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The Federal Pesticide Act of 1978 (1978 Act)\(^1\) is designed to facilitate implementation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).\(^2\) It accomplishes this in part by clarifying and delineating the regulatory powers given the Environmental Protection Agency by FIFRA.\(^3\) Among the significant clarifications is the express delegation to the states of responsibility for regulating pesticide use.\(^4\) Previously, the responsibility had not been clearly assigned to either the states or the EPA; this resulted in duplication of enforcement programs by the states and the EPA, which in turn engendered a dispute as to which mode of enforcement best implemented the provisions and intent of FIFRA. By resolving the dispute in favor of the state enforcement programs, the 1978 Act attempts to end such inefficient duplication and achieve enforcement responsive to both local and federal needs.

Nonetheless, Congress has not stripped the EPA of all power to enforce laws regulating pesticide use. The 1978 Act gives the EPA the responsibility to evaluate whether state enforcement programs meet certain standards,\(^5\) and leaves the EPA a residual enforcement power under particular circumstances.\(^6\) Exactly what these standards or circumstances shall be is not entirely ascertainable from the 1978 Act. Should the standards be set too high, or the circumstances defined too broadly, state enforcement power will be diluted beyond that intended by Congress.

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\(^4\) 1978 Act, supra note 1, sec. 24, §§ 26-27 (redesignating §§ 26 & 27 of FIFRA as §§ 30 & 31, respectively, and inserting new §§ 26-29) (new §§ 26 & 27 to be codified as 7 U.S.C. §§ 136w-1 & 136w-2, respectively).

\(^5\) Id. sec. 24, § 26 (to be codified as 7 U.S.C. § 136w-1).

\(^6\) Id. § 27 (to be codified as 7 U.S.C. § 136w-2).
The legislative history of the 1978 Act is sufficiently clear, however, to prevent such possible misinterpretations. This note will describe the relation of state and EPA regulatory authority prior to 1978, and will analyze the impact of specific pesticide use enforcement provisions of the 1978 Act on that relationship beginning with the standards required of a state enforcement program. The scope of the EPA's role in overseeing state compliance with these standards will be discussed, followed by an analysis of the breadth of the enforcement power retained by the EPA under the 1978 Act. Finally, this note will focus on the congressional policy considerations underlying the grant of primary enforcement responsibility to the states, and indicate the extent to which these considerations should further contract the EPA's enforcement role.

**Legislative Background to the Division of Enforcement Responsibility**

Since 1947, FIFRA\(^1\) has been the basic federal pesticide statute.\(^2\) Initially, its scope was limited to the regulation of labeling of pesticides in interstate commerce.\(^3\) In 1972, the original FIFRA was completely revised by the Federal Environmental Pesticide Control Act (FEPCA)\(^4\) to provide comprehensive federal regulation of pesticides.\(^5\) Among the new provisions of FIFRA were sections making

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certain conduct in the use of pesticides unlawful. 12 Similar regulations regarding pesticide use already existed in a few states, 13 and following the passage of FEPCA, other states enacted pesticide use laws. 14 Generally, these state laws adopted standards similar to those established by FIFRA. As a result, state pesticide use provisions are generally equivalent to or more stringent than the FIFRA standards. 15

Unfortunately, neither the FIFRA nor its legislative history indicated how the states and the EPA were to apportion their authority to enforce these pesticide use provisions. On the one hand, Congress granted general authority to the EPA to “prescribe regulations to carry out the provisions of [FIFRA],” 16 arguably a grant broad enough to allow the EPA to enforce pesticide use regulations within a state. This proposition is supported to some extent by the EPA’s additional authority to assess civil penalties for violations of “any provision” of FIFRA, 17 and to inspect the records and establishments of any pesticide producer, seller or distributor. 18

On the other hand, FIFRA explicitly gave each state authority to regulate the sale or designate the uses of a pesticide, provided the regulation did not permit sale or uses prohibited by FIFRA. 19 While not expressly giving enforcement authority to the states, this provision suggests that state enforcement of pesticide violations was not meant to be completely preempted by the EPA. 20 An alternative

