

V. PESTICIDES AND CHEMIGATION

Producer Note: Use of pesticides and other farm chemicals is regulated by federal and state statutes. Most states have some form of licensing or certification requirements controlling those who use pesticides. In addition, if a producer employs agricultural workers there are regulations which address safety concerns about pesticide use by or around those workers.

A. Federal Insecticide, Fungicide, and Rodenticide Act

The EPA also administers the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),⁴¹ the major federal statute governing pesticide use. FIFRA establishes minimum national standards for the use of pesticides, and regulates the registration, production, and sale of pesticides.

FIFRA grants primary, but not exclusive, enforcement responsibility for pesticide use to the states. States retain the authority to regulate the sale or use of any federally-registered pesticide or device in the state, but only if state regulations do not permit sale or use of pesticides prohibited under FIFRA. States may not impose any requirements for pesticide labeling or packaging in addition to or different from those required under FIFRA.

1. *Use of Pesticides*

FIFRA provides that it is unlawful for any person to use a registered pesticide in a manner inconsistent with its labeling. Based on the pesticide's toxicity or the degree of adverse effects on humans and the environment, EPA divides pesticides into two broad groups, either unclassified (general use) or restricted use pesticides.⁴²

Pesticides for unclassified or general use may be purchased and used by any person in a manner consistent with the pesticide's label. Restricted use pesticides may be applied only by or under the direct supervision of a certified applicator. Note that "under the direct supervision of a certified applicator" means that the pesticide is applied by a competent person acting under the instructions and control of a certified applicator who is available if and when needed. This means that the certified applicator need not be physically present at the time and place the pesticide is applied, unless the pesticide label prescribes a greater degree of supervision.

FIFRA requires the certification of applicators of restricted use pesticides and provides for EPA-approved state certification programs.

⁴¹ 7 U.S.C. § 136 *et seq.* (1994).

⁴² Pesticides classified under FIFRA for restricted use are listed at 40 C.F.R. § 152.175 (1995).

2. *Reporting Requirements*

Under FIFRA regulations, commercial applicators must keep and maintain routine operational records containing information on kinds, amounts, uses, dates, and places of application of restricted use pesticides. Records must be maintained and kept for a period of two years.

The 1990 Farm Bill added the following record keeping and disclosure requirements for pesticide use:

- All pesticide applicators, including certified and non-certified, must maintain restricted use pesticide application records; time frames governing when records must be maintained are included and spot application records are required;
- Within thirty days of restricted use pesticide application, all applicators must give a copy of records of the pesticide application to the person for whom the application was provided;
- Records must be made available to any federal or state agency that deals with pesticide use or any health or environmental issue related to the use of pesticides at the request of the agency; however, a government agency may not release data from the records that directly or indirectly reveals the identity of individual producers and USDA is charged with administering access to the records by federal agencies, while states designate a lead agency to administer access by state agencies;
- When a health professional determines that pesticide information maintained in the records is necessary to provide medical treatment or first aid to an individual who may have been exposed to pesticides, persons required to maintain the records must promptly provide the record and available label information to the health professional upon request, and, in the case of an emergency, the information must be provided immediately;
- Penalties in the form of fines may be imposed by USDA for failure to comply with pesticide use and reporting requirements; and
- USDA and EPA are required to use the records to develop and maintain a database sufficient to enable USDA and EPA to publish annual comprehensive reports concerning agricultural and nonagricultural pesticide use.

Producer Note: Certified private pesticide applicators must record information no later than 14 days following the pesticide application. The information must include the brand or product name of the federal restricted use pesticide and the product's EPA registration number; the total amount applied; the size of the area treated; the crop, commodity, stored product, or site to which the pesticide was applied; the location of the application; the month, day, and year of the application; and the certified applicator's name and certified number.

