ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 173

[OPP 00159; PH-FRL 2215-3]

Federal Insecticide, Fungicide, and Rodenticide Act, State Primary Enforcement Responsibilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final interpretive rule.

SUMMARY: This rule states EPA's interpretation of several of the key provisions in sections 26 and 27 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), but does not impose substantive requirements on the States. Sections 26 and 27 established a standard and procedure for according States the primary enforcement responsibility for pesticide use violations (primacy). The rule also provides operational substance to the criteria used by EPA for primacy related decisionmaking, and ensures that such decisionmaking is consistent throughout the regions.

EFFECTIVE DATE: This rule will not take effect before the end of 60 calendar days of continuous session of Congress after

the date of publication. EPA will publish a notice of the actual effective date of this rule. See **SUPPLEMENTARY INFORMATION** for further details.

FOR FURTHER INFORMATION CONTACT: Laura Campbell, Pesticides and Toxic Substances Enforcement Division (EN-342), Office of Pesticides and Toxic Substances, Environmental Protection Agency, Rm. M-2624E, 401 M St., SW., Washington, D.C. 20460, (202-382-5566).

SUPPLEMENTARY INFORMATION:

Background

In 1978, Congress enacted Pub. L. 95-396 which contained numerous revisions to the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*). One of the changes added two new sections to FIFRA, sections 26 and 27, U.S.C. 136w-1 and 136w-2, which together established a standard and procedure for according States the primary enforcement responsibility for pesticide use violations (primacy).

Section 26 provides three methods by which a State can obtain primacy. Section 26(a) requires a State to be accorded primacy if the Administrator finds that the State has (1) adopted adequate use laws, (2) adopted adequate procedures for implementing those laws, and (3) agreed to keep such records and make such reports as the Administrator may require by regulation. Section 26(b) allows a State to obtain primacy if the State has an approved section 4 certification plan that meets the criteria set forth in section 26(a), or if a State enters into a cooperative agreement for the enforcement of pesticide use restrictions under section 23.

Section 27 authorizes the Administrator to override or rescind a grant of primacy in certain situations. Section 27(a) requires the Administrator to refer significant allegations of pesticide use violations to the States. If a State does not commence appropriate enforcement action within 30 days of such referral, EPA may bring its own enforcement action.

Section 27(b) authorizes the Administrator to rescind the primary enforcement responsibility of a State if she finds that the State is not carrying out such responsibility. The Administrator initiates a rescission proceeding by notifying the State of those aspects of the State's pesticide use enforcement program which the Administrator has found to be inadequate. If the State does not correct the deficiencies in its program within 90 days, the Administrator may rescind the States's primary enforcement responsibility in whole or in part. EPA has promulgated procedures which govern the conduct of a proceeding to rescind State primacy. These procedures were published in the Federal Register of May 11, 1981 (46 FR 26058). (40 CFR Part 173).

Section 27(c) authorizes the Administrator to take immediate action to abate an emergency situation where the State is unable or unwilling to respond to the crisis.

As is evident from the above description, several of the operative terms in sections 26 and 27 require further definition. This rule clarifies the meaning of such words as "adequate" and "appropriate" which FIFRA sets forth as the criteria for most of the decisions which will be made under these two sections. The rule also sets guidelines to be used by EPA in making primacy-related decisions, and ensures that such decisionmaking is consistent by limiting, although not eliminating, Agency discretion in the primacy area.

Specifically, this rule addresses the following issues:

1. Procedures EPA will follow when referring allegations of pesticide use violations to the State and tracking State responses to these referrals (see Unit I, Subdivision A below).
2. The meaning of "appropriate enforcement action" (see Unit I, Subdivision B).
3. Clarification of when a State will be deemed to have (1) adopted adequate pesticide use laws and regulations, and (2) implemented adequate procedures for the enforcement of such laws and regulations (see Unit II).
4. The criteria the Administrator will use to determine whether a State is adequately carrying out its primary enforcement responsibility for pesticide use violations (see Unit III).
5. The factors which constitute an emergency situation, and the circumstances which require EPA to defer to the State for a response to the crisis (see Unit IV).

Comments Received

Four comments were received in response to the proposal of the Interpretive Rule. (47 FR 16799, April 20, 1982).

In the proposed rule, a determination of the gravity of violation was based on two factors: (1) risk associated with the violative action, and (2) risk associated with the pesticide. Some of the comments stated that EPA should determine the gravity of each violation based on whether actual harm occurred as a result of the violation. If the Agency were to determine the seriousness of a violation based on the actual harm which occurred in a particular case, pesticide users would be encouraged to take the risk of misusing a pesticide, with the hope that no actual harm would result from their unlawful act. Congress charged EPA with regulating pesticide use in a manner which will prevent unreasonable risk of pesticide exposure to man or the environment. Congressional intent would not be carried out if EPA encouraged pesticide users to engage in unsafe activities by not charging violations in cases where no actual harm occurred. For this reason, the final rule retains the language of the proposed rule.

