

Department : Agriculture

STATE OF MINNESOTA
Office Memorandum

Date : May 3, 1995

To : Maryanne Hruby, Director
LCRAR

From : Carol Milligan 
Agriculture Planning Division

Phone : 296-6906

Subject : **Submittal of Statement of Need and Reasonableness**

As required by Minnesota Statutes, sections 14.131 and 14.23, attached is the Statement of Need and Reasonableness for rules governing restricted use pesticides. The Notice of Intent to Adopt Rules and the rules will be published in the *State Register* on 5/22/95.

Please call me if you have any questions.

Attachment

In The Matter of The Proposed Amendments
To Rules Of the Department of Agriculture
Governing Private Applicator
(*Minnesota Statutes* part 1505.0980)
and Restricted Use Pesticides Display for Sale
(*Minnesota Rules* part 1505.1100)

STATEMENT OF NEED
AND REASONABLENESS

General Statement

During the spring and summer of calendar year 1994, the department began checking calendar year 1993 restricted use pesticide (RUP) sales records required to be submitted to the Minnesota Department of Agriculture by pesticide dealer's (PD's) licensed under *Minnesota Statutes*, section 18B.31.

The definition of an RUP is contained in *Minnesota Statutes*, section 18B.01., Subdivision 24. Pesticides are designated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) 1988, section 3(d)(1)(C)(i) & (ii) as RUP's either because the acute, dermal, or inhalation toxicity of the pesticide presents a hazard to the applicator or other persons; or because its use, without additional regulatory restriction may cause unreasonable adverse effects on the environment.

RUP sales records are required to be submitted annually by PD's, by *Minnesota Statutes*, section 18B.37, Subdivision 1.

In its review of the 1993 RUP sales records, the department discovered that in excess of 50% of the PD's had made from as little as 1 to as many as 98 RUP sales to persons who were not certified as required by *Minnesota Statutes*, section 18B.36.

The department regards both the sale of RUP's and number of RUP's sold to persons who are not certified as a serious public health and environmental concern if the actual applicator of the RUP's is not certified.

In examining the RUP sales to persons who were not certified, the department determined that a) sales were made to persons whose certification had expired, who did not indicate that the application of restricted use pesticides would be done by a certified person, b) sales were made to uncertified persons, for application by certified persons, and c) sales were indicated as being made to persons who were not certified; but where the PD commercially applied the RUP.

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Currently *Minnesota Statutes*, section 18B.31 allows a PD to sell RUP's only to an applicator certified by the commissioner unless a sale is allowed by rule. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)(1988), section 12(a)(2)(F), does not allow a person to sell or make available for use a RUP to any person who is not properly certified, except that a RUP may be sold to a person who is not certified for application by a certified applicator. The *Code of Federal Regulations* [(CFR), 40 CFR 171.11 (g)(2)(ii)(G)] specifies requirements for the sale of a RUP to non-certified persons for application by certified persons. Finally, *Minnesota Statutes*, section 198B.36 does not allow a private applicator to purchase a RUP without presenting a private applicator card or the card number.

The intent of both state and federal law is to strictly control the distribution of RUP's so that they are only available to those persons who have demonstrated a continuing level of competency and ability to use RUP's properly and safely.

In evaluating the options available to the department to correct the problems it has discovered, in reviewing both its authority and the effectiveness of regulatory tools available to the department under state and federal law, and after consultation with the US Environmental Protection Agency (EPA), Region V, the department concluded that the best course of action to take would be to amend its existing rules for the sale and purchase of RUP's.

To that end the department published a Notice of Solicitation of Outside Information or Opinions Regarding Proposed Amendments to Rules Governing Private Applicator (*Minnesota rules* part 1505.0980) and Restricted Use Pesticides Display for Sale (*Minnesota Rules*, part 1505.1100). In the notice the department stated that it intended to form an advisory task force.

The department received four requests from persons to participate, and solicited two other persons to complete the formation of the Restricted Use Pesticide Sales and Purchase Advisory Task Force (ATF) October 28, 1994. In addition, the department was contacted by three interested persons who wished to be kept informed of the ATF's activities.

The ATF included two persons representing the department's agricultural chemical investigator field staff, two persons representing the agricultural chemical distribution and commercial application industry, two persons representing the University of Minnesota Extension Agricultural Education Service, and two persons representing farm groups. Almost all persons included as part of the ATF were able to attend the ATF meetings, with the only exception being the representatives of the farm groups who were only able to attend one meeting.

In its meetings, the ATF discussed the rule process; current state and federal statutes and rules; the current status of the sale, purchase, and delivery of RUP's; what types of regulatory controls may be necessary to govern the sale, purchase, and delivery of RUP's; the status of the sale, purchase, and delivery of RUP's in surrounding states; the issue of "what is a sale"; and potential problems with the expiration date for private applicator certification.

The intent of the department's amendments is to more strictly control the sale, purchase, and delivery of RUP's and to make legal certain activities which the department knows are occurring, and which the department believes do not have the potential to have a negative effect on human health or the environment.

