

* * * is corrected to read * * *

Education Amendments of 1980 (Pub. L. 96-374), 94 Stat. 1383 * * *.

2. On page 85431, column three, in § 778.7(a)(1)(ii), the line " * * * expended in Federal and/or other" is corrected to read " * * * expended in Federal or other * * *".

3. On page 85433, column one, in § 778.8(a) the phrase, "evaluation criteria in § 778.6" is corrected to read "selection criteria in § 778.7".

4. On page 85433, column one, in § 778.8(b) the phrase, "The Secretary will pilot" is corrected to read "The Secretary will plot".

Dated: April 29, 1981.

T. H. Bell,

Secretary of Education.

[FR Doc. 81-14178 Filed 5-8-81; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 173

[EN-FRL 1750-5]

Procedures Governing the Rescission of State Primary Enforcement Responsibility for Pesticide Use Violations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Sections 26 and 27 of the Federal Insecticide, Fungicide, and Rodenticide Act authorize EPA to grant to a qualifying State the primary enforcement responsibility for pesticide use violations, and to rescind such responsibility if the State's pesticide enforcement program is inadequate. This rule sets forth procedures designed to ensure that rescission proceedings are conducted in an orderly and uniform manner.

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 (EN-342), Pesticides and Toxic Substances Enforcement Division, U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, (202) 755-0970.

SUPPLEMENTARY INFORMATION:

Background

The 1978 Amendments to the Federal Insecticide, Fungicide and Rodenticide

Act (FIFRA) require States to be accorded the primary responsibility for the enforcement of pesticide use violations within the State in certain situations. States can obtain primacy if they enter into a cooperative agreement with the Environmental Protection Agency (EPA) under section 23 of FIFRA or if their use enforcement programs are found by the Administrator of EPA to be adequate under section 26(a).

Section 27(b) of FIFRA authorizes EPA to rescind a State's primacy if the Administrator determines that the State is not adequately discharging its use enforcement responsibilities. Under section 27(b), whenever the Administrator makes such a determination he must send a notice to the State specifying the deficiencies in the State's use enforcement program. If after ninety days from receipt of a notice by a State the Administrator finds that the State has not corrected the deficiencies set forth in the notice, the Administrator may rescind, in whole or in part, the State's primary enforcement responsibility for pesticide use violations.

On October 3, 1980 these procedures were proposed in the Federal Register (45 FR 65633) and comments were requested by December 2, 1980. After consideration of the comments received, EPA has decided not to change section 173. The significant comments are discussed below.

Comments Received

Five comments were submitted in response to the proposal of the rescission procedures. Environmental groups submitted two of the comments and a pesticide company, a State Department of Agriculture and a pesticide trade association each submitted one. None of the comments received suggested any substantive changes in the regulation as proposed. Several of the commentors urged EPA to adopt the proposed procedures and use them where appropriate. One commentor suggested that informal procedures should be available to resolve disputes about the adequacy of a State's pesticide use enforcement program. Section 173.4 of the regulation as proposed set forth an informal mechanism for resolving such disputes. The remaining comments were insubstantial or irrelevant.

Initiation of Rescission Proceedings

The rule promulgated today provides the procedures by which EPA intends to effectuate rescission where appropriate. A rescission proceeding is initiated by the issuance of a notice of intent to rescind. Before such a formal step is

taken, however, the Administrator, as a matter of policy, will confer with the State and attempt to resolve the matter through informal negotiations.

The Administrator will issue a notice of intent to rescind if he determines, on the basis of information gathered by the Agency or submitted to EPA by other reliable sources, and after consultation with the appropriate Regional Administrator, that the State is not carrying out, or cannot carry out due to the lack of adequate legal authority, its use enforcement responsibility. (Further discussion of the criteria for making this determination will be contained in an interpretive rule which will soon be proposed for comment). The notice of intent to rescind will list the deficiencies that the Administrator has found in the State program. The notice will also detail the basis for each of the findings.

State Response to Notice of Intent To Rescind

States can respond to the receipt of a notice of intent to rescind in one of several ways. First, a State can correct the deficiencies specified in the notice. Second, the State can present evidence to the Administrator at an informal conference which shows that the determinations made in the notice are unfounded. Third, the State and EPA can agree that the State will take the steps necessary to remedy the deficiencies in the State program according to an agreed upon time schedule. This agreement would then be embodied in a written and signed document. Finally, the State, within 60 days of the issuance of the notice, could request a public hearing on the Administrator's determination to rescind its primary enforcement responsibility for pesticide use violations.

If the State corrects the deficiencies in its program, agrees to do so in a written settlement agreement, or convinces the Administrator that the findings made in the notice are not supported by the facts, the Administrator will issue an order withdrawing the notice of intent to rescind and terminating the proceeding. If sixty days elapse from the date of notice of intent was served upon the State without the Administrator issuing such an order, the notice of intent to rescind will be published in the Federal Register. The public may submit comments on the matters discussed in the notice of intent to rescind.

