

Chapter Four

FEDERAL/STATE COOPERATION

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FEDERAL/STATE COOPERATION

AUTHORITY

Cooperative Enforcement Agreements

Section 23 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, provides EPA the authority to enter into cooperative agreements with the States, territories and Indian tribes (hereinafter referred to simply as “States”) to (1) delegate the authority to cooperate in the enforcement of FIFRA and (2) assist the States in the training and certification of pesticide applicators.

State Primacy

Sections 26 and 27 of FIFRA, as amended, set forth the conditions under which States may receive primary enforcement responsibility (primacy) for pesticide use violations and authorize the Administrator to override or rescind a grant of primacy in certain situations. On January 5, 1983, EPA published in the Federal Register (pp. 404-411) a Final Interpretive Rule to provide operational guidance for FIFRA sections 26 and 27. The procedures governing the rescission of State primacy enforcement responsibility for pesticide use violations are found in 40 CFR 173.

A State may obtain primary enforcement responsibility for pesticide use violations during any period which the Administrator determines if the State has (1) adopted adequate pesticide use laws and regulations; (2) adopted and implemented adequate procedures for the enforcement of State laws and regulations; (3) kept records; and (4) submitted reports showing compliance with (1) and (2) above. If a State has a plan approved by the Administrator that meets the requirements of section 11 of FIFRA and that the Administrator determines meets the above criteria, it will have primary enforcement responsibility for pesticide use violations. In addition, a State that enters into a cooperative agreement with the Administrator for the enforcement of pesticide use restrictions under section 23 of FIFRA has primary enforcement responsibility.

The Administrator has primary enforcement responsibility for States that do not have primary enforcement responsibility under FIFRA (i.e., as of January 2002, Wyoming and half of Colorado).

Referral Procedures under FIFRA Sections 26 and 27

Section 27 of FIFRA requires EPA to refer to the States any information the Agency receives indicating a significant violation of pesticide use laws. In accordance with the Final Interpretive Rule governing FIFRA sections 26 and 27, EPA in consultation and with each State will identify, in writing, priority areas for formal referral to the State. These priority areas will consist of those pesticide activities in the State that present the greatest potential for harm to health and the environment. The priority areas will be revised on an annual basis based upon the effectiveness of the programs in reduction of the harm associated with pesticide use in the State. The negotiated written agreement between the State and the Region will contain the criteria for the selection of significant pesticide use cases.

All pesticide use cases identified as “significant” will be referred to the State by EPA in writing, and will be formally tracked as set forth in the Final Interpretive Rule. All other cases will be referred to the State for information purposes and will not be formally tracked.

An inspection is considered to be adequate if the State has (1) followed proper sampling and other evidence gathering techniques, (2) responded expeditiously to the referral, and (3) documented all inculpatory or exculpatory events or information.

If the State's enforcement response is inadequate and the Region is unable to persuade the State to correct any deficiencies through communications with the State, the Region may pursue its own enforcement response after notifying the State. That notification should summarize the facts relating to the State inspection, discuss the reasons for EPA's determination that the action is inadequate, and state that the EPA will initiate its own enforcement action.

The State has 90 days after 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.

Neither section 26 or 27 of FIFRA limits the authority of the Administrator to enforce the Act where the Administrator determines that emergency conditions exist that require immediate action and the State authority is unwilling or unable to respond to the emergency.

Inspectional Authority

Under the cooperative enforcement agreement program, EPA delegates federal inspectional authority to the States for conducting FIFRA inspections. Most States have inspectional authority similar to FIFRA.

The following State/tribal guidelines must be used to determine when to use federal or State credentials. The inspector must never use both State and federal authority for the same inspection. If the inspector initiates an inspection under State authority, but discovers suspected violations of a federal nature, it is not necessary to issue federal credentials prior to documenting the violations. Case law has proven that evidence collected under either authority is admissible as evidence as long as the inspector followed official procedures and used official forms for the credentials under which he/she was conducting the inspection.

Inspections When the State Has Use Primacy

State inspectors must always use State authority, State credentials, State forms, and State procedures when conducting use/misuse inspections where the State has primacy. Note: See Exhibit 4-1, FIFRA Enforcement Policy (July 7, 1981), at the end of this chapter.