The department believes amending its existing rules is the most reasonable course of action to take, because to not amend its rules would result in hundreds of private applicators, and pesticide dealers violating current state and federal law, by following practices which have become part of standard business practice in modern agriculture.

Statutory Authority

The adoption of these amendments is authorized by *Minnesota Statutes*, section 18B.06, which requires the department to adopt rules to implement and enforce *Minnesota Statutes*, chapter 18B.

Small Business Considerations

Minnesota Statutes, section 14.115, requires the Department of Agriculture to consider the effect on small business when it adopts rules. The proposed amendments will have a direct effect on small businesses engaged in the distribution and use of pesticides classified as "restricted use" by the US Environmental Protection Agency (EPA).

Specific methods for reducing the impact of the rules on small business have considered. The impact of the rules on small businesses has been reduced as follows:

a. Less stringent requirements. The department is requiring minimal distribution restrictions, certification verification, record keeping, and reporting requirements consistent with the type found in *Minnesota Statutes*, section 18B.31., 18B.36, and 18B.37, and the *Code of Federal Regulations*, [(CFR), 40 CFR 171.11 (g)(2)(ii)(G)]. The requirements contained in the proposed amendments are the minimum necessary to accomplish the department's goal of more strictly controlling the distribution of restricted use pesticides and for the department to determine compliance with the requirements being proposed.

b. Less stringent schedules. The department has chosen an effective date for the amendments that will allow small businesses a minimum of one year to train staff, inform clientele, and modify their existing sales and record keeping systems. Prior to the amendments being enforced, the department will conduct an information campaign by mail, and/or other means to inform both dealers and private applicators of the amendments.

c. Consolidation or simplification of requirements. See a.

d. Performance standards. Not applicable

e. Exemption. Due to requirements contained in *Minnesota Statutes*, section 18B.31, 18B.36, and 18B.37; the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)(1988), section 12; and *Code of Federal Regulations* [(CFR), 40 CFR 171.11 (g)(2)(ii)(G), the department is not able to exempt small businesses from the requirements contained in the amendments.

Fiscal Impact

Minnesota Statutes, section 14.11, subdivision 1, does not apply because adoption of these rules will not result in any spending by local public bodies.

Rule-By-Rule Analysis

1505.0980 PRIVATE APPLICATOR CERTIFICATION; PROHIBITIONS; RESTRICTIONS

Subpart 1 Certification requirements

The only changes to the certification requirements that have been made are insignificant grammatical/format changes to increase readability.

It is necessary to remove the language referencing following label requirements, because that language is redundant to that contained in and superseded by *Minnesota Statutes*, section 18B.07.

It is reasonable to eliminate the language requiring restricted use pesticide labels to be followed, because removing the language in no way relieves regulated clientele from complying with requirements of *Minnesota Statutes*, section 18B.07, which are more restrictive.

The language regarding requiring sales receipts to be signed has been deleted because the amendments being offered by the department in the new subparts provide for more strict control over the purchase of restricted use pesticides than was previously required. In addition Minn. Stat. 18B.36 contains language which supersedes the requirements of the original language.

Subpart 2. Prohibition on purchasing or making restricted use pesticides available to uncertified persons.

Paragraph One

It is necessary to prohibit a certified person or an uncertified person from purchasing or making a restricted use pesticide available to a person who is not licensed or certified in order to insure that restricted use pesticides will only be applied by those persons who have sufficient education, training, and experience. In the last two years the department has noticed a 30% decline in the number of private applicators certified in Minnesota. The department is concerned that there may be a large number of persons whose certification expired or have never become certified that may be applying restricted use pesticides.

It is reasonable to prohibit such activity to protect human health and the environment from the effects of misuse of restricted use pesticides.

Paragraph Two

It is necessary to define the act of purchasing, and when the act of purchasing has been consummated in order to not interfere with act of selling done by pesticide dealers. The amendments to *Minnesota Statutes* part 1505.1100. will allow restricted use pesticides to be sold to uncertified persons only if they are applied by a certified person.

It is reasonable to define the act of purchasing as stated, because this is the understanding that most persons have of the definition of purchasing. In addition, it is reasonable to state that a purchase has been consummated only when the restricted use pesticide is made available to a person because it allows a person to buy a restricted use pesticide, but does not allow that person, or the agent of that person to obtain the restricted use pesticide, unless a licensed or certified applicator has been identified to the pesticide dealer.

Subpart 3. Restrictions on taking possession of restricted use pesticides by uncertified persons

It is necessary to specify that there are restrictions on uncertified persons taking possession of restricted use pesticides in order to educate uncertified persons of the requirements they must comply with in order to take possession of a restricted use pesticide.

The requirements stated are reasonable, because they are the minimum necessary for the pesticide dealer to identify both the certified applicator, and the person who will make the restricted use pesticide available to the certified applicator.

**1505.1100 RESTRICTED USE PESTICIDE DISPLAY; SALES AND DISTRIBUTION;
AND RECORD KEEPING**

The originally titled 1505.1100, RESTRICTED USE PESTICIDES DISPLAY FOR SALE was retitled to more accurately reflect the amendments contained in this part.