12 117 CONG. REc. 39975 (1971) (an explanation by Rep. Latta of H.R. 10729, the House bill enacted as FEPCA). FEPCA made it unlawful for any person either to make available for use, or to use any registered pesticide classified for restricted use for some or all purposes unless the person using the pesticide is certified or working under the direct supervision of a certified applicator, or to use any registered pesticide in a manner inconsistent with its labeling. Pub. L. No. 92-516, §§ 3(d)(1)(C), 12(a)(2)(F)-(G), 86 Stat. 973 (1972) (codified as 7 U.S.C. §§ 136a(d)(1)(C), 136a(a)(2)(F)-(G)).
14 Fifty states had passed comprehensive pesticide use statutes by the end of 1975. OFFICE OF PESTICIDE PROGRAMS, U.S. ENVIRONMENTAL PROTECTION AGENCY, DIGEST OF STATE PESTICIDE USE AND APPLICATION LAWS (1975).
17 Id. § 136l(a)(1).
18 Id. §§ 136f-136g.
19 Id. § 136v(a).
concept, that of cooperative enforcement, is also found in the language of FIFRA. Such cooperation could include mutual division of enforcement responsibility between a state and the EPA, and would therefore leave at least some enforcement responsibility with the state.

The legislative history of FIFRA gives no better indication as to how enforcement responsibility should be divided. During the FEPCA debate in the House of Representatives it was implied several times that the EPA was to carry out enforcement proceedings. Yet, during the same debate, the statement was made that states were to be given “prime responsibility for the certification and supervision of pesticide applicators,” while the EPA was to set “the program standards the States must meet.” State “supervision” implies enforcement of use violations; however, nothing said by the House makes clear whether this was really intended to include enforcement functions. The Senate FEPCA debate on this issue is similarly ambiguous. Thus, under FIFRA, the question of enforcement responsibility was left unsettled.

THE FEDERAL PESTICIDE ACT OF 1978

When appropriations ended under FIFRA in 1977, Congress took the opportunity offered by the appropriation hearings to amend

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21 The EPA is required to cooperate with any appropriate agency of any state in carrying out the provisions of FIFRA. 7 U.S.C. § 136t(b) (1976) (amended 1978).
22 During the House debate on H.R. 10729, later enacted as FEPCA, Representative Latta explained that the bill would “redirect [FIFRA’s] thrust by providing for regulation through the [EPA] of both the manufacture of pesticides and their use by individuals as well as commercial applicators.” 117 Cong. Rec. 39975 (1971). Similarly, Representative Poage noted that the House Committee on Agriculture, which had jurisdiction over H.R. 10729, believed that the bill gave the EPA “authority . . . to enforce regulations which should prevent a recurrence of . . . incidents where improper application of pesticides caused harm to the ecology.” Id. at 39976.
23 Id. at 39976-77 (remarks of Rep. Poage, member of the House Comm. on Agriculture).
24 The remarks of Senator Allen, made during the debate on S. 1678 (later enacted as the 1978 Act), support the contention that Congress intended FEPCA to include pesticide use enforcement under state “supervision.” He said that giving the states primary enforcement responsibility under S. 1678 did “nothing more than to reiterate, in explicit statutory language, the intent of Congress in its enactment of [FEPCA].” He then described how the state certification plans provided for effective state enforcement programs. 123 Cong. Rec. S13,096 (daily ed. July 29, 1977).
25 For example, Senator Nelson stated that H.R. 10729, which was enacted as FEPCA, sought “to modernize [FIFRA] and give the [EPA] the proper administrative tools to both regulate the entry of new pesticides into the market and oversee the actual use and application of these pesticides.” 118 Cong. Rec. 32260 (1972). However, nothing in the Senate FEPCA debate indicates how “oversee” might be defined.
FIFRA again. These new amendments, the 1978 Act, were signed into law on October 30, 1978, so that FIFRA, as amended by the 1978 Act, constitutes the federal statutory framework of pesticide regulation in force today.

Two sections of the 1978 Act explicitly allocate responsibility for the regulation of pesticide use between the states and the EPA. The first, section 26, sets forth the conditions under which a state will have primary enforcement responsibility. The second, section 27, states the circumstances under which the EPA may exercise a residual enforcement power.

These two sections, which appear to give most of the enforcement responsibility to the states, also limit that grant of authority by allowing the EPA to decide whether a state has met the standards for acquiring primary responsibility, and by giving the EPA residual enforcement power under certain circumstances. Although the 1978 Act fails to delineate these standards and circumstances, legislative history provides explicit contours.