Hearings

Upon request of the State within sixty (60) days of the issuance of the notice of intent to rescind, a hearing will be

scheduled and the date for the hearing will be published along with the notice of intent to rescind. Parties, for purposes of proceedings have been defined in the definitions sections as the State and the Agency's Office of Enforcement. However, at the hearing, representatives from the State, EPA, and the public will be able to present evidence relating to the adequacy of the State's pesticide use enforcement program. A presiding officer will preside over the hearing and upon its termination will make a recommended decision on the adequacy of the State's pesticide use enforcement program. The Presiding Officer has the option to recommend that the Administrator (1) find that the State has corrected, or agreed to correct, the deficiencies in its program, (2) find that the State has shown that the determinations made in the notice of intent to rescind were unfounded, or (3) rescind the State's primary enforcement responsibility for pesticide use violations in whole or in part.

Agency Decision

The recommended decision of the Presiding Officer will become final 45 days after it is issued unless either of the parties appeal the initial decision to the Administrator or unless the Administrator elects to review the decision on his own initiative (*sua sponte*). After an appeal or *sua sponte* review, the Administrator will issue a final order which adopts, modifies, or sets aside the recommendations made in the Presiding Officer's decision.

The Agency believes that the procedures promulgated today will encourage States and EPA to cooperate in resolving any problems in a State's use enforcement program.

Effective Date.

On December 17, 1980, President Carter signed the Federal Insecticide, Fungicide and Rodenticide Act Extension Bill (Pub. L. 96-539). This bill amended several sections of FIFRA, including section 25 on rulemaking. Section 4 of the Extension Act adds a new paragraph to FIFRA, section 25(e), which requires EPA to submit final regulations to Congress for review before the regulation becomes effective. In accordance with this requirement, copies of this rule have been transmitted to the appropriate offices in both Houses of Congress. The rule will not take effect before the end of 60 calendar days of continuous session of Congress after the date of its publication in the Federal Register. Because the 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. EPA will publish a notice in the Federal Register announcing the end of this "report and wait" period to notify 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 only affects States, which are not small entities under the Regulatory Flexibility Act, 5 U.S.C. sec. 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 because it is entirely procedural in nature, and thus:

- (1) Does not have an annual effect on the economy of \$100 million or more;
- (2) Will not increase costs to consumers, industry, or government; and
- (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.

Accordingly, under the authority of sections 25(a) and 27(b) of the Federal insecticide, Fungicide, and Rodenticide Act, the new Part 173 set forth below is hereby added to 40 CFR.

Dated: April 8, 1981.

Walter C. Barber,
Acting Administrator.

PART 173—PROCEDURES GOVERNING THE RESCISSION OF STATE PRIMARY ENFORCEMENT RESPONSIBILITY FOR PESTICIDE USE VIOLATIONS

Sec.

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Authority: Secs. 25(a) and 27(b) of the Federal Insecticide, Fungicide, and Rodenticide Act, [7 U.S.C. 136w and 136w-2].

§ 173.1 Applicability.

These procedures govern any proceeding to rescind a State's primary enforcement responsibility for pesticide use violations conducted under section

27(b) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. 136 *et seq.*

§ 173.2 Definitions.

For purposes of this part:

(a) "Administrator" means the Administrator of the United States Environmental Protection Agency or his delegate.

(b) "Notice of intent to rescind" means a notice to a State issued under § 173.3 which initiates a proceeding to rescind the State's primary enforcement responsibility for pesticide use violations.

(c) "State" means the agency or agencies primarily responsible for enforcing pesticide use laws or regulations within the State or jurisdiction undergoing rescission proceedings.

(d) "Party to the proceeding" shall mean the State or the Agency's Office of Enforcement.

(e) "Presiding Officer" means an attorney appointed by the Administrator to conduct the rescission proceeding. The Presiding Officer shall be an employee or representative of the Agency and shall not have had prior direct connection with the specific proceeding except in circumstances where subsequent hearings are in order.

§ 173.3 Initiation of rescission proceedings.

(a) Whenever the Administrator determines that a State having primary enforcement responsibility for pesticide use violations is not carrying out such responsibility, or cannot carry out such responsibility due to the lack of adequate legal authority, the Administrator shall notify the State in writing of his intent to rescind its primary enforcement responsibility, in whole or in part, by serving upon the State a notice of intent to rescind.

(b) The notice of intent to rescind shall:

(1) Specify those aspects of the State's pesticide use enforcement program determined to be inadequate;

(2) Specify the facts which underlie the findings contained in the rescission notice;

(3) Have attached thereto copies of any relevant documents discoverable under the Federal Rules of Civil Procedure and the Freedom of Information Act which contain data relied upon by the Administrator in making his decision to issue the notice;

(4) Have attached thereto a copy of this Part; and

(5) Be sent to the State by certified mail, return receipt requested.

(c) The State may respond in writing to the findings specified in the notice of intent to rescind.

§ 173.4 Informal conference and settlement.