Two comments concerning the imposition of criminal penalties for pesticide misuse were received. One comment stated that Congress intended criminal sanctions to be applied only in cases involving unlawful manufacture of pesticides. Nothing in FIFRA or its legislative history so limits the use of criminal penalties. The only criterion in the statute for the imposition of criminal penalties is that a violation is "knowing". The language referring to criminal penalties in the proposed rule has been largely retained in the final rule.

Another comment expressed the concern that imposing more stringent sanctions where violations are found to be "knowing" penalizes persons who are informed about the law. Section 14 of FIFRA states that "knowing" violations are subject to criminal penalties. Knowledge of the violator is a valid criterion to use in determining gravity because of a "knowing" violation shows a disregard for the law.

One comment stated that no State with more stringent pesticide use laws than the Federal law should be granted primacy. Although EPA cannot require a State to enact a pesticide use law that is more stringent than FIFRA, there is no prohibition against granting primacy to a State whose pesticide use law is more stringent.

One comment suggested a change in the requirement that State laboratories conducting sample analysis participate in EPA's check sample program. The comment stated that the National Enforcement Investigation Center (NEIC) check sample program should be coordinated with the American Association of Pest Control Officials (AAPCO). The NEIC check sample program is currently coordinated with the AAPCO check sample program. The rule has been changed to reflect this comment.

Further Information on Effective Date of This Rule

On December 17, 1980, the Federal Insecticide, Fungicide, and Rodenticide Act extension bill (Pub. L. 96–539) became law. This bill amended several sections of FIFRA, including section 25 on rulemaking. Section 4 of the Extension Act adds a new paragraph, section 25(e), to FIFRA which requires EPA to submit final regulations to Congress for review before the regulations become effective. Copies of this rule have been transmitted to appropriate offices in both Houses of Congress.

Under section 4 of the 1980 FIFRA Extension Act, this rule will not take effect before the end of 60 calendar days of continuous session of Congress after the date of publication of this rule. Since the actual length of this waiting period may be affected by Congressional action, it is not possible, at this time, to specify a date on which this regulation will become effective. Therefore, at the appropriate time EPA will publish a notice announcing the end of the legislative review period and notifying the public of the actual effective date of this regulation.

Compliance With the Regulatory Flexibility Act

I hereby certify that this rule will not have a significant economic impact on small entities. The rule affects only State pesticide control agencies, which are not small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

Compliance With Executive Order 12291

Under Executive Order 12291, EPA must judge whether a regulation is "Major" and therefore subject to the requirement of a Regulatory Impact Analysis. This regulation is not Major since it is interpretive in nature and does not contain new substantive requirements. The regulation:

1. Does not have an annual effect on the economy of $100 million or more.
2. Will not substantially increase costs to consumers, industry, or government.
3. Will not have a significant adverse effect on competition, employment, investment, productivity, or innovation.

This regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291. (Sec. 25(a)(1) (7 U.S.C. 136w)). [Note: This rule will not appear in the Code of Federal Regulations.]

I. Appropriate Enforcement Action

A. *Procedures Governing Referrals.* 1. *General.* Section 27(a) requires EPA to refer to the States any information it receives indicating a significant violation of pesticide use laws. If a State has not commenced appropriate enforcement action within 30 days, EPA may act on the information.

Given current resource limitations, EPA is not in a position to monitor State responses to every allegation of pesticide misuse referred by the Agency. Rather, the Agency will focus its oversight activities on evaluating the overall success of State pesticide enforcement programs, and will track, on a case-by-case basis, only those allegations involving particularly serious violations. Such "significant" allegations will be formally referred to the States and tracked by EPA, while other less serious complaints will be forwarded to the States for information purposes only.

2. *Criteria for significant cases.* To determine which alleged violations are sufficiently significant to warrant formal referral and tracking, the regions will go through a two step process. First, the regions, in consultation with each State, will identify priority areas for referral. These priority areas will consist of those pesticide activities in the State which present the greatest potential for harm to health or the environment (e.g. the application of a pesticide by a certain method to a particular crop, such as ground application of endrin to apple trees). The selection of these priority areas will depend primarily on the results of pesticide enforcement program evaluations conducted by the States and the regions. The priority areas will be revised on an annual basis based upon the effectiveness of the program in reducing the harm associated with pesticide use.