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26 The 1978 Act developed in Congress through both House and Senate committee initiatives. The Senate Committee on Agriculture, Nutrition, and Forestry held hearings in June 1977 on the necessity of amending FIFRA. *Extension of the Federal Insecticide, Fungicide, and Rodenticide Act: Hearings on S. 1678 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry, 95th Cong., 1st Sess. (1977).* S. 1678 was then drawn up and reported to the Senate. The bill provided for extensive revision of FIFRA, but contained no language on primary responsibility for enforcing pesticide use regulations. *See S. Rep. No. 334, 95th Cong., 1st Sess. 10-26 (1977).* Such a provision was subsequently added by the adoption of an amendment offered by Senator Allen. 123 Cong. Rec. S13,096 (daily ed. July 29, 1977). S. 1678, as amended, was then passed by the Senate. *Id.* at S13,103.


A conference committee was then convened to consider the Senate and House versions of S. 1678, and it reported back a compromise version on September 12, 1978. 124 Cong. Rec. H9,529 (daily ed. Sept. 12, 1978). The report suggested incorporation of most of the House language on primary enforcement responsibility. *Id.* at H9,539-40. The Senate agreed to the compromise version of S. 1678 on September 18, 1978, *id.* at S15,303 (daily ed. Sept. 18, 1978), as did the House on the following day, *id.* at H10,117 (daily ed. Sept. 19, 1978).


30 *Id.* sec. 24, § 27 (to be codified as 7 U.S.C. § 136w-2) (inserting new § 27, and redesignating old § 27 of FIFRA as § 31).
Section 26: State Primary Enforcement Responsibility

Transfer of Primary Enforcement Responsibility

Under section 26(b), all states entering into a "cooperative agreement" for the enforcement of pesticide use restrictions under section 23 of FIFRA, as amended by the 1978 Act, shall have primary enforcement responsibility. Responsibility, according to Senator Leahy, is transferred "automatically" to states participating in cooperative enforcement arrangements.

States which do not enter into a cooperative agreement must have their program approved by the EPA before they may exercise primary enforcement responsibility. Approval, as governed by section 26(a), is contingent on EPA determination that a state has ade-
quate pesticide use laws and regulations, has adopted and is imple-
menting adequate enforcement procedures, and will keep records
and make reports to the EPA showing compliance with such laws,
regulations and procedures.

The 1978 Act gives no clear indication of how strict these stan-
dards must be. Although section 26(a) prohibits the EPA from re-
quiring more stringent state pesticide laws and regulations than
those in FIFRA, as amended by the 1978 Act, the language of the
new Act nowhere specifies whether or to what extent lesser state
standards would be adequate to obtain EPA approval.

Legislative history does shed light on the standards intended by
Congress. Senator Allen, during debate on the 1978 Act, proposed
that a state be granted primary enforcement responsibility if its
current enforcement plan is approved by the EPA as part of the
state certification plan under section 4 of FIFRA. 35 Since state certi-
fication plans are meant to regulate only the qualifications of appli-
cators, their enforcement procedures are not necessarily as compre-
hensive36 as those under cooperative enforcement agreements, which
subject “any person” to the Act.37 Nonetheless, in practice the scope
of enforcement provided by cooperative agreements and under state
certification plans may be equivalent.38

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1978 Act, supra note 1, sec. 24, § 26(a) (to be codified as 7 U.S.C. § 136w-1(a)).

approved certification plans under § 4 of FIFRA. 44 Fed. Reg. 4352, 4360 (1979). Section 4
provides that “[i]f any State . . . desires to certify applicators of pesticides, the Governor
of such State shall submit a State plan for such purpose. The [EPA] shall approve the plan
. . . if such plan in [its] judgment [meets certain specific requirements].” FIFRA, 7
U.S.C. § 136b (1976). Enforcement provisions are considered a necessary element of an approvable
state certification plan under EPA policy, 40 Fed. Reg. 11698, 11699 (1975), although the primary
purpose of state certification plans under § 4 is to allow states to determine which
individuals are qualified to use and supervise the use of restricted-use pesticides. 40 C.F.R.
§ 171.1 (1978).

