

**FOR FURTHER INFORMATION CONTACT:** Megan Brachtl, Compliance and Innovative Strategies Division, Office of Transportation and Air Quality (Mail Code: 6406J), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., 20460; telephone number: (202) 343-9473; fax number: (202) 343-2802; e-mail address: [brachtl.megan@epa.gov](mailto:brachtl.megan@epa.gov).

**SUPPLEMENTARY INFORMATION:** Because EPA received adverse comment, we are withdrawing several provisions of the direct final rule to amend the Renewable Fuel Standard program requirements, published on October 2, 2008. We stated in that direct final rule that if we received adverse comment by November 3, 2008, the portions of the direct final rule on which adverse comments were received would not take effect, and we would publish a timely withdrawal of such portions of the direct final rule in the **Federal Register**. We subsequently received adverse comments on the following provisions: The amendments to 40 CFR 80.1129(b)(1) and 80.1129(b)(8) (providing that a party with a small refinery or small refiner exemption may only separate RINs that have been assigned to a volume of renewable fuel that the party blends into motor vehicle fuel), 40 CFR 80.1129(b)(4) (providing that any party may separate the RINs from renewable fuel that it produces or markets for use in motor vehicles in neat form, or uses in motor vehicles in neat form), and 40 CFR 80.1131(a)(8) and 80.1131(b)(4) (changing the location in the RFS regulations of a provision stating that a RIN that is transferred to two or more parties is considered an invalid RIN). Because EPA received adverse comments, we are withdrawing these provisions.

EPA published a parallel proposed rule on the same day as the direct final rule. The proposed rule invited comment on the substance of the direct final rule. We will address the comments received on the portions of the direct final rule being withdrawn today in a subsequent final action based on the parallel proposed rule also published on October 2, 2008 (73 FR 57274). As stated in the parallel proposal, we will not institute a second comment period on this proposed action. The provisions for which we did not receive adverse comment will become effective on December 1, 2008, as provided in the October 2, 2008, direct final rule.

Dated: November 20, 2008.

**Stephen L. Johnson,**  
Administrator.

■ Accordingly, the amendments to 40 CFR 80.1129(b)(1), 80.1129(b)(4),

80.1129(b)(8), 80.1131(a)(8), and 80.1131(b)(4) published on October 2, 2008 (73 FR 57248) are withdrawn as of November 26, 2008.

[FR Doc. E8-28125 Filed 11-25-08; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 112

[EPA-HQ-OPA-2008-0569 FRL-8746-1]

RIN 2050-AG48

### Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure Rule; Revisions to the Regulatory Definition of "Navigable Waters"

**AGENCY:** Environmental Protection Agency.

**ACTION:** Final rule; Response to court order vacating regulatory definition of navigable waters.

**SUMMARY:** The Environmental Protection Agency (EPA) is promulgating a final rule to amend a Clean Water Act (CWA) section 311 regulation that defines the term "navigable waters." On July 17, 2002, EPA promulgated a final rule which included revisions to the definition of "navigable waters" in the Spill Prevention, Countermeasure and Control (SPCC) regulation. In this action, EPA is announcing the vacatur of the July 17, 2002 revisions to the definition of "navigable waters" in accordance with an order, issued by the United States District Court for the District of Columbia (D.D.C.) in *American Petroleum Institute v. Johnson*, 571 F.Supp.2d 165 (D.D.C. 2008), invalidating those revisions. The court decision also restored the regulatory definition of "navigable waters" promulgated by EPA in 1973; consequently, we are amending the definition of "navigable waters" in part 112 to comply with that decision.

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

**ADDRESSES:** The public docket for this final rule, Docket ID No. EPA-HQ-OPA-2008-0569, contains the information related to this rulemaking. All documents in the docket are listed in an index at <http://www.regulations.gov>. Although listed in the index, some information may not be publicly available, such as Confidential Business Information (CBI) or other information the disclosure of which 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 at <http://www.regulations.gov> or in hard copy at the EPA Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the Public Reading Room is 202-566-1744, and the telephone number to make an appointment to view the docket is 202-566-0276.

**FOR FURTHER INFORMATION CONTACT:** For general information, contact the Superfund, TRI, EPCRA, RMP, and Oil Information Center at 800-424-9346 or TDD at 800-553-7672 (hearing impaired). In the Washington, DC metropolitan area, contact the Superfund, TRI, EPCRA, RMP, and Oil Information Center at 703-412-9810 or TDD 703-412-3323. For more detailed information on specific aspects of this final rule, contact Hugo Fleischman of EPA at 202-564-1968 ([fleischman.hugo@epa.gov](mailto:fleischman.hugo@epa.gov)), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460-0002, Mail Code 5104A.