Thereafter EPA will determine on a case-by-case basis which allegations in these priority areas involve sufficiently "significant" violations to be formally referred to the State and tracked. If a complaint received by EPA alleges a minor infraction which clearly presents little or no danger to health or the environment, or if the information contains patently spurious allegations, such as those from sources which have repeatedly proved unreliable, the matter will be forwarded to the State for information purposes only.

3. *The 30-day time period.* The Agency interprets the term "commence appropriate enforcement action" in section 27(a) to require States to initiate a judicial or administrative action in the nature of an enforcement proceeding, if one is warranted. Starting an investigation of the matter would not be sufficient. If the State does not commence an appropriate administrative, civil, or criminal enforcement response, EPA would then be permitted, although not required, to bring its own enforcement action.

Although section 27(a) permits EPA to act if the State has not commenced an enforcement action within 30 days, the Agency recognizes that States may not be able to complete their investigation of many formal referrals in so short a time. The time needed to investigate a possible use violation will vary widely, depending upon the nature of the referral. A referral which simply conveys an unsubstantiated allegation will usually require more investigation than a referral which partially or fully documents a pesticide use violation. Consequently, the Agency wishes to develop a flexible approach towards the tracking of referrals.

To accomplish this objective, EPA is adopting a system in which the referral process is broken down into two stages, investigation and prosecution.

4. *The investigation stage.* Following the formal written referral of an allegation of a significant pesticide use violation, the appropriate regional pesticide official will contact the State to learn the results of the investigation and the State's intended enforcement response to the violation. If the State has not conducted an adequate investigation of the alleged violation, the region may choose to pursue its own investigation or enforcement action after notice to the State. As a general rule, however, the regional office will attempt to correct any deficiencies in the investigation through informal communication with the State.

An investigation will be considered adequate if the State has (1) followed proper sampling and other evidence-gathering techniques, (2) responded expeditiously to the referral, so that evidence is preserved to the extent possible, and (3) documented all inculpatory or exculpatory events or information.

5. *The prosecution stage.* After completion of the investigation, the State will have 30 days, the prosecution stage, to commence the enforcement action, if one is warranted. An appropriate enforcement response may consist of required training in proper pesticide use, issuance of a warning letter, assessment of an administrative civil penalty, referral of the case to a pesticide control board or State's Attorney for action, or other similar enforcement remedy available under State law. The 30-day period may be extended when necessitated by the procedural characteristics of a State's regulatory structure (see Unit V.A. Hypothetical 1).

If, after consultation with the State, EPA determines that the State's intended enforcement response to the violation is inappropriate (see subdivision B), EPA may bring its own action after notice to the State. Regional attorneys will not, however, initiate an enforcement proceeding sooner than 30 days after the matter was referred to the State.

At times, a State may find that the particular enforcement remedy it views as the appropriate response to a use violation is not available under the State's pesticide control laws. Therefore the State may, at any time, request EPA to act upon a violation utilizing remedies available under FIFRA. In these instances, of course, EPA will immediately pursue its own action, if one is warranted.

To illustrate better the proposed referral system, two hypothetical situations are described in Unit V. A.

B. *Appropriate Enforcement Action.* 1. *General.* After the Agency learns of the enforcement action, if any, the State proposes to bring against the violator, the EPA regional pesticide office will consider, in consultation with the State, whether the proposed action is "appropriate", relative to the remedies available to the State under its pesticide control legislation. EPA interprets the modifier "appropriate" in section 27(a) of FIFRA to require that the severity of the proposed enforcement action correlate to the gravity of the violation.

It is not possible in this Interpretive Rule to prescribe the specific enforcement action which will constitute an appropriate response to a particular violation. There are too many variables which will influence the treatment of a use violation, including the disparity between the types of enforcement remedies available under the various State pesticide control statutes. This document can, however, establish criteria to be employed in evaluating the appropriateness of a proposed State enforcement action. More detailed guidance on evaluating relative gravity is contained in EPA's "Guidelines for the Assessment of Civil Penalties under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended", published in the **Federal Register** of July 31, 1974 (39 FR 27711). The Guidelines establish dollar amounts to be applied under the Federal statute to use violations in civil penalty proceedings. Regional personnel can use these figures as a guide in evaluating the gravity of a particular violation. The Agency will not require that a State response to a violation have a monetary impact equivalent to that of a civil penalty which EPA would impose under the Guidelines. Rather, the dollar amounts contained in the penalty matrices can be used by regional personnel to define the relative gravity of a violation by comparing the figures applicable to different violations.