36 To obtain approval of its certification plan, a state must have, at a minimum, provisions
making it unlawful for persons other than certified applicators, or persons working under their
direct supervision, to use restricted-use pesticides, as well as provisions for right-of-entry, and
record keeping by certified applicators. 40 C.F.R. § 171.7(b)(1)(iii)(C)-(E) (1978). Also, a
state has to provide for “denying, suspending, and revoking certification of applicators, and
assessing criminal and/or civil penalties . . . [for the] misuse of a pesticide and falsification
of [required records].” Id. § 171.7(b)(1)(iii)(A)-(B).


38 This is mainly because concern over pesticide misuse is directed principally at restricted-
use pesticides, as their potential for harm is much greater than that of general-use pesticides.
See FIFRA, 7 U.S.C. § 136a(d)(1) (1976) (basis upon which a pesticide is to be classified).
Since state certification plans control the use of all pesticides by certified applicators, and
Even so, Congress apparently felt that certification plans might not provide enforcement standards high enough to justify a grant of primary enforcement responsibility. Instead of following Senator Allen's proposal, Congress granted automatic primary enforcement responsibility only to those states participating in cooperative enforcement agreements.\(^3\) States having only section 4 certification plans are required, under section 26(b), to obtain approval from the EPA under section 26(a) before they will be granted primary enforcement responsibility. Therefore, by implication, Congress seems to have intended the EPA to require the standards relating to cooperative enforcement agreements in evaluating state enforcement plans under section 26(a).\(^4\)

However, even applying cooperative agreement standards, the EPA should be able to approve primary responsibility for most states with certification plans since most states have existing enforcement plans meeting those standards.\(^5\) For the states failing to meet these standards initially, approval should not be difficult to obtain since their enforcement programs would be deemed deficient merely because they only regulate users of restricted-use pesticides. Since these states already possess a regulatory framework under their certification plans, the scope of their regulation could be broadened without major legislative revision or change in regulatory philosophy.\(^6\)

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\(^3\) 1978 Act, supra note 1, sec. 24, § 26(b) (to be codified as 7 U.S.C. § 136w-1(b)).

\(^4\) In fact, the requirement that the EPA complete state evaluations under § 26(a) within six months, 1978 Act, supra note 1, sec. 24, § 26(b), suggests that Congress did not expect...
As to the seven states with neither a cooperative agreement nor an approved certification plan, the EPA has proposed that primary enforcement responsibility not be conferred until "such time as the state's [certification] plan is given full approval by EPA and its enforcement authorities have been reviewed for adequacy, or the state applies for review of its enforcement authorities and EPA finds they are consistent with . . . § 26(a)."

The EPA's Oversight Role

Under section 26(a)(3), the EPA retains oversight functions even in states which have primary enforcement responsibility, but only to the extent of reviewing state records or reports concerning compliance with state pesticide use laws and enforcement procedures.

The reporting requirements which the 1978 Act allows the EPA to impose on the states should not be too burdensome if the EPA follows the same procedures already established for certification plans. For certification plans, the EPA feels that it is "necessary to have information concerning a broad range of enforcement activities," but has assured the states that requests for information "will be employed judiciously, and that requests . . . will be made with sufficient lead time." This limited exercise of review power should enable the EPA to monitor state compliance with enforcement responsibilities without substantially impinging on state exercise of that responsibility.

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the states to have much difficulty in obtaining approval for primary enforcement responsibility.


4 1978 Act, supra note 1, sec. 24, § 26(a)(3) (to be codified as 7 U.S.C. § 136w-1(a)(3)).

For the text of this section, see note 34 supra.

43 The legislative history indicates that originally the EPA was to have an even broader power of on site investigation of state enforcement. For example, Senator Leahy, a member of the Senate Committee on Agriculture, Nutrition and Forestry, stated during debate on the 1978 Act that the EPA "will . . . have ample opportunity to monitor the performance of the States in the area of pesticide use enforcement, including opportunity to conduct its own inspections for verification that the State program fulfills the objective of the Federal law." 123 Cong. Rec. S13,096 (daily ed. July 29, 1977).

However, after this statement, the narrower language in § 26(a)(3) was incorporated into the 1978 Act. This change seemingly rejects Senator Leahy's idea that the EPA could send its own investigators into a state to monitor that state's performance. The narrow language is also in line with congressional "faith" in the adequacy of state enforcement programs, see, e.g., id. (remarks of Sen. Allen), and with congressional desire to eliminate duplication of effort, see, e.g., 124 Cong. Rec. S15,304 (daily ed. Sept. 18, 1978) (remarks of Sen. Leahy).

