

## **COMPONENT THREE**

### **LEGAL AUTHORITY**

#### **3.1 INTRODUCTION**

States, through the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), may under their own authority develop and implement a pesticide management plan. However, working cooperatively with federal, state, and local government agencies will be essential to ensuring an effective State Management Plan (SMP). State Management Plan development and implementation will require regulatory authorities. It will also require voluntary and specially designed protection programs. These programs may include such elements as, local government involvement in land purchased to protect a wellhead or a county ordinance used to site a pesticide facility away from a sensitive ground water recharge area. This component deals specifically with the legal authorities needed to develop, implement, and enforce a SMP.

Legal authority comes from the 1947 FIFRA (7 U.S.C. §136 et seq.) as amended by the Federal Environmental Pesticide Control Act of October 1972 and the FIFRA amendments of 1975, 1978, 1980, and 1988. Together, they provide for the federal and state regulation of pesticides. The 1978 amendment has several sections giving the states greater responsibility in regulating pesticides. The State has the legal authority to control pesticides (regulate use, transportation, application, storage, etc.) under South Dakota Codified Law (SDCL) §38-20A, SDCL §38-21 and ARSD §12:56 and to protect ground water under SDCL §34A-2-103 and SDCL §38-21. The South Dakota SMP process will be a cooperative effort. The South Dakota Department of Agriculture (SDDA) and the Department of Environment and Natural Resources (DENR) have the majority of SMP responsibilities as the state agencies with statutory authority over pesticides and water resources, respectively.

#### **3.2 SOUTH DAKOTA DEPARTMENT OF AGRICULTURE**

The SDDA is required by law (SDCL §38-1-18) to promote, encourage and protect the interests of agriculture. It is SDDA's position that on major issues facing agriculture and the environment, sustainable agriculture, integrated pest management, crop rotation, conservation and other sustainable practices are to be looked at with a vision of the future and the need to protect South Dakota's resources.

##### **3.2.1 DIVISION OF AGRICULTURAL SERVICES**

###### A. Legal Authorities

The SDDA is the state lead agency and governor contact for the state to develop and implement the SMP. Through codified law, rule making authority, policy, Memorandums of Understanding (MOU), the State of South Dakota and U.S. Environmental Protection Agency Multi-year Agreement, and the Cooperative Enforcement Agreement of 1985, SDDA regulates the use, sale, transportation, handling, storage, registration and disposal of pesticides in South Dakota. Authority granted pursuant to SDCL §1- 26, §38-20A, and §38-21, authorizes SDDA to administer and carry out the legislative intent related to agency materials inspection, rule making authority, and the regulation and use of pesticides. Questions, comments and appeals relating to the SMP will be addressed through the normal regulatory channels built into policies, enforcement procedures, and hearing procedures. Appeals may also be made directly to the Secretary of Agriculture, for consideration.

**CODIFIED LAW; SOUTH DAKOTA DEPARTMENT OF AGRICULTURE**

**SDCL §1-26 ADMINISTRATIVE PROCEDURE AND RULES**

All rules, final orders, decisions, opinions, intra-agency agreements and memoranda shall be available for public inspection. Rules in general shall be published. All interested parties shall be afforded a reasonable opportunity to submit data, opinions, or arguments either in writing or orally, at a hearing held for that purpose. Agencies shall consider those submissions regarding the proposed rule. Any interested party may petition to delay the effective date of the rule with the agency that adopted the rule. Appeals may also be made directly to the Secretary of Agriculture.

**SDCL §38-20A PESTICIDES**

Section SDCL §38-20A provides SDDA with authority over the registration, pesticide fee structure, misbranding, inspection and sampling of pesticides.

***SDCL §38-20A-49 Opportunity To Present Views***

This section provides the respondent an opportunity to present his or her views before proceedings take place.

**SDCL §38-21 AGRICULTURAL PESTICIDE APPLICATION**

This statute provides SDDA with authority over disposal of unusable pesticides, recycling of pesticide containers, registration and cancellation of pesticides, use and restrictions on pesticides, storage and handling of pesticides, and formulation disclosure.

***SDCL §38-21-15 Pesticide Handling Causing Injury Or Pollution Prohibited***

This section prohibits handling (transport, store, use, dispose of, or handle) a pesticide in such a manner as to cause injury to humans or to pollute ground water or surface water. Provides for up to a \$5,000 penalty per violation.