## SUPPLEMENTARY INFORMATION:

### I. Background

#### A. Potentially Affected Entities

Persons or entities who own or operate facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using or consuming oil or oil products, which due to their location, could reasonably be expected to discharge oil in quantities that may be harmful, as described in 40 CFR part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines, could be affected by this rule. The rule addresses the regulatory definition of "navigable waters" under the Clean Water Act (CWA) section 311, a term that is important in determining which owners or operators are required to prepare Spill Prevention, Control and Countermeasure (SPCC) Plans and/or Facility Response Plans (FRP) under 40 CFR part 112 for their facilities. As described further below, this action does not increase regulatory burdens, but rather conforms the language in EPA's CWA section 311 regulations to the outcome of a lawsuit challenging the regulatory definition. Examples of entities that might potentially be affected include:

Industry sector	NAICS code
Oil Production .....	211111
Farms .....	111, 112
Electric Utility Plants .....	2211
Petroleum Refining and Related Industries .....	324
Chemical Manufacturing .....	325
Food Manufacturing .....	311, 312
Manufacturing Facilities Using and Storing Animal Fats and Vegetable Oils .....	311, 325
Metal Manufacturing .....	331, 332
Other Manufacturing .....	31-33
Real Estate Rental and Leasing .....	531-533
Retail Trade .....	441-446, 448, 451-454
Contract Construction .....	23
Wholesale Trade .....	42
Other Commercial .....	492, 541, 551, 561-562
Transportation .....	481-488
Arts Entertainment & Recreation .....	711-713
Other Services (Except Public Administration) .....	811-813
Petroleum Bulk Stations and Terminals .....	4247
Education .....	61
Hospitals & Other Health Care .....	621, 622
Accommodation and Food Services .....	721, 722
Fuel Oil Dealers .....	45431
Gasoline stations .....	4471
Information Finance and Insurance .....	51, 52
Mining .....	212
Warehousing and Storage .....	493
Religious Organizations .....	813110
Military Installations .....	928110
Pipelines .....	4861, 48691
Government .....	92

The list of potentially affected entities in the above table may not be exhaustive. The Agency's goal is to provide a guide for readers to consider regarding entities that potentially could be affected by this action. However, this action may affect other entities not listed in this table. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding section titled **FOR FURTHER INFORMATION CONTACT**.

#### B. The SPCC Rule and Litigation

Section 311 of the CWA prohibits the discharge of oil in quantities that may be harmful, as described in 40 CFR part 110, into or upon the navigable waters of the United States or adjoining shorelines (33 U.S.C. 1321(b)(3)). Section 311(j)(1)(C) requires the President of the United States (the President) to issue regulations establishing procedures, methods, equipment, and other requirements to prevent discharges of oil to navigable waters or adjoining shorelines from vessels and facilities and to contain such discharges. 33 U.S.C. 1321(j)(1)(C). The President delegated the authority to regulate non-transportation-related onshore facilities to EPA in Executive Order 11548 (35 FR 11677, July 22, 1970), which was superseded by Executive Order 12777 (56 FR 54757, October 22, 1991).

The SPCC rule was originally promulgated on December 11, 1973 (38 FR 34164). The 1973 SPCC rule defined "navigable waters" in 40 CFR 112.2(k) as follows:

The term "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.

On July 17, 2002, EPA published a final rule amending the SPCC rule at 40 CFR part 112, formally known as the Oil Pollution Prevention regulation (67 FR 47042). The July 2002 rule became effective on August 16, 2002, and included revised requirements for SPCC and Facility Response Plans (FRPs), including a revision to the regulatory definition of "navigable waters" (§ 112.2).

The American Petroleum Institute, the Petroleum Marketers Association of America and Marathon Oil Company challenged certain aspects of this regulation. On March 31, 2008, the U.S.

District Court for the District of Columbia ruled that the Agency's promulgation of the revised definition of "navigable waters" in the July 2002 SPCC rule violated the Administrative Procedure Act. (*American Petroleum Institute v. Johnson*, 571 F.Supp. 2d 165, 173 (D.D.C. 2008)). The court concluded that the Agency failed to provide a reasoned explanation for its decision to promulgate the broader definition of "navigable waters." (*Id.* at 173, 182-185.) The court vacated the July 2002 SPCC regulatory definition of "navigable waters" and specifically restored the 1973 SPCC regulatory definition pending further rulemaking or other appropriate Agency action. (*Id.* at 186-87.) None of the parties appealed the court's decision.