44 For the record and report requirements imposed on states under certification plans, see 40 C.F.R. § 171.7(d) (1978).


44 Id.
Section 27: Residual Enforcement Powers of the EPA

Failure of the State to Take Adequate Action on a Referred Complaint

Under section 27(a), the EPA must refer “any complaint or other information alleging or indicating a significant violation of the pesticide use provisions of [FIFRA]” to a state having primary enforcement responsibility. The 1978 Act does not define “significant violation,” but its legislative history is, again, helpful.

This provision, as originally proposed in the House, required the EPA to refer to the state “any complaint alleging a violation.” The language was subsequently narrowed during conference committee consideration of the 1978 Act by insertion of the word “significant” to modify “violation,” indicating that Congress intended the EPA to winnow out reports of trivial violations. Furthermore, the primary enforcement responsibility of the states would be negated if the EPA could compel the states to investigate any complaint, for such a course would severely restrict a state’s prosecutorial discretion, a normal attribute of enforcement responsibility.

The EPA may intervene and act on a complaint referred to a state under section 27(a) whenever a state has not “commenced appropriate enforcement action” within thirty days of referral. What constitutes “appropriate enforcement action” is not yet clear. How-
ever, it would seem that the EPA could require no more than that the state follow its normal procedure for acting on that type of use violation.

Failure or Inability of the State to Carry Out Adequate Enforcement

Under section 27(b), the EPA has authority to rescind all or part of a state’s primary enforcement responsibility if it determines that the state will not, or cannot, discharge that responsibility. Neither the 1978 Act nor Congress has elaborated on what would constitute an inadequate performance of responsibility. Before the EPA can rescind state enforcement responsibility, section 27(b) requires that it notify the state of its program’s inadequacies, and then afford the state ninety days to correct them; if the inadequacies go uncorrected, rescission may follow. The EPA will soon propose regulations which will “outline procedures for rescinding primary use enforcement responsibility.” The proposed regulations will probably include hearing provisions, since current regulations governing certification plans provide for a hearing at the request of the state.

Following rescission, it is unclear what a state must show in order to regain primary enforcement responsibility. Because Congress intends that states should exercise enforcement responsibility whenever possible, a state seemingly would have to evidence clearly either a chronic inability to carry out its responsibilities or bad faith before the EPA could demand special assurances or impose more rigorous enforcement program standards.

Section 27(b) states:

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.

Supra note 1, sec. 24, § 27(b) (to be codified as 7 U.S.C. § 136w-2(b)).


For the text of § 27(b), see note 56 supra.


If exercised discreetly, the EPA's power to rescind only part of a state's enforcement responsibility could benefit both the EPA and the state. Since it would allow the EPA to take over only the deficient portion of a state program, this power would reduce federal cost for interim enforcement and would provide the state time to correct the deficiency while leaving the rest of its regulatory program intact.

Emergency Enforcement Powers of the EPA

Under section 27(c),62 the EPA may also exercise residual enforcement powers when it determines that "emergency conditions exist that require immediate action on the part of the [EPA] and the State authority is unwilling or unable adequately to respond to the emergency."83

The language of the Senate provision on emergency enforcement authority originally gave the EPA broader powers: "Nothing herein shall limit the authority of the [EPA] to enforce this Act, where [it] determines that conditions exist which require action by the [EPA]."84 The language that the House adopted was more limiting, as it provided that the EPA must determine that emergency conditions exist which require immediate action.85 It was this narrower House provision, along with a further limitation that "the State authority [must be] unwilling or unable adequately to respond to the emergency," that was finally incorporated into FIFRA by the 1978 Act.86 The latter provision also limits the EPA by forcing the agency to evaluate the adequacy of the state's response or ability to respond before any EPA action may be taken.

The EPA's residual emergency power has been further limited by a narrow interpretation of "emergency." The House Committee on Agriculture, in presenting its version of the 1978 Act, reported that "emergency" applied to situations where the EPA felt that "an

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62 Section 27(c) states:
Neither section 26 of this Act nor this section shall limit the authority of the Administrator to enforce this Act, where the Administrator determines that emergency conditions exist that require immediate action on the part of the Administrator and the State authority is unwilling or unable adequately to respond to the emergency.