***SDCL §38-21-16 Reporting Of Pesticide Accidents***

This section allows accident reporting requirements to be developed.

***SDCL §38-21-18, -20, -40 Standards Of Certification And License Requirements***

These sections allow for the certification and licensing of applicators. Private and commercial applicators must be certified for use of restricted use and general use pesticides.

***SDCL §38-21-39 Restricted-use Pesticide Classification***

This section provides SDDA the authority to determine state restricted-use pesticide classification. The SDDA may adopt rules to restrict the use of certain pesticides and may disallow the use of certain pesticides for the entire state or for certain designated areas within the state.

*SDCL §38-21-44 Suspension, Denial & Revocation Or Modification Of License Or Certification*

This section of the law allows the Secretary of SDDA to suspend, deny, and revoke or modify the license or certification of the applicant.

*SDCL §38-21-51 Administration And Enforcement*

This section allows the department to enforce the sections of SDCL §38-21. Regulation of pesticide transportation, storage and disposal, restricted use, restricted designated areas of pesticide use, pesticide record keeping, certification and licensing, and use of pesticides through the irrigation systems are included in this section.

*SDCL §38-21-52 Cooperation And Agreements*

The SDDA has the authority under SDCL §38-21 to enter into cooperative agreements with federal, state or local agencies for purposes of administering pesticide programs, including protecting ground water and surface water from pesticide contamination.

*SDCL §38-21-53 Entry And Inspection*

This section allows for the inspection and sample collection on any public or private lands (all land and water areas) actually or reportedly exposed to pesticides.

*SDCL §38-21-57 Pesticide Regulatory Fund*

This section allows the SDDA to collect funds (public and private sources including legislative appropriations, federal grants, gifts, and fees) to meet expenses and administer the pesticide program.

**ADMINISTRATIVE RULES; SOUTH DAKOTA DEPARTMENT OF AGRICULTURE**

**Chapter 12:56 *PESTICIDES***

**Chapter 12:56:02 *Storage And Disposal***

This section requires that pesticides be stored and disposed of in such a manner so as not to contaminate food, feed, or the environment.

**Chapter 12:56:03 *Transportation***

This section regulates actions during transportation involving spills, identifies pesticides that are hazardous, and describes the securing of bulk pesticides. Pollution prevention is a key element of this section.

**Chapter 12:56:04 and :05 and :12 *Commercial Applicators & Applicator Certification & Private Certification***

Commercial and private applicators are identified in this section by category and are required to have certification. Commercial applicators must also be licensed.

**Chapter 12:56:06 *Damage Claims***

This section contains report contents for any pesticide damage claim.

*Chapter 12:56:07 Commercial Application Records*

Requirements for commercial application records and the reporting of this information to SDDA are contained in this section. Records must be kept for three years. Pesticide use survey information may be collected for reporting purposes statewide every three years. More frequent collection may occur in counties with nonpoint source ground water quality monitoring taking place.

*Chapter 12:56:15 Handling And Loading*

This section deals with bulk pesticides and states they shall be handled in a manner as to prevent spillage or discharge.

*Chapter 12:56:17 Operational Area Containment*

This section provides for the containment of pesticides under certain conditions, such as sensitive ground and surface water areas. Pollution prevention is the main goal of this section.

**POLICIES; SOUTH DAKOTA DEPARTMENT OF AGRICULTURE**

*PESTICIDES*

*Pesticide Compliance Policy Guide Commercial Applicator Records - 450.b*

This section clarifies information that is to be included on the pesticide application records.

*Dry Bulk Pesticide Storage Enforcement Policy*

This section establishes a state enforcement penalty matrix with a violation level and penalty base.

*Bulk Pesticides - 160.a*

It is the policy of the SDDA to allow the use of automated pesticide distribution systems, which have common connections, provided certain precautions and requirements are met. Cross-contamination must be prevented.

*Penalty Policy*

Establishes an enforcement penalty matrix with a violation level and penalty base.

*Pesticide Compliance Policy Guide - Certification - 120.a*

Clarifies when a product is considered a pesticide and registered by EPA under FIFRA and when it is an animal drug regulated under the Federal Food, Drug, and Cosmetic Act (FFDCA). It also clarifies when a private applicator applying a pesticide must be certified.