Subpart 2. Sale and distribution to unlicensed or uncertified persons

It is necessary to allow the sale of restricted use pesticides to persons who will not apply a restricted use pesticide in order to take into account business, farm, and property management relationships that have become common place in modern agriculture.

These relationships include, but are not limited to, absentee landlord/lessor, landlord/lessor, property owner/farm manager-employee, and property owners/business partner-employee, and similar relationships. In the examples listed the lessor, farm manager, business partner, and employee generally are the persons who are certified and actually apply the RUP's.

It is also necessary to include the specific language referencing who a restricted use pesticide may be offered for sale or sold to, so as not to be in conflict with the provisions of *Minnesota Statutes*, section 18B.31, Subdivision 1.(c)., which prohibits the sale of RUP's to persons who are not licensed or certified, except as allowed by rule.

It is reasonable to allow the sale of RUP's to persons who are not certified or licensed to create greater efficiencies in the production of agricultural commodities, and which the department believes will not create an increased risk of injury to human health or the environment.

In addition the practice of allowing the sale of restricted use pesticides to uncertified persons is reasonable because this practice is allowed under FIFRA, Section 12. (a)(2)(F).

Subpart 3 Making restricted use pesticides available; Record keeping

A. It is necessary for the pesticide dealer to obtain certain information relating to making restricted use pesticides available in order to insure that the pesticide dealer does not make a restricted use pesticide available to any person for which there is no licensed or certified applicator identified.

The information contained in items (1) & (4) is necessary because it serves to determine a point in time for the pesticide dealer to both determine if the person to whom the restricted use pesticide will be made available has a valid unexpired license/certification and to properly identify what restricted use pesticide is being made available.

The information contained in items (2) & (3) is necessary because it provides the basis for determining the identity and license/certification status of the person attempting to gain possession of a restricted use pesticide.

It is reasonable to require the information in items (1) - (4) because much of that information is already being recorded by pesticide dealers for inventory, customer prospecting, and financial accounting reasons. The collection of such information is also consistent with that required to be kept by The *Code of Federal Regulations* [(CFR), 40 CFR 171.11 (g)(2)(ii)(G)], when RUP's are made available to unlicensed/uncertified persons.

B. It is necessary to record the information required in Subpart 3, A., (1) - (4) no later than the end of the business day in which a restricted use pesticide is made available in order to insure that restricted use pesticide distribution records are current and are able to be checked for compliance both by the pesticide dealer and the department.

In its review of restricted use pesticide distribution records for calendar year 1993 and 1994, the department discovered numerous instances of restricted use pesticides being made available to persons whose license/certification had expired, and/or who were never licensed or certified. The department believes that this problem occurred because the pesticide dealer delayed in both obtaining and recording the distribution information.

It is reasonable to require such information to be recorded by the end of each business day, because it is common practice in most business to record sales/revenue information by the end of each business day for accounting purposes.

It is necessary to allow information to be recorded both manually or on computer to allow pesticide dealers options for compliance.

It is necessary to require that manual records be kept on forms provided by the commissioner in order to insure consistency in record keeping from pesticide dealer to pesticide dealer.

It is reasonable to both options for record keeping because the use of both manual and computer records is common practice amongst pesticide dealers.

It is necessary to require that all information that is recorded by computer be complete in order to avoid situations that the department has documented where computer records do not contain all required information and restricted use pesticides have been made available to persons who have not been licensed or certified.

C. It is necessary for pesticide dealers to submit restricted use pesticide distribution records to the department, in order for the department to verify that a) records are being maintained, b) that restricted use pesticides are not being made available to persons who are not licensed or certified, and c) to comply with the departments statutory responsibility to collect and maintain statewide pesticide use records.

It is necessary to require that restricted use pesticide distribution records be submitted to the department by a particular date each year in order to insure that there is a timely submission of records by pesticide dealers. Previously there has been no requirement for date certain submission, and records have been submitted to the department over a 2-6 month period. The department believes that there is a greater likelihood that pesticide dealers will comply with the record submission date if the date is established in rule.

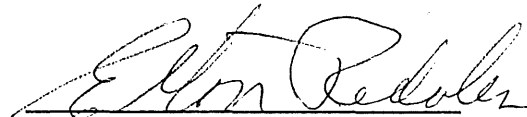
It is reasonable to require submission of records by a set date each year, in order to assist pesticide dealers in managing the submission of records at a point in the calendar year when submission of records will not interfere with normal business practice.

EFFECTIVE DATE.

It is necessary to specify a specific date for persons to comply with in order to allow adequate time for regulated persons to become aware of the change in regulations and for the department to conduct and information/education campaign.

December 1, 1995 is a reasonable effective date because it is supported by industry, and the change in regulation occurs at a time that is best for regulated clientele to comply before the spring busy season.

4-25-95
Date


Elton Redalen, Commissioner
Department of Agriculture