1978 Act, supra note 1, sec. 24, § 27(c) (to be codified as 7 U.S.C. § 136w-2(c)).

63 Id.


immediate intervention is required for public health purposes.”

This choice of the “public health” terminology should rule out EPA intervention in emergencies which threaten the “environment” without posing a direct threat to public health.

Policy Considerations Behind the Grant of Primary Enforcement Responsibility to the States

- Behind the specific language and legislative history of sections 26 and 27, stands a clear congressional preference for state enforcement programs. This attitude seems to stem from congressional concern that EPA enforcement activity prior to the 1978 Act did not respond to congressional intent or local needs. Additionally, Congress expressed concern that the EPA’s expenditure of funds and energy on enforcement was a misuse of resources, since state enforcement was adequate and the EPA had fallen far behind in many of its other responsibilities. The congressional response to these concerns, as captured in the legislative history, clearly indicates that Congress intended the EPA to exercise only a minimal role in pesticide use enforcement.

During consideration of the 1978 Act, Congress indicated that the

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48 The apparent limitation of emergencies to “public health” threats under § 27(c) leaves a gap in the EPA’s residual enforcement powers since neither § 27(a) nor § 27(b) enables the EPA to respond quickly to an emergency threatening the environment. Previous debate on the definition of “emergency conditions” suggests that the congressional choice of language in the 1978 Act was intentional. At issue in the 1975 debate was the type of emergency conditions which would allow the EPA to waive its duty to notify the Secretary of Agriculture about proposed pesticide control actions. The House had limited the conditions to those of “imminent hazard to human health.” 121 Cong. Rec. 31595, 32514 (1975). The Senate, however, extended the definition to situations where imminent hazards exist to endangered species of wild life, rare ecosystems, or important fish or game resources. Id. at 36115-16. But this Senate language was subsequently found to be “much too broad” by the House conferees, who adopted the House language instead. Id. at 37442.


EPA’s narrow reading of certain pesticide use provisions in FIFRA failed to respond to the congressional intent underlying those measures. In one case, the EPA was interpreting “use inconsistent with the label”72 to include any deviation from the label instructions. Congress criticized this interpretation as working too severe a hardship on pesticide users,73 and as not exhibiting a common-sense approach.74 The states were not similarly criticized; in fact, several state enforcement officials joined in the criticism of the EPA.75 To clarify the issue, the 1978 Act amended the definitions of “use inconsistent with the label” to permit certain deviations.76 Related to the concern that the EPA was interpreting pesticide use provisions too stringently was a congressional concern that the EPA was not cognizant of local needs. Representative Fithian, during the House debate on the 1978 Act, noted with approval that now “[l]ocal farmers, farm organizations, and community and business leaders will be able to work directly with the State and local pesticide enforcement officers, thus assuring the establishment of adequate efficacy procedures and enforcement regulations.”77 Representative Wampler similarly stated, “I favor getting as much authority as we reasonably can to those local government entities . . . that are closest to the problems.”78 These statements imply that the EPA is inherently less able than the states to meet local needs.

The tenor of the legislative history indicates that the strongest influence behind congressional preference for state enforcement programs was a desire to impart greater efficiency into the regulatory

72 The provision of FIFRA which makes it unlawful for any person to “use any registered pesticide in a manner inconsistent with its labeling,” 7 U.S.C. § 136j(a)(2)(G) (1976), is an important means of regulating pesticide use since federal regulations require the pesticide label to detail explicitly any limitations on the use of the pesticide. 40 C.F.R. § 162.10 (1978). This allows the enforcement agency to avoid the difficult task of demonstrating that a pesticide was used in an unlawful manner. However, the limitation of uses to those described on the label has also created a problem by reducing the flexibility of pesticide use.

73 Senator Leahy commented during debate on S. 1678 that under current EPA standards “[u]ses that do not comply with the label are determined to be illegal,” and “this stricter interpretation has caused a significant hardship to many applicators and users of pesticides. . . . In response to this problem the committee has adopted four changes in the definition of ‘use inconsistent with the label.’” 123 Cong. Rec. S13,091 (daily ed. July 29, 1977).