(a) After receipt of a notice of intent to rescind, the State may request that an informal conference be held between appropriate State and EPA officials to discuss the findings made in the notice of intent to rescind. The informal conference shall then be held in the State. If the Administrator finds, on the basis of information submitted by the State at the conference, that the deficiencies specified in the notice did not exist or were corrected by the State, the Administrator shall issue an order withdrawing the notice of intent to rescind and terminating the rescission proceeding.

(b) At any time after receipt of a notice of intent to rescind and before the issuance of a final order, the State and EPA may resolve the issues raised in the notice by agreement. Any settlement agreement shall be in writing and signed by the parties and shall:

(1) Detail the deficiencies found in the State program;

(2) Specify the steps the State has taken or will take to remedy the deficiencies; and

(3) Set forth a precise schedule for each remedial action yet to be initiated.

(c) If a written agreement is signed by the parties, the Administrator shall issue an order withdrawing the notice of intent to rescind and terminating the rescission proceeding. If the State does not comply with the terms of the settlement agreement, the Administrator may reissue the notice of intent to rescind.

§ 173.5 Request for hearing.

A State may request a hearing before a Presiding Officer not later than sixty (60) days after receipt of a notice of intent to rescind.

§ 173.6 Publication of the notice; scheduling the hearing.

(a) If the Administrator has not issued an order terminating the rescission proceeding within sixty (60) days after service of the notice of intent to rescind upon the State, the Administrator shall publish the notice of intent to rescind in the Federal Register. The Administrator may modify the original notice of intent to rescind before its publication by deleting those deficiencies listed in the original notice which have been corrected or which were shown not to have existed. The public may submit

comments upon the matters specified in the published notice of intent to rescind within the time specified therein.

(b) Concurrently with the publication of the notice of intent to rescind, the Administrator shall schedule a hearing in the State if one has been requested by the State. The date, time, and location of the hearing shall be published in the Federal Register along with the notice of intent to rescind.

(c) If a hearing is requested and the Administrator has not issued an order terminating the rescission proceeding, the Administrator shall provide for a hearing as scheduled. Representatives of the State, EPA, and the public may present evidence at the hearing. The Administrator shall appoint a Presiding Officer who shall preside over the hearing and make a recommended decision regarding the adequacy of the State's pesticide use enforcement program. The Administrator, after consultation with the State, may prescribe additional procedures governing the conduct of the hearing.

(d) If a termination order is issued or the hearing is rescheduled after the notice of intent to rescind is published in the Federal Register, such order or notice rescheduling the hearing shall also be published in the Federal Register.

§ 173.7 Hearing and recommended decision.

(a) The Presiding Officer shall:

(1) Conduct a fair and impartial hearing, without unnecessary delay;

(2) Ensure that the facts are fully elicited; and

(3) Consider all evidence, comment, and argument which is submitted by persons who will be affected by the outcome of the proceeding and which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. The Presiding Officer may require any prospective witness to make available, in advance of the hearing, a brief summary of his or her testimony.

(b) If, following the close of the hearing, the Presiding Officer finds that the State has corrected, or has agreed in writing to correct, the deficiencies specified in the notice of intent to rescind or has shown that such deficiencies do not exist, the Presiding Officer shall issue a decision recommending that the notice of intent to rescind be withdrawn and that the rescission proceeding be terminated.

(c) If, following the close of the hearing, the Presiding Officer finds that the State has not corrected the deficiencies in its program, the Presiding

Officer shall issue a decision recommending that the State's primary enforcement responsibility for pesticide use violations be rescinded in whole or in part.

(d) The recommended decision of the Presiding Officer shall become final Agency action forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Administrator is taken from it by a party to the proceeding, or (2) the Administrator elects, sua sponte, to review the recommended decision.

§ 173.8 Final order.

(a) If the State does not request a hearing within the sixty-day time period and the Administrator has not issued an order withdrawing the notice of intent to rescind, the Administrator shall issue a final order as soon as practicable after the time for public comment on the notice of intent to rescind has elapsed. The final order shall either withdraw the notice of intent to rescind and terminate the proceeding or rescind, in whole or in part, the State's primary enforcement responsibility for pesticide use violations.

(b) If a hearing has been held and the Presiding Officer has made a recommended decision, then either the Office of Enforcement or the State may appeal the recommended decision to the Administrator or the Administrator may elect to review the recommended decision on his own initiative.

(c) After an appeal or sua sponte review the Administrator shall issue a final order terminating the rescission proceeding or rescinding, in whole or in part, the State's primary enforcement responsibility for pesticide use violations.

(d) In no event may the Administrator issue his final decision sooner than ninety (90) days after service of the notice of intent to rescind on a State.

(e) Any final order, or a recommended decision which becomes a final order under § 173.7(c), shall be published in the Federal Register.

§ 173.9 Judicial review.

The State may appeal an order rescinding, in whole or in part, its primary enforcement responsibility for pesticide use violations to the appropriate federal court pursuant to section 16 of FIFRA.