2. *Gravity of the violation.* The Agency believes that the gravity of a pesticide use violation is dependent upon the risk the violation poses to human health and the environment. The factors which determine the degree of risk presented by a use violation can be divided into two categories: factors related to the particular action which constituted the violation and factors related to the pesticide involved in the incident.

a. *Risk associated with the violative action.* The circumstances surrounding the violative action partially determine the risk the violation presents to human health or the environment. To assess the degree of such risk, State and regional personnel should ask such questions as:

i. Did the violation occur in a highly populated area, or near residences, schools, churches, shopping centers, public parks or public roads, so that health was endangered?

ii. Did the violation occur near an environmentally sensitive area, such as a lake or stream which provides drinking water to the surrounding community, a wildlife sanctuary, a commercial fishery, or other natural areas?

iii. Did a structural application threaten to contaminate food or food service equipment?

iv. Did the violation have the potential to affect a large or a small area?

v. What was the actual harm which resulted from the violation?

vi. Was the nature of the violation such that serious consequences were likely to result?

This last question is designed to take into account the variation in the inherent risk associated with different categories of use violations. For example, a drift violation resulting from improper aerial application generally presents a greater risk of harm than a storage violation, since the latter infraction does not necessarily involve the improper exposure of the pesticide to the environment.

b. *Risk associated with the pesticide.* The factors which will be crucial in evaluating the risk associated with the pesticide itself include:

i. The acute toxicity of the pesticide or pesticides involved in the incident. The toxicity of a pesticide will be indicated by the "human hazard signal word" on the labels (see 40 CFR 162.10). "Danger" or "Poison" are indicators of a highly toxic pesticide while "Warning" and "Caution" signify successively less toxic substances.

ii. The chronic effects associated with the pesticide, if known.

iii. The amount of the pesticide involved in the incident, relative to the manner of application (e.g., aerial versus structural).

iv. Other data concerning the harm a pesticide may cause to human health or the environment, such as data concerning persistence or residue capability.

An analysis of the interrelationship between these two categories of risk factors should yield a notion of the relative gravity of the violation and the severity of the action which should be taken in response.

3. *Category of applicator, size of business, and history of prior violation.* Gravity is not the only factor which EPA will take into account in evaluating the propriety of an enforcement action. Section 14 of FIFRA requires that distinctions in the severity of an enforcement response be made between the categories of persons who commit use violations. The intent of Congress, as expressed in section 14, is that commercial pesticide applicators who violate use requirements will be subject to more stringent penalties that other persons who violate use restrictions. Congress also envisioned that the size of the violator's business will be a factor in determining the severity of the penalty. In addition, section 14 distinguishes between violators who have committed previous infractions and those who are first offenders. Thus, the issuance of a warning letter by a State to a person or firm who has been repeatedly warned in the past about a certain violation would not generally be considered an appropriate response to the violation.

4. *Knowing violations; criminal penalties.* The state of mind of the violator is another important consideration. In extreme circumstances where the civil penalty remedy is inappropriate, it is the Agency's policy to pursue a criminal action against persons who knowingly violate a provision of FIFRA. EPA will be particularly interested in pursuing criminal prosecution for those violations which involve a death or serious bodily injury or in which the violator has demonstrated a reckless or wanton disregard for human safety, environmental values or the terms of the statute. To be appropriate, a State's response to a knowing violation under the circumstances indicated above must be similarly severe.

5. *Deterrence.* It should be noted that the appropriateness of an enforcement

action is a dynamic, rather than a static, concept. Because it is dynamic, penalties must be periodically evaluated. If a certain violation is occurring more frequently, the leniency of the remedies which have been applied to this infraction in the past should be questioned. Consequently, what is appropriate in one year may be viewed as an inadequate response in the next.

The factors described above, together with the aforementioned Guidelines, should help to clarify the Agency's definition of "appropriate enforcement action." To understand better how the criteria described above can be used to evaluate whether a proposed State enforcement action is appropriate, the reader is referred to the hypothetical fact situations in Appendix B.

II. Criteria Governing Grants of Primacy

Section 26 of FIFRA sets forth the general criteria which apply to EPA's decision whether to grant primacy to a State:

"(a) For the purposes of this Act, a State shall have primary enforcement responsibility for pesticide use violations during any period for which the Administrator determines that such State—

"(1) has adopted adequate pesticide use laws and regulations; *Provided*, That the Administrator may not require a State to have pesticide use laws that are more stringent than this Act;

"(2) has adopted and is implementing adequate procedures for the enforcement of such State laws and regulations; and

"(3) will keep such records and make such reports showing compliance with paragraphs (1) and (2) of this subsection as the Administrator may require by regulation.