#### II. This Final Rule

This final rule conforms the language in the Code of Federal Regulations with the legal state of the regulation defining "navigable waters" in the SPCC rule following the District Court's decision invalidating the July 2002 SPCC rule revisions to the definition of "navigable waters." This rule restores the 1973 SPCC rule definition of "navigable waters" in conformance with the District Court's decision.

### III. Why Do We Have Good Cause for Promulgating an Immediately Effective Final Rule Without Prior Notice and Opportunity for Public Comment?

Under the Administrative Procedure Act (APA), 5 U.S.C. 553, agencies generally are required to publish a notice of proposed rulemaking and provide an opportunity for the public to comment on any substantive rulemaking action. However, the Agency may issue a rule without providing notice and an opportunity for public comment, when the Agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rule issued) that notice and public comment procedures thereon are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(3)(B). EPA has determined that there is good cause for making this rule final without prior proposal and opportunity for comment because of the court-ordered decision from the 2002 SPCC rule litigation. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

This rule merely conforms the language in Clean Water Act section 311 regulations to the District Court's decision invalidating the revisions to the regulatory definition of "navigable waters" promulgated on July 17, 2002. By restoring the 1973 SPCC rule definition of "navigable waters," the revision in this final rule conforms the regulations to reflect the legal status quo in light of the District Court's March 31, 2008 order, invalidating the July 2002 SPCC rule definition of "navigable waters." Therefore, pursuant to 5 U.S.C. 553(b)(3)(B), the Agency finds that solicitation of public comment is unnecessary because the court vacated the July 2002 SPCC regulatory definition of "navigable waters" and specifically restored the 1973 SPCC regulatory definition pending further rulemaking or other appropriate Agency action.

Under 5 U.S.C. 553(d)(1) and (3), rules must be published at least 30 days prior to their effective date, except where the rule "grants or recognizes an exemption or relieves a restriction," or where justified by the Agency for "good cause." The good cause rationale presented in the preceding paragraph also applies herein. Because this rule conforms to the published regulatory text with the applicable regulations following the District Court's March 31, 2008 order, the Agency has good cause to make this rule effective immediately.

### IV. Statutory and Executive Order Reviews

#### A. General Requirements

This rule does not establish any new requirements, mandates or procedures. As explained above, this rule merely conforms the SPCC regulatory definition of "navigable waters" to reflect the District Court's March 31, 2008, decision. This rule does not result in any additional or new regulatory requirements because it is merely undertaken to conform the regulatory language to that judicial determination. Accordingly, EPA has determined that this rule is a "significant regulatory action" under Executive Order 12866, and thus is subject to review by the Office of Management and Budget (OMB).

This final rule does not impose an information collection burden under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). The rule conforms the definition of "navigable waters" to reflect the ruling in the July 2002 SPCC rule litigation and does not establish or modify any information reporting or recordkeeping requirements. Therefore, this rule is not subject to the requirements of the *Paperwork Reduction Act*. Because this rule is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the *Regulatory Flexibility Act* (5 U.S.C. 601 *et seq.*). In addition, this rule does not contain any unfunded mandate or impose any enforceable duty or any significant or unique impact on small governments as described in the *Unfunded Mandates Reform Act of 1995* (Pub. L. 104-4). This rule also does not impose any federalism requirements or require prior consultation with tribal government officials as specified by Executive Order 13132 (64 FR 43255, August 10, 1999) or Executive Order 13175 (65 FR 67249, November 9, 2000), or involve special consideration of environmental justice-related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994).

This rule is not subject to Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant as defined under Executive Order 12866 and is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001), because it is not a significant

regulatory action under Executive Order 12866. The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

#### B. Submission to Congress and the Comptroller General

The Congressional Review Act (CRA), 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. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public comment procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated above, the Agency has made such a good cause finding, including the reasons stated, and established an effective date of November 26, 2008. 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 this rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

#### List of Subjects in 40 CFR Part 112

Environmental protection, Navigable waters, Oil pollution, Reporting and recordkeeping requirements, Water pollution control, Water resources.

Dated: November 20, 2008

**Stephen L. Johnson,**  
Administrator.

■ In consideration of the foregoing, 40 CFR part 112 is amended as follows:

#### PART 112—OIL POLLUTION PREVENTION

■ 1. The authority citation for part 112 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*; 33 U.S.C. 2720; E.O. 12777 (October 18, 1991), 3 CFR, 1991 Comp., p. 351.

#### Subpart A—[Amended]

■ 2. Amend § 112.2 by revising the definition of "navigable waters" to read as follows:

#### § 112.2 Definitions.

\* \* \* \* \*

*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