### **3.3 SOUTH DAKOTA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

The legal authorities of DENR in the development and implementation of the SMP are listed below. These activities are primarily the responsibility of the Ground Water Quality Program (GWQP) and the Geological Survey Program (GSP). Several independent boards have been established which hear public input on relevant issues, advise DENR on matters of policy, and act upon various licenses, permits, and claims relating to the environment or natural resources. The 1989 Centennial Environmental Protection Act (CEPA) provides in SDCL §34A-2-103 for the coordination of a variety of programs, activities, and funds established by state law in addition to the requirements of SDCL §34A-2.

#### **3.3.1 DIVISION OF ENVIRONMENTAL SERVICES**

**Ground Water Quality Program**  
**Drinking Water Program**  
**Waste Management Program**  
**Water Rights Program**

**And**

#### **DIVISION OF FINANCIAL AND TECHNICAL ASSISTANCE**

**Geological Survey Program**  
**Watershed Protection Program**

#### A. Legal Authorities

The DENR's SMP legal authority is generally found in SDCL §34A-2 (Water Pollution Control Act). Specifically, SDCL §34A-2-43 prohibits violations of the federal Water Pollution Control Act (33 United States Code (USC) Sec. 1251 to 1376, et. seq.), SDCL §34A-2-45 allows DENR to inspect pollution sources, SDCL §34A-2-46 allows DENR a right of entry upon property where pollution is produced, and SDCL §34A-2-48 allows the Secretary of DENR to issue orders to clean up water pollution. Most violations are enforced through administrative procedures. The procedures are found in the SDCL §34A-2-53 through §34A-2-60, et. seq. Specifically, SDCL §34A-2-53 allows the Secretary of DENR to issue Notices of Violation and seek civil monetary penalties for water pollution violations. SDCL §34A-2-72 allows DENR to initiate civil actions in Circuit Court to immediately restrain water pollution. Under SDCL §34A-2-75, violations of the Water Pollution Control Act may also be prosecuted as misdemeanor criminal violations. (See Appendix G for Ground Water Quality Standards).

In addition to the authority contained in SDCL §34A-2, SDCL §34A-10 allows any person to maintain an action in Circuit Court to restrain illegal impairment of water resources or for a declaratory ruling prohibiting water pollution. Pollution of water resources by hazardous wastes is subject to enforcement under SDCL §34A-11 (Hazardous Waste Management Act), and discharges of other regulated substances impacting water resources are subject to enforcement under SDCL §34A-12 (Regulated Substance Discharges).

South Dakota Codified Law §34A-12-3 creates a Regulated Substance Response Fund, which may be accessed by the Secretary of DENR to clean up pollution from SDCL §34A-2 violations under certain circumstances, including failure of a responsible party to take necessary remedial actions. Under SDCL §34A-12-6, DENR may then maintain a civil legal action against the responsible party to cost recover amount expended from the fund for remediation. (See Appendix C for Regulated Substance Discharges Rules).

### *Component Three*

South Dakota's DENR has been delegated the primary enforcement of the federal Safe Drinking Water Act by EPA. South Dakota Codified Law §34A-3A - Safe Drinking Water, authorizes the development of a voluntary wellhead protection program, a public water supply supervision program, and rulemaking authority for drinking water standards. Administrative Rules of South Dakota 74:04:05 - Drinking Water Standards, specifies Maximum Contaminant Levels (MCLs), monitoring requirements, variances from monitoring requirements, increased monitoring requirements under certain conditions, and record keeping.

### **3.4 SOUTH DAKOTA DEPARTMENT OF HEALTH**

#### A. Legal Authority<sup>1</sup>

No Legal Authority.

### **3.5 PESTICIDES AND GROUND WATER ADVISORY GROUP**

The Pesticides and Ground Water Advisory Group (PAGWAG) currently consist of the following: SDDA, DENR, Natural Resources Conservation Service (NRCS), the Cooperative Extension Service (CES), South Dakota State University (SDSU), the Fertilizer and Ag Chemical Association, and a registrant representative. Advisors will assist SDDA in the development and implementation of the Generic and Pesticide Specific State Management Plans for South Dakota.

The advisors have the following legal authorities in the SMP:

#### A. Legal Authority<sup>1</sup>

No Legal Authority.