"(b) Notwithstanding the provisions of subsection (a) of this section, any State that enters into a cooperative agreement with the Administrator under section 23 of this Act for the enforcement of pesticide use restrictions shall have the primary enforcement responsibility for pesticide use violations. Any State that has a plan approved by the Administrator in accordance with the requirements of section 4 of this Act that the Administrator determines meets the criteria set out in subsection (a) of this section shall have the primary enforcement responsibility for pesticide use violations. The Administrator shall make such determinations with respect to State plans under Section 4 of this Act in effect on September 30, 1978 not later than March 31, 1979.

Thus, a State may obtain primacy in two ways: (1) by demonstrating that the elements of its use enforcement program, or of its approved certification program, satisfy the two main criteria in section 26(a), (adequate laws and adequate procedures implementing those laws), or (2) by entering into a cooperative agreement for the enforcement of use restrictions, provided the terms of the agreement do not specify otherwise. The Agency will also evaluate the adequacy of a State's use enforcement program before conferring primacy by this latter method.

A. *Adequate Laws and Regulations.* To be considered adequate, a State's pesticide control legislation must address at least the following areas:

1. *Use restrictions.* State pesticide control legislation will be considered adequate for purposes of assuming full primacy if State law prohibits those acts which are proscribed under FIFRA and which relate to pesticide use. The activities presently proscribed under FIFRA include:

a. Use of a registered pesticide in a manner inconsistent with its label (FIFRA section 12(a)(2)(G)).

b. Use of a pesticide which is under an experimental use permit contrary to the provisions of the permit (section 12(a)(2)(H)).

c. Use of a pesticide in tests on humans contrary to the provisions of section 12(a)(2)(P).

d. Violation of the provision in section 3(d)(1)(c) requiring pesticides to be applied for any restricted use only by or under the direct supervision of a certified applicator. Violations of suspension or cancellation orders are not considered use violations for purposes of the primacy program.

States may be granted partial primacy if they regulate less than all categories of use violations. For example, EPA may in the future decide to issue "other regulatory restrictions" on use under section 3(d)(1)(C)(ii), (such as a requirement to notify area residents before pesticide spraying). If such a restriction were issued, (and not reflected on pesticide product labels), each State would automatically have partial primacy extending to all of the categories listed above which are proscribed by State law, unless the State already has authority to enforce such restrictions. A State with partial primacy would obtain full primacy by enacting a prohibition tracking the section 3(d)(1)(C)(ii) restriction.

2. *Authority to enter.* To carry out effectively their use enforcement responsibilities, State officials should be able to enter, through consent, warrant, or other authority, premises or facilities where pesticide use violations may occur. States should also have concomitant authority to take pesticide samples as part of the use inspection process.

3. *Flexible remedies.* Finally, State legislation must provide for a sufficiently diverse and flexible array of enforcement remedies. The State should be able to select from among the available alternatives an enforcement remedy that is particularly suited to the gravity of the violation. Without such flexibility, a State may frequently be forced to underpenalize violators, and thereby fail significantly to deter future use violations. Thus, in order to satisfy the "adequate laws" criterion, States should demonstrate that they are able to:

a. Issue Warning Letters or Notices of Noncompliance;

b. Pursue administrative or civil actions resulting in an adverse economic impact upon the violator, e.g., license or certification suspensions or civil penalty assessments; and

c. Pursue criminal sanctions for knowing violations.

B. *Adequate Procedures for Enforcing the Laws.* In order to obtain primacy, States must not only demonstrate adequate regulatory authority, but must also show that they have adopted procedures to implement the authority. These procedures must facilitate the quick and effective prevention, discovery, and prosecution of pesticide use violations.

1. *Training.* One step towards this objective is the training of enforcement personnel. At a minimum, States, in cooperation with EPA, should implement procedures to train inspection personnel in such areas as violation discovery, obtaining consent, preservation of evidence, and sampling procedures. Enforcement personnel should be adequately versed in case development procedures and the maintenance of proper case files.

Instruction in these techniques should take the form of both on-the-job training and the use of prepared training materials. The Agency also considers a continuing education program to be a crucial training procedure, so that enforcement personnel can be kept abreast of legal developments and technological advances.

2. *Sampling techniques and laboratory capability.* Requests for primacy should also show that the State is technologically capable of conducting a use enforcement program. States must have ready access to the equipment necessary to perform sampling and laboratory analysis, and should implement a quality assurance program to train laboratory personnel and protect the integrity of analytical data. Laboratories conducting sample analyses must also agree to participate in EPA (NEIC) Check Sample programs which are designed to ensure minimum standards of analytical capability. (Such a program is already operational for formulation samples, and a residue sample program is also under consideration). The EPA Check Sample program is coordinated with the Association of American Pesticide Control Officials (AAPCO) to reduce unnecessary duplication of effort. The EPA will be guided in evaluating the adequacy of State analytical procedures by official compilations of approved analytical methods, such as the Food and Drug Administration's (FDA) Pesticide Analytical Manual, the CIPAC (Collaborative International Pesticides Analytical Council) Handbook, the EPA Manual of Chemical Methods for Pesticides, and Official Analytical Chemists Analytical Procedures. For additional guidance on adequate sampling techniques, States should consult EPA's FIFRA Inspectors Manual or contact the appropriate regional office.

