest management tool in mushroom production facilities, and indicated that an application would be filed to reinstate the canceled mushroom house use.

On September 10, 2008 (73 FR 52607) (FRL-8379-9), EPA issued a final rule revoking the tolerance for residues of diazinon on mushrooms at 0.75 ppm (among others), effective immediately. The Agency acknowledged AMI's comment, nonetheless declining to maintain the tolerance because AMI had not stated an immediate need for the tolerance, stating that "there are no current or pending uses of diazinon in mushroom houses and no resolution of the exposure risk to workers during application at this time."

## III. AMI Objection

On November 4, 2008, AMI filed an objection to the tolerance rulemaking pursuant to 21 U.S.C. 346a(g)(2)(A), objecting to the revocation of the mushroom tolerance. AMI's basis for the objection is the statement in Unit I.C. of the proposed rule that EPA would not proceed to immediately revoke a tolerance where someone indicates an interest in retaining the tolerance.

## IV. Order on Objection

The basis for AMI's objection is sound. Given EPA's commitment in the proposed rule not to immediately

revoke the tolerance if a comment was filed requesting that the tolerance be retained, EPA erred by immediately revoking the mushroom tolerance for diazinon notwithstanding AMI's comment expressing an interest in retaining the tolerance. However, EPA did not commit in the proposed rule to an indefinite retention of the tolerance. Accordingly, EPA, by this final rule, and pursuant to FFDCA section 408(g)(2)(C), is amending the diazinon tolerance in 40 CFR 180.153(a) to reflect that the tolerance for mushrooms at 0.75 ppm is reinstated and will remain in effect until September 10, 2010. This will allow a reasonable period of time for either a person to successfully apply for a registration to bring back the use in mushroom houses, or for some existing registrant to obtain an amendment to an existing registration to bring back this use. If EPA approves an application reinstating the mushroom house use before the expiration date of September 10, 2010, EPA will either amend the tolerance to remove the expiration date or promulgate a new tolerance as appropriate. If no such registration action has occurred prior to that date, the revocation of the tolerance on mushrooms will become effective on September 10, 2010.

**V. Conclusion**

Therefore, pursuant to FFDCA section 408(g)(2)(C), the tolerance for the residues of diazinon, (O, O-diethyl O-(6-methyl-2-(1-methylethyl)-4-pyrimidinyl)-phosphorothioate; CAS Reg. No. 333-41-5), in or on the food commodity mushroom at 0.75 ppm is reinstated until September 10, 2010.

**VI. Statutory and Executive Order Reviews**

EPA included the required statutory discussion in the September 10, 2008 final rule (72 FR 52607).

**VII. Congressional Review Act**

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report to each House of the Congress and the Comptroller General of the United States. EPA will submit a report containing this rule 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**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 180**

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 18, 2008.

**Martha Monell,**

*Acting Director, Office of Pesticide Programs.*

■ Therefore, 40 CFR chapter I is amended as follows:

**PART 180—[AMENDED]**

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.153, is amended by alphabetically adding the following entry and a footnote to the table in paragraph (a) to read as follows:

**§ 180.153 Diazinon; tolerances for residues.**

(a) General. \* \* \*

Commodity	Parts per million
* * * * *	*
Mushroom .....	0.75 <sup>2</sup>
* * * * *	*

<sup>1</sup> \* \* \*

<sup>2</sup>The expiration/revocation date for this tolerance is 9/10/2010.

\* \* \* \* \*

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

[Docket No. 071030625-7696-02]

RIN 0648-XL95

**Fisheries of the Northeastern United States; Scup Fishery; Commercial Quota Harvested for 2008 Winter II Period**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS announces the closure of the scup commercial coastwide fishery from Maine through North Carolina for the Winter II Period. Regulations governing the scup fishery require publication of this notification to advise the coastal states from Maine

through North Carolina that this quota has been harvested and to advise Federal vessel permit holders and Federal dealer permit holders that no commercial quota is available for landing scup in these states. Federally permitted commercial vessels may not land scup in these states for the remainder of the 2008 Winter II quota period (through December 31, 2008).

**DATES:** Effective 0001 hours on November 24, 2008, through December 31, 2008.

**FOR FURTHER INFORMATION CONTACT:**

Emily Bryant, Fishery Management Specialist, (978) 281-9244.

**SUPPLEMENTARY INFORMATION:**

Regulations governing the scup fishery are found at 50 CFR part 648. The regulations at § 648.121 require the Regional Administrator to monitor the commercial scup quota for each quota period and, based upon dealer reports, state data, and other available information, to determine when the commercial quota for a period has been harvested. NMFS is required to publish a notification in the **Federal Register** advising and notifying commercial vessels and dealer permit holders that, effective upon a specific date, the scup commercial quota has been harvested and no commercial quota is available for landing scup for the remainder of the Winter II Period. Based upon recent projections, the Regional Administrator has determined that the Federal commercial quota of 940,948 lb (427 mt) for the 2008 Winter II Period will be fully harvested on or before December 31, 2008. To maintain the integrity of the 2009 Winter II Period quota by avoiding or minimizing quota overages, the commercial scup fishery will close for the remainder of the Winter II Period (through December 31, 2008) in Federal waters, effective as of the date specified above (see **DATES**).

Section 648.4(b) provides that Federal scup moratorium permit holders agree, as a condition of the permit, not to land scup in any state after NMFS has published a notification in the **Federal Register** stating that the commercial quota for the period has been harvested and that no commercial quota for scup is available. Therefore, effective 0001 hours on November 24, 2008, further landings of scup by vessels holding Federal scup moratorium permits are prohibited through December 31, 2008. Effective 0001 hours on November 24, 2008, federally permitted dealers are also advised that they may not purchase scup from federally permitted vessels that land in coastal states from Maine through North Carolina for the remainder of the Winter II Period