### **3.6 SOUTH DAKOTA DEPARTMENT OF AGRICULTURE - OTHER**

#### **3.6.1 DIVISION OF RESOURCE CONSERVATION AND FORESTRY**

#### A. Legal Authority<sup>1</sup>

No Legal Authority.

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<sup>1</sup> There are only a few agencies that have any legal authority in the development, implementation, and enforcement of SMPs. In South Dakota, SDDA and DENR have statutory authority over pesticides and water resources, respectively. On the federal side EPA has authority over both pesticides and water pollution. This section will reinforce Component Two (Roles and Responsibilities) and emphasizes the fact that it takes more than the regulatory agencies to develop and implement SMPs. Component Three recognizes those agencies, groups, and organizations that are cooperatively participating in SMP development and implementation.

**3.7 SOUTH DAKOTA BOARD OF REGENTS  
SOUTH DAKOTA STATE UNIVERSITY  
SOUTH DAKOTA AGRICULTURAL EXPERIMENT STATION  
COOPERATIVE EXTENSION SERVICE**

A. Legal Authority<sup>1</sup>

No Legal Authority.

**3.8 SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS**

A. Legal Authority<sup>1</sup>

No Legal Authority.

**3.9 LABORATORY**

Only laboratories that are qualified and capable of performing analysis on water samples, soil samples, vegetation samples, and/or pesticide samples will be used.

A. Legal Authority<sup>1</sup>

No Legal Authority.

**3.10 FEDERAL AGENCIES**

**3.10.1 ENVIRONMENTAL PROTECTION AGENCY - PESTICIDE REGULATION**

A. Legal Authorities

7 U.S.C. §136 et seq.

*The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)*

The FIFRA as amended, regulates pesticides. This act allows EPA to address pesticide concerns in ground water on a national level. By cooperating with the states through Performance Partnership Agreements, EPA passes on that authority, along with some funding.

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The EPA regulatory authority includes pesticide initial registration, re-registration, and legal availability. Provisions under section 3 and section 6 of FIFRA provide for this regulation (refer to Box 3.1). Under section 3 "other regulatory restrictions", EPA would undertake rule making with publication of the proposed action in the Federal Register. Publication of the details in the Federal Register provides an opportunity for

**Box 3.1**  
**Pesticide**  
**Restrictions and Cancellation**  
**FIFRA Sections 3 and 6**

Section 3(d)(1)(C)(ii) of FIFRA allows EPA to restrict the use of pesticides through proposed rulemaking authority. The 40 CFR parts 152 and 156 - Pesticides and Ground Water State Management Plan Regulation, Proposed Rule would allow SMP development and implementation. Section 6(b) would allow the cancellation of any product that causes unreasonable adverse effects on the environment. The basis for this determination is, as the pesticide is currently used, its risk outweighs the benefits, and cancellation is warranted.

public comment on classifying one or more pesticides for restricted use. The SMPs would be specified as part of the restrictions required. The basis for this action is a determination that the reduction in risk outweighs the decrease in benefits imposed by the restrictions.

Through FIFRA the EPA also has the legal authority to protect water resources. This includes both ground water and surface water. In the SMP development,

the waters to be protected are ground water and hydraulically connected surface waters.

33 U.S.C. § et seq. *Clean Water Act (CWA)*

The CWA was established to protect the integrity of the nation's waters. Grants to protect the nation's waters are awarded to states for development and implementation of state wellhead protection programs, for development of statewide ground water protection strategies, for nonpoint source pollution programs, and other water quality programs.

42 U.S.C. §300 et seq. *The Safe Drinking Water Act (SDWA)*

The SDWA is designed to ensure the safety of public drinking water supplies. The Act requires EPA to establish both national drinking water quality standards (MCLs) and monitoring requirements for suppliers of public water. Amendments to the SDWA authorize the states to establish wellhead protection programs and conduct source water assessments for the protection of public drinking water supplies.

41 U.S.C. §6901 et seq. *The Resource Conservation and Recovery Act (RCRA)*

The RCRA regulates the disposal of hazardous wastes, which include pesticides or pesticide contaminated materials deemed no longer useful.

42 U.S.C. §9601 et seq. *The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*

The CERCLA provides EPA with the authority to require corrective actions. It also allows for assessment and recovery of damages from liable parties. Enforcement activities under CERCLA could be involved in pesticide spills, leaks, misuse or illegal applications. Also, CERCLA is the only federal law that provides for the "temporary provision of an alternative water supply" under circumstances of an imminent human health threat.