3. *Processing complaints.* Since a significant portion of pesticide use violations are identified through reports from outside EPA or the State lead agency, the State must implement a system for quickly processing and reacting to complaints or other information indicating a violation. An adequate referral system should contain:

a. A method for funneling complaints to a central organizational unit for review.

b. A logging system to record the receipt of the complaint and to track the stages of the follow-up investigation.

c. A mechanism for referring the complaint to the appropriate investigative personnel.

d. A system for allowing a rapid determination of the status of the case.

e. A procedure for notifying citizens of the ultimate disposition of their complaints.

4. *Compliance monitoring and enforcement.* Along with the above described enforcement procedures, States must provide assurance that sufficient manpower and financial resources are available to conduct a compliance monitoring program, i.e., either planned or responsive use inspections. In addition, States must implement procedures to pursue enforcement actions expeditiously against violators identified through compliance monitoring activities.

The Agency also believes that program planning and the establishment of enforcement priorities is an integral part of an adequate enforcement program. Such planning, taking into account the national program priorities as manifested through the grant negotiation process, as well as the priorities specific to the individual State, will help assure that compliance monitoring and enforcement resources are properly allocated.

5. *Education.* States should implement a program to inform their constituencies of applicable pesticide use restrictions and responsibilities. Examples of education methods include disseminating compliance information through cooperative extension services, seminars, publications similar to the **Federal Register**, newspapers, and public assistance offices where persons can call to ask questions or report violations. Such an educational program will promote voluntary compliance and is essential to effective enforcement. States should also develop procedures for soliciting input from the public regarding the administration of the pesticide use enforcement program.

III. Criteria Governing Rescission of Primacy Under Section 27(b)

Section 27(b) authorizes the Administrator to rescind primacy from a State in certain situations:

> "(b) Whenever the Administrator determines that a State having primary enforcement responsibility for pesticide use violations is not carrying out (or cannot carry out due to the lack of adequate legal authority) such responsibility, the Administrator shall notify the State. Such notice shall specify those aspects of the administration of the State program that are determined to be inadequate. The State shall have ninety days after receipt of the notice to correct any deficiencies. If after that time the Administrator determines that the State program remains inadequate, the Administrator may rescind, in whole or in part, the State's primary enforcement responsibility for pesticide use violations.

In deciding whether a State is not carrying out, or cannot carry out, its use enforcement responsibilities, the Administrator will apply the criteria for an adequate program set forth in Unit II to the performance of the State during the time the State had primacy.

A. *Adequate Laws.* The legal authority can conduct an adequate use enforcement program is a criterion which affects both the decision to grant primacy and the decision to rescind it. Within the context of rescission, the Administrator will assess the impact of any amendments or supplements to the State's pesticide use laws and regulations. If legislative changes have adversely affected the State's ability to collect information or bring enforcement actions, the State may be subject to a rescission action on grounds of inadequate laws.

B. *Adequate Procedures.* In determining whether a State which has adequate legal tools is carrying out its use enforcement obligations, the Agency will examine the efficacy of the procedures adopted by the State to implement its pesticide laws. The Agency will be particularly interested in the remedies the State has actually applied to the various use violations. The lack of sufficient correlation between the gravity of a use violation and the severity of the enforcement response would be evidence that the State's arsenal of remedies is not being applied in a flexible manner.

In addition, EPA will evaluate each program element listed in Unit II.B., in light of the performance of the State during the period the State had primary use enforcement responsibility.

1. *Training.* The Administrator will note whether any difficulties encountered by the State in enforcing pesticide use restrictions have resulted from a lack of adequate training of State enforcement personnel.

2. *Sampling techniques and laboratory capability.* The Administrator will consider whether the State's sampling techniques and

analytical capabilities are enhancing or hindering the State's ability to unearth and prosecute successfully persons who misuse pesticides. Another important consideration will be the degree to which State laboratory and sampling procedures have kept pace with developments in analytical technology.

3. *Processing complaints.* The Administrator will examine whether complaints have been processed quickly and efficiently. The degree to which citizens alleging a use violation seek redress from EPA after first directing their complaint to the State will be considered. In addition, the Administrator will take into account the performance of the State in responding to allegations referred to the State by EPA under section 27(a) of FIFRA.