74 The EPA’s failure to take a common-sense approach was recognized as early as 1975. H.R. Rep. No. 497, 94th Cong., 1st Sess. 30 (1975).


process. The prevailing sentiment during the congressional debate of the 1978 Act was that state enforcement of pesticide use was generally adequate, if not better than EPA enforcement and, therefore, the EPA efforts were unnecessary duplication. Representative Wampler stated that “State agencies have proved to be quite effective in dealing with matters relating to pesticides and other chemicals. In many circumstances, States have taken initiatives that the EPA could well emulate.” Senator Allen pointed out that “[t]he majority of States today already have adopted [plans for the use of pesticides by certified applicators] . . . . In many cases these plans provide for more restrictive regulation of pesticide use than required by the Federal standards established under FIFRA.”

Regarding the duplication of enforcement efforts, Senator Allen explained that giving the states primary enforcement responsibility “would allow the States to carry out their approved plans on the one hand and leave EPA to carry out its own responsibilities under FIFRA with respect to those matters more appropriately left to central Federal administrations.” The report of the House Committee on Agriculture makes it particularly clear that one of its purposes was to eliminate such duplication of effort.

The Prospective Effect of Sections 26 and 27

It might be argued that placing major reliance on the states for enforcement of pesticide use violations would dilute the FIFRA enforcement standards. Such a conclusion is plausible only if the states are assumed to be less concerned with environmental protection, or more susceptible to agriculture or pesticide industry lobbying for relaxed enforcement standards, than the EPA.

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79 For example, in explaining the conference committee report on S. 1678, Senator Talmadge said, “the committee's primary concern . . . was to find a way to make FIFRA work effectively.” Id. at S15,306-07 (daily ed. Sept. 18, 1978).


82 Id.


84 For example, Butler argues that states provide less uniform and environmentally conscious pesticide regulation. Butler, Federal Pesticide Law, in FEDERAL ENVIRONMENTAL LAW 1245, 1272-73 (E. Dolgin & T. Guilbert eds. 1974).

85 It has even been argued that state agencies may lessen the level of regulation out of fear
That conclusion, however, seems unwarranted. Even conceding for the sake of argument that state bias will obtain in some instances, it is difficult to visualize how giving the states primary enforcement responsibility might significantly diminish current standards of pesticide use enforcement. First, the greater efficiency of state enforcement should counterbalance the specter of state bias. Second, sections 26 and 27 establish sufficient mechanisms for insulating current enforcement standards from state bias. Section 26 limits the grant of primary enforcement responsibility to states matching the current standards of the cooperative agreements. Sections 26 and 27 also preserve the integrity of those standards by allowing the EPA to review state enforcement activity and to preempt state authority when necessary to insure adequate enforcement. Finally, section 27 provides for EPA enforcement of those use violations that a state cannot, or will not, enforce.

Accordingly, sections 26 and 27 are designed to facilitate enforcement as originally intended under FIFRA rather than to lower enforcement standards. Any other interpretation of sections 26 and 27 would frustrate Congress' policy of granting primary enforcement responsibility to the states.

CONCLUSION

The 1978 Act expressly gives primary enforcement responsibility for pesticide use violations to states meeting certain standards. This allocation reflects a clear congressional preference, in this area of pesticide regulation, for granting enforcement responsibility to the states, and not the EPA. Congress provides the EPA with means for ensuring that the state programs are adequate. It also gives the EPA some residual enforcement power, although the 1978 Act and its legislative history indicate that this remaining EPA authority is intended to be narrow in scope, and is to interfere with state enforce-


66 One commentator felt that "the prognosis for effective enforcement on the state level is more encouraging [than that at the federal level], as state officials may be expected to be more cognizant of local pesticide use, personnel and potentially dangerous conditions." Comment, The Federal Environmental Control Act of 1972: A Compromise Approach, 3 Ecology L.Q. 303 n.137 (1973).

67 For a discussion of the congressional concern for efficiency, see notes 82-83 & accompanying text supra.

68 See notes 37-45 & accompanying text supra.

69 See notes 47-50, 61 & accompanying text supra.

70 See notes 54-59, 65-68 & accompanying text supra.
ment programs only to ensure the continuance of adequate enforce-
ment. Under FIFRA, as amended by the 1978 Act, most states will
be granted essentially exclusive responsibility for enforcing pesti-
cide use violations, without sacrifice of the current enforcement
standards.

RICHARD B. SCHOENBOHM