**3.10.2 U.S. DEPARTMENT OF AGRICULTURE**

**3.10.2.1 NATURAL RESOURCES CONSERVATION SERVICE**

A. Legal Authority<sup>1</sup>

No Legal Authority.

**3.10.2.2 CONSOLIDATED FARM SERVICES**

A. Legal Authority<sup>1</sup>

No Legal Authority.

**3.10.2.3 AGRICULTURAL MARKETING SERVICES**

A. Legal Authority<sup>1</sup>

No Legal Authority.

**3.10.3 UNITED STATES GEOLOGICAL SURVEY**

A. Legal Authority<sup>1</sup>

No Legal Authority.

**3.10.4 UNITED STATES FISH AND WILDLIFE SERVICE**

A. Legal Authority<sup>1</sup>

No Legal Authority.

**3.10.5 UNITED STATES BUREAU OF RECLAMATION**

A. Legal Authority<sup>1</sup>

No Legal Authority.

<sup>1</sup> There are only a few agencies that have any legal authority in the development, implementation, and enforcement of SMPs. In South Dakota, SDDA and DENR have statutory authority over pesticides and water resources, respectively. On the federal side EPA has authority over both pesticides and water pollution. This section will reinforce Component Two (Roles and Responsibilities) and emphasizes the fact that it takes more than the regulatory agencies to develop and implement SMPs. Component Three recognizes those agencies, groups, and organizations that are cooperatively participating in SMP development and implementation.

### **3.11 INDUSTRY**

#### **3.11.1 REGISTRANT**

##### A. Legal Authority<sup>1</sup>

No Legal Authority.

#### **3.11.2 SOUTH DAKOTA FERTILIZER AND AG CHEMICAL ASSOCIATION**

##### A. Legal Authority<sup>1</sup>

No Legal Authority.

### **3.12 REVIEWERS OF DRAFT SMP - ORGANIZATIONS AND GROUPS**

Several agencies, organizations, and special interest groups will be asked to review and comment on the SMP. These are are:

#### **3.12.1 ACTIVE AGRICULTURAL ORGANIZATIONS**

- South Dakota Nonpoint Source Task Force;
- South Dakota Corn Growers Association;
- South Dakota Soybean Association;
- South Dakota Oil Seeds Council;
- South Dakota Wheat Commission;
- South Dakota Association of Agricultural Cooperatives;
- South Dakota Crop Improvement Association;
- South Dakota Irrigators Association;
- South Dakota Aviation Association;
- South Dakota Farm Bureau Federation;
- South Dakota Farmers Union;
- South Dakota National Farmers Organization;
- Soil and Water Conservation Society;
- South Dakota Association of Conservation Districts;
- South Dakota Association of Soil Scientists;
- South Dakota Fertilizer and Ag Chemical Association; and
- South Dakota State Horticultural Association.

##### A. Legal Authority<sup>1</sup>

No Legal Authority.

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### 3.12.2 Active Community Groups

- Lakes and Streams Association;
- South Dakota Water Congress;
- Water Development Districts;
- Dakota Rural Action;
- South Dakota Wildlife Federation;
- South Dakota Municipal League;
- South Dakota Association of Rural Water Systems;
- South Dakota Chapter of American Water Works Association;
- South Dakota Association of County Commissioners;
- League of Women Voters;
- Izaak Walton League of America, Inc.;
- Audubon Society;
- Sierra Club; and
- Interested Public.

#### A. Legal Authority<sup>1</sup>

No Legal Authority.

### 3.13 TRIBES

#### A. Legal Authority<sup>1</sup>

No Legal Authority.

However, Tribal Management Plans are an option for some tribes.

### 3.14 LOCAL BRANCHES OF GOVERNMENT

#### A. Legal Authority

Restricted Legal Authority.

The FIFRA delegates the authority to regulate pesticides to the states. The SDDA has primacy for pesticides in South Dakota. Local units of governments have the opportunity to petition the Secretary of SDDA for a pesticide use restriction. If the petition is deemed valid, SDDA will look at how best to incorporate the request into the SMP. Also, most local units of government can zone for the placement of a pesticide facility through local zoning ordinances.

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