4. *Compliance monitoring and enforcement.* Under this element, the Administrator will compare the State's level of compliance monitoring activities with that of other comparable States. The EPA will review State case files to determine whether the State has aggressively investigated a case before deciding on the disposition of the matter. The EPA will also investigate whether a State's Attorney General's office or other prosecutorial authorities have demonstrated a willingness to pursue cases referred by the State's pesticide control lead agency.

The Agency will examine whether State enforcement resources have been directed towards the more significant enforcement problem areas, and whether enforcement priorities have been reevaluated as the demands of an adequate program change over time.

5. *Education.* The Administrator will evaluate whether the State's education program is encouraging voluntary compliance with pesticide use restrictions. As part of this process, the Administrator will note those use violations which are at least partially attributable to the violator's lack of familiarity with applicable laws and regulations. The Administrator will also review State procedures for facilitating public participation in the enforcement program.

These criteria are indices of the adequacy of a State's use enforcement program, but they do not conclusively determine whether a State is discharging its primacy responsibilities. Since the Agency's goal is to protect the public from the risks associated with pesticides, one of EPA's central inquiries will be whether the State's primacy program assures compliance with pesticide use restrictions. EPA, in evaluating State program adequacy, will consider both the deficiencies of the program and the success of the program in achieving compliance.

IV. Emergency Response

Notwithstanding other provisions of sections 26 and 27, the Administrator may, after notification to the State, take immediate action to abate emergency situations if the State is "unwilling or unable adequately to respond to the emergency."

FIFRA does not define "emergency conditions." Other EPA-administered statutes, however, characterize emergencies in fairly consistent terms. The consensus of these statutes is that an emergency presents a risk of harm to human health or the environment that is both serious and imminent, and that requires immediate abatement action.

Examples of use-related emergency situations are:

1. Contamination of a building by a highly toxic pesticide.

2. Hospitalizations, deaths, or other severe health effects resulting from use of a pesticide.

3. A geographically specific pattern of use or misuse which presents unreasonable risk of adverse effects to health or sensitive natural areas. This situation may occur, for example, if a hazardous pesticide is consistently misused in a particular area so that the net effect is the creation of substantial endangerment to the environment, such as runoff into a water supply.

A. *"Unwilling".* When EPA learns of an emergency situation, Agency representatives must notify the affected State. These representatives will try to obtain a commitment from the State as to (a) what the State is capable of doing in response to the situation, and (b) when the State intends to respond to the crisis.

Emergencies, by nature, require the quickest possible response. In most cases, due to proximity, the State will have the opportunity to be first on the scene. If the State manifests an unwillingness to respond rapidly to the situation, or if the State cannot give assurances that it will respond more quickly than EPA could respond, Agency emergency response teams will be activated.

B. *"Unable".* The EPA will immediately take action to abate an emergency if the State is unable to do so. The Agency interprets "unable" to mean that either the State does not have the authority to adequately respond or that the State is incapable of solving the problem due to the lack of technology or resources.

1. *Authority.* The EPA can utilize its authority in section 16(c) of FIFRA to seek, in conjunction with the Department of Justice, a district court order preventing or restraining misuse of a pesticide. States should also be able to address a use-related emergency in this manner or by the rapid issuance of an enforceable stop-use order or other similar means. If the State lacks this authority and the emergency conditions warrant a legal response in the nature of specific enforcement or equitable relief, EPA may initiate its own action after notice to the State.

2. *Technical capability.* Some emergency situations may present problems which the States are technologically incapable of solving. In these instances, if EPA possesses the requisite technology or equipment, the Agency will immediately respond to the crisis. For example, where a dissolved organic pesticide has contaminated a surface water system, EPA would activate its portable advanced waste treatment unit, a resource that is not generally available to the States.

The EPA will also take action if the State cannot rapidly commit the necessary manpower to the emergency situation. In most cases EPA will not, however, initiate a response on this basis if the State has developed an emergency response plan detailing the procedures to be followed in counteracting a pesticide emergency.

V. Hypothetical Situations

In reading the hypotheticals in Units A and B, assume that the cases discussed fall under priority referral areas discussed in Unit I.A.2.

A. *Action by Citizen. Hypothetical 1.* EPA refers to the State a citizen's allegation that an aerial applicator has allowed pesticides to drift over his property. After 25 days, the EPA Region obtains the results of State's investigation and learns that the State plans to issue a warning letter to the applicator. The EPA advocates a more firm response and, after discussion, the State agrees to suspend the applicator's certification. The State certification board does not meet, however, until two months later. In this instance, the Region may decide to extend the normal 30 day prosecution stage to accommodate the schedule of the board.

