UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

85 JUL 11 A 8: 48

In the Matter of	)	
	)	
B & M Chemicals, Inc.,	)	Docket No. IF&R VIII-133C
	)	
Respondent	)	

Federal Insecticide, Fungicide and Rodenticide Act. Where one corporation maintains a sales office in one city and a warehouse in another, both are dealerships within the meaning of 40 CFR 171.11(g)(2)(i).

Federal Insecticide, Fungicide and Rodenticide Act. A dealership is required to maintain records of sales of restricted use pesticides when the sale is concluded by making the pesticide available for use, i.e., delivery.

Federal Insecticide, Fungicide and Rodenticide Act. A sale of a restricted use pesticide without making the pesticide available for use is not a transaction requiring the maintaining of a record of the transaction.

Appearances:

Mr. C. B. Huddleston
President
B & M Chemicals, Inc.
P. O. Box 16052
Denver, CO 80216

Respondent

Jerry W. Goad, Esquire
Office of Regional Counsel
U. S. EPA, Region VIII
1860 Lincoln Street
Denver, CO 80295

Attorney for Complainant

ACCELERATED DECISION [1/]

This is a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act, as amended, (FIFRA), Section 14(a)(1), 7 U.S.C. 136 l(a)(1) for assessment of a civil penalty for alleged violations of the Act.[2/]

Complaint was issued by the Environmental Protection Agency (EPA--Complainant), Region VIII, against B & M Chemicals, Inc. on November 1, 1984, charging Respondent with failure to maintain proper and complete records of every transaction involving restricted use pesticides.

FIFRA Sections 12(a)(2)(N) and 4(a)(1), and CFR Section 171.11(g) require that every restricted use pesticide dealer record and maintain information concerning every transaction involving restricted use pesticides including: Name and address of each person to whom restricted use pesticides are made available; the certification number, expiration date of the certification and category of certification of every person to whom restricted use pesticides are made available; the EPA registration number of the restricted use pesticides made available; and the amount of restricted use pesticide made available.

1/ This Accelerated Decision constitutes an Initial Decision. 40 CFR 22.20(b).

2/ FIFRA, Section 14(a)(1) provides, as follows:

> Any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense.

Respondent maintains a sales office at 7476 W. 83rd Way, Arvada, Colorado and maintains a warehouse in Brighton, Colorado, almost one-hour traveling time from Arvada. The initial inspection was conducted on September 12, 1984, at the Brighton, Colorado warehouse. The inspector was permitted to examine and copy Respondent's sales records of restricted use pesticides. All of the records for these sales were not at the warehouse. The inspector was advised that complete records were maintained at the Arvada sales office. Respondent explained his operation, as follows:

> B & M Chemicals has a sales office, located at 7476 W. 83rd Way, Arvada, Co. All the sales orders originate here either by phone calls from our customers or by the person taking the order from the customer. The accounting office is located at 8030 Allison Place, Arvada, Co. Records here show credit standings and other information concering [sic] the customer including any special requirements such as is in question here. The warehouse is located at 570 Baseline Road, Brighton, Colorado, here the products are stored and made ready for delivery. We are not open at the Brighton warehouse for the public as is in most dealer operations. We deliver all our orders to our customers and none are released without clearing the Arvada office. The warehouse has no display, no signs etc to indicate or attract "walk in" customers. We have felt that it is far better for an "office person" to keep all the records rather than depend on warehouse and delivery people to keep these important records. The only time that any customers are allowed to pick-up at the warehous [sic] is by making an appointment so someone can be there and see that all requirements are taken care of. We have only one operation as explained here. I know of no better way of handling. 3/

At a reinspection at the Arvada sales office, Complainant found that Respondent does maintain a set of complete pesticide records. The question here presented is whether or not the regulations require that Respondent

3/ It should be noted that Respondent advised EPA by letter dated May 23, 1984, that B & M Chemicals is a dealer of restricted use pesticides, the business address being 570 Baseline Road, Brighton, Colorado 80601.

should have maintained a complete set of records at both Arvada and Brighton, the position of Complainant being that the regulations require this at each dealership, both addresses being "dealerships."

Complainant asserts the following points in support of this contention.

40 CFR Section 171.2(b)(3): The term "dealership" means any site owned or operated by a restricted use pesticide retail dealer where any restricted use pesticide is made available for use, or where the dealer offers to make available for use any such pesticide.

40 CFR Section 171.2(b)(1): The term "restricted use pesticide retail dealer" means any person who makes available for use any restricted use pesticide, or who offers to make available for use any such pesticides.

40 CFR Section 171(b)(2: The term "make available for use" means to distribute, sell, ship, deliver for shipment, or receive and (having so received) deliver, to any person. . .