Nonprimacy Inspections

- < **State Authority.** State inspectors must use State authority, State credentials, State forms and State procedures when conducting inspections whenever the State has authority to conduct the activity.
- < **Federal Authority.** State inspectors must use federal authority, federal credentials, federal forms, and federal procedures when conducting inspections for which the State does not have authority, but which are authorized by EPA and/or FIFRA.

There also are instances where EPA has requested a 'for cause' inspection when it is known that the case will be referred to EPA for action. Federal credentials should be used in this case.

BACKGROUND

The cooperative enforcement agreement program establishes a working partnership between EPA and the States/tribes for cooperative enforcement of both federal and State pesticide laws and regulations. The following lists some of the primary objectives of this partnership:

- < Protect the public and the environment by ensuring product compliance and proper use.
- < Improve coordination of the federal and State pesticide enforcement program.

- < Work together to resolve cases and deal with problems.
- < Improve targeting of resources by tailoring the program to meet the local needs and concerns of each State.
- < Provide more efficient use of resources through the use of State offices and personnel.

RESPONSIBILITY

Both the EPA and the States perform different roles in the cooperative enforcement agreement program. Some areas of responsibility are listed below:

Environmental Protection Agency

- < Provides federal funding to assist the States through cooperative agreements.
- < Provides national focus and oversight to the program.
- < Provides national guidance, compliance/enforcement strategies, and policies.
- < Provides training for State/lab personnel.
- < Delegates authority to States and provide federal credentials for State inspectors to conduct inspections where State authority is lacking.
- < Initiates federal civil and criminal enforcement actions for violations of FIFRA that are referred to EPA by the States.

States

- < Assist with funding for the cooperative enforcement agreement program.
- < Participate in the development of national guidance, compliance/enforcement strategies, and policies.
- < Ensure compliance with both federal and State pesticide laws by conducting an inspection and sampling program.
- < Initiate State enforcement actions for violations of State laws.
- < Refer fully documented cases of violations of FIFRA to EPA for federal civil or criminal enforcement action.
- < Document and refer to EPA potential violations of other federal statutes.

Exhibit 4-1 - FIFRA Enforcement Policy

FIFRA ENFORCEMENT POLICY

Referral of State Misuse Cases to EPA, Section 26.2(b)

Issue:

Is it legally permissible for the Environmental Protection Agency to prosecute Federal pesticide misuse violations which are based on evidence collected by State inspectors following State procedures?

Policy: Yes, as long as States follow basic Constitutional evidentiary procedures, evidence collected under State authority can be used to prosecute violations of Federal pesticides laws.

Discussion:

Pursuant to section 26 of FIFRA, most States now exercise primary enforcement responsibility for pesticide misuse violations. Although the Federal government retains concurrent authority with the States to prosecute misuse violations, this power is not ordinarily exercised.

Accordingly, States with primacy generally conduct use inspections under the authority of State law. In the usual pesticide misuse case, State law provides ample enforcement authority for the State to effectively prosecute misuse violations. Consequently, the States need not generally refer misuse cases to the EPA for prosecution under the parallel Federal authorities.

However, there are two instances where the States may choose to refer misuse cases to EPA for Federal prosecution:

- 1) When the misuse is prohibited by Federal law, but not by State law and,
- 2) When both State and Federal law prohibit the misuse, but the State lacks adequate resources to pursue prosecution.

When either of these types of misuse cases is referred to EPA for action, the Agency will review the case file to ensure that the State inspection procedures adhere to basic Constitutional guarantees. Information collected by State inspectors is not excluded in court merely because it is gathered by State inspectors; instead it is subject to the common law rules of evidence or to the Federal Rules of Evidence. The issue of the admissibility of evidence derived from State Inspections involves the analysis of two questions: (1) was the information and evidence obtained by State inspectors legally

obtained and (2) is that evidence within the scope of admissible evidence.

If both of these questions can be answered for any given information, then that evidence may be properly introduced into civil proceeding to enforce a violation of the FIFRA.

Accordingly the wide variety of State inspection procedures do not affect the capacity of the Agency to accept a misuse case for prosecution. States may follow their own inspection procedures without regard to whether or not the misuse case will be referred to the Agency. The eventual referral of the case to the Agency for prosecution does not require a State inspector to change any existing State inspection procedures.



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JUL 7 1981

Date