Hypothetical 2. A citizen calls EPA with information concerning a fish kill which occurred in a stream near his residence. The citizen claims that he reported his information to the State, but State officials have not responded to his complaint. The EPA's Regional official calls the State, and learns that the State did indeed know of the problem, but has not yet had the opportunity to investigate the allegation. The Regional

official, believing the allegation to be significant, formally refers the complaint to the State, and the State agrees that the matter should be investigated within 20 days. After 20 days, the Region learns that the State has not yet begun its investigation. In this case, the Region will begin its own inquiry into the matter, and may commence its own enforcement action, after notice to the State, provided that 30 days have elapsed from the date of the referral.

B. *Action by State.* In both of these hypotheticals, assume that the State has chosen a Warning Letter as the appropriate enforcement response.

Hypothetical 1. Mr. Smith operates a one-man crop dusting company. Smith is hired to spray Herbicide A over a power company's lengthy right-of-way. The right-of-way is bounded on one side by a residential development and on the other by a wooded area. Smith performs the aerial application amidst high swirling winds in contravention of the instructions on the herbicide's label. A significant portion of the herbicide drifts onto the wooded area. Herbicide A, which contains the hazard word "danger" on its label, is a highly toxic and persistent restricted use pesticide. Smith has no record of prior pesticide-related violations with government pesticide control offices.

The Agency would consider the issuance of a warning letter to be an inappropriate response to this violation.

a. *Risk associated with the violative action.* Fortunately in this instance, the herbicide did not result in damage to humans or sensitive environmental areas. But at the time the violation was committed, the risk that harm would result from the misuse was quite significant, given the high swirling winds and the proximity of a residential neighborhood. Only chance prevented the herbicide from drifting into an inhabited area. The risk of harm was also increased by the fact that a great deal of land was subject to drift given the length of the target area.

b. *Risk associated with the pesticide.* Herbicide A is labelled "danger" and is therefore an acutely toxic Category I pesticide under 40 CFR 162.10. The harm that would result from exposure to this persistent substance is substantial, regardless of whether chronic effects or residue properties have been ascribed to it. In addition, a large amount of herbicide A was involved in the violation.

c. *Other factors.* Smith is a commercial applicator under FIFRA and would be subject to the maximum penalty. As a mitigating factor, however, Smith could point to the absence of prior FIFRA violations.

In summary, since Smith's actions were highly likely to result in serious harm to human health, his drift violation warrants a severe enforcement response, such as assessing a fine or suspending his certification. Despite Smith's clean record, a warning letter would not be deemed "appropriate enforcement action."

Hypothetical 2. A small food processing firm which markets frozen TV dinners utilizes company maintenance personnel to accomplish its pest control needs. No particular training is provided for such employees but they are instructed to read and follow the label directions. They are provided all appropriate application equipment and protective clothing. A company employee applied a non-persistent general-use (Category IV) pesticide which was registered for structural pest control to combat a particularly serious cockroach infestation. Despite label instructions requiring the user to avoid contaminating food, food containers, or cooking utensils, the employee applied the pesticide directly upon and below counter tops and related surfaces in the room where food cooking racks are stored. The application took place late Friday afternoon. The cooking racks were not utilized again until Monday morning. An inspection took place on Monday morning. This was the third pesticide use inspection which the State had conducted at the firm in the last four years. None of the prior inspections had revealed a pesticide-related violation. Residue samples taken Monday morning revealed no trace residue of the pesticide on the treated surfaces.

Since the violation constitutes a first offense by an "other person" under section 14(a)(2) of FIFRA, the maximum federal enforcement response would be a Notice of Warning. Accordingly, the Warning Letter issued by the State would constitute an appropriate enforcement action.

a. *Risk associated with the violative action.* The direct application of any pesticide to a cooking rack in a food processing establishment poses some risk of exposure to humans. Although the pesticide used in this case was not applied in great amounts or over large areas, the inherent risk associated with the violation is relatively high, since violation results in the introduction of the pesticide into non-target surfaces with the likelihood of human exposure.

b. *Risk associated with the pesticide.* In this instance, the risk associated with the pesticide itself is relatively small. This Category IV pesticide is not acutely toxic or persistent, and is not known to cause any chronic effects. Sample analysis revealed no trace of the product at the time the exposed cooking racks were to be used.

c. *Other factors.* Under FIFRA, the issuance of a Notice of Warning is the maximum enforcement response to a use violation committed by a private applicator with no history of prior violations. Thus, the Agency would, of course, view the proposed State enforcement action as appropriate. If the violation were repeated, a more stringent enforcement action would be warranted.

Dated: December 22, 1982.

John W. Hernandez, Jr.,

Acting Administrator.

[FR Doc. 83-6 Filed 1-4-83; 8:45 am]

BILLING CODE 6560-50-M