In the instant case, the Respondent sells, ships, and/or delivers restricted use pesticides from its Brighton, Colorado warehouse. The Respondent therefore is making restricted use pesticides available for use from the warehouse, and since the warehouse is a "site" owned or operated by the Respondent, the warehouse is a "dealership."

In sum, Complainant asserts that Respondent's warehouse is a "dealership within the meaning of the regulations, and accordingly, the Respondent is required to maintain restricted use pesticide records at the warehouse (40 CFR Section 171.11 (g)(2)(i)).

The regulations contemplate the possibility of more than one "dealership" being owned or operated by a restricted use pesticide dealer. In order to quickly verify and document the movement, sale, use and disposal of restricted use pesticides, the regulations require such records to be kept at each individual dealership; there is no allowance for a central location of records as the Respondent is utilizing.

Complainant continues: At first blush this may seem burdensome, but in light of the fact that the history of pesticide regulation is long and pervasive, and since we are dealing with pesticides whose chemical nature is sufficiently hazardous to warrant the distinction of "restricted use pesticide," the regulations are reasonably related to a legitimate government interest. It should also be pointed out that the Respondent does maintain some restricted use pesticides records in the form of a sales log at its warehouse. However, the log does not contain all the required information and therefore the records are incomplete.

Findings Of Fact

1. Respondent is a corporation doing business at two locations in the State of Colorado, at Arvada and also Brighton.

2. Respondent is a person as defined in Section 2(s) of FIFRA (7 U.S.C. Sec. 136(s)).

3. Respondent offers for sale and sells restricted use pesticides.

4. Respondent maintains a sales office in Arvada, Colorado and a warehouse in Brighton, Colorado.

5. The sales office does not maintain stock of restricted use pesticides for delivery after retail sale to customers.

6. The warehouse does maintain a stock of restricted use pesticides for delivery after retail sale to customers.

7. Records of all sales of restricted use pesticides were maintained at the sales office and some records were maintained at the warehouse.

8. The sales office does not make restricted use pesticides available for use and while it is a "dealership," it is not required that records be maintained unless and until restricted use pesticides are made available.

9. The warehouse does make restricted use pesticides available for use and is a dealership. 40 C.F.R. 171.11(g)(2)(i).

10. Respondent had knowledge of the recordkeeping requirements and maintained a complete set of records.

Discussion and Conclusion

The facts and question of law presented here are novel. There is no doubt that 40 CFR 171.11(g)(2)(i) is applicable. There is also no doubt that each individual dealership must maintain a record of each transaction as stated in the regulation above-cited. However, the novelty of this set

of facts is that one part of this corporation makes sales and another part makes the pesticide available for use. In effect, as Respondent contends, it is a single operation. It would be quite simple to conclude that since both the sales office and warehouse constitute only one operation, the records requirement in this proceeding was satisfied. However, a studied reading of the regulations and an analysis of the theory behind them forces us to reject this view.

The sales office is a retail dealer in pesticides and should it make pesticides available for use by retail delivery thereof, it would be required to keep a record of each transaction. Since no deliveries for use are made, no records are required.

The warehouse is a dealership making pesticides available for use and is subject to the requirement of recordkeeping. Since records were not maintained there, it is concluded that a violation is found to exist.

The penalty proposed is $4,200.00 and is based upon Category V, Respondent's gross sales exceeded $1,000,000.00 for the year. The Complaint states that this amount was proposed after taking into account the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violation. Respondent did not contest this amount.

It is concluded that since the makeup of Respondent's operation in Arvada and Brighton was susceptible to the contention of Respondent that it is one operation and the one complete set of records was sufficient and since a civil penalty is not meant to be punitive in nature, but rather to ensure future compliance, the civil penalty of $4,200.00 herein proposed is reduced to $500.00.

ORDER [4/]

Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act, Section 14(a)(1), 7 U.S.C. 136 l(a)(1), a civil penalty of $500.00 is assessed against B & M Chemicals, Inc. for violation of the Act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the Final Order upon Respondent by forwarding to the Regional Hearing Clerk, P. O. Box 360859M, Pittsburgh, PA 15251, a cashier's check or certified check payable to the Treasurer, United States of America.

Edward B. Finch
Chief Administrative Law Judge

Dated: July 11, 1985
Washington, D. C.

4/ Unless an appeal is taken pursuant to the rules of practice, 40 CFR 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. See 40 CFR 22.27(c).

CERTIFICATE OF SERVICE

I hereby certify that the original of this Accelerated Decision was hand-delivered to the Hearing Clerk, U. S. EPA, Headquarters, and three copies were mailed by certified mail, return receipt requested, to the Regional Hearing Clerk, U. S. EPA, Region VIII, for distribution pursuant to 40 CFR 22.27(a).

Leanne B. Boisvert
Leanne B. Boisvert
Legal Staff Assistant

Dated: July 11, 1985