Producer Note: For spot applications, a certified private pesticide applicator must record information regarding spot treatments if they apply restricted use pesticides on the same day in a total area of less than 1/10th of an acre. The information must include the brand or product name of the federal restricted use pesticide and the product's EPA registration number; the total amount applied; the location of treatment designated as "spot application," followed by a description (e.g. the location could be recorded as "spot application" followed by "treatment for noxious weeds on Field A, C, and all pastures"); and the month, day, and year of the application. This provision does not pertain to greenhouse and nursery applicators, who are required to keep all data elements as listed.

3. *Disposal of Pesticide Containers*

Producer Note: Producers must take special care in disposing of pesticide containers. Although permits for disposal are not required, under FIFRA the pesticide labeling will reflect requirements for disposal which must be met in order to prevent violations of the law.

A pesticide's labeling may contain specific procedures for disposal of the pesticide and its container. Disposal of the pesticide in a manner inconsistent with the labeling violates FIFRA. EPA regulates the disposal of pesticides which can no longer be legally used due to cancellation of their registration. The agency also recommends special procedures for the disposal of unwanted pesticides.⁴³

4. *Worker Protection Standard*

Producer Note: Producers are also required to take precautions to protect farm workers from pesticides. Producers must properly train and notify workers of pesticide dangers. Producers should refer to the EPA publication entitled *The Worker Protection Standard for Agricultural Producers--How to Comply; What Employers Need to Know* for specific explanations of the requirements.

⁴³ 40 C.F.R. pt. 165 (1995).

Agricultural employers must also comply with the Worker Protection Standard (WPS) for Agricultural Pesticides. The WPS covers all agricultural employers and their employees. The WPS contains requirements for training employees who handle pesticides, provisions for protecting employees from pesticide exposure, and how to provide emergency assistance to exposed employees.

B. State Pesticide and Chemigation Laws and Regulations

Producer Note: South Dakota, like most states, has laws designed to control the use of pesticides. The laws are designed to closely monitor the distribution and ultimate use of these substances within the state.

1. Pesticides

The South Dakota Department of Agriculture (Department) administers the state's pesticide programs.⁴⁴

All pesticides offered in commerce must be registered with the Department, and the registration must include names and addresses of pesticide registration applicants and producers, name of pesticide, copy of the label, the list of ingredients, and classification of the pesticide for general or restricted use. A list of ingredients is not required, but may be requested of registration applicants.

Pesticides are considered misbranded if the labeling is inadequate in any way, or if the pesticide, if used as directed, is injurious to man or animals, or to the applicator. Sale of misbranded pesticides is prohibited.

The Department has established rules for pesticides which include sampling, inspection, and analysis to determine compliance with state law regarding content, identification, and adulteration; as well as approval by the Secretary of Agriculture of site and storage conditions for bulk pesticide facilities.

The Department may issue stop sale orders against pesticides offered for sale which are inconsistent with any state or federal regulation.

⁴⁴ S.D. CODIFIED LAWS ANN. § 38-20A-1 *et seq.* (1996).

a. *Applicators and Distributors*

Producer Note: The Department has issued extensive regulations that set forth detailed rules concerning the registration, sale, storage, use, and handling of pesticides.⁴⁵ These regulations should be reviewed by all farmers and ranchers who use pesticides. Copies can be obtained from the Department.⁴⁶

Generally, pesticides must be applied only by licensed applicators.⁴⁷ Persons who apply other than restricted use pesticides through hand powered equipment to lawns, ornamental shrubs, and small trees are exempt, as are producers who apply pesticides on their own farms or the farms of neighbors as an accommodation. However, certification is required if the producer commercially applies restricted use pesticides for production of agricultural commodities, the value of the crop is potentially in excess of \$1,000, or the application is made aurally.

While federal law allows the application of restricted use pesticides by non-certified applicators under the direct supervision of certified applicators, South Dakota law does not allow this practice.

All persons who wish to engage in the business of applying pesticides to the lands of others must obtain an appropriate applicator's license, which may restrict or classify the types of compounds, areas, or methods of application the license holder may use. Applicator's licenses expire on the last day of February in the year following issuance.

Producer Note: Producers who apply pesticides to their own or to neighbors' crops as an accommodation are generally exempt from licensing. Individuals who are unsure about whether they are exempt under the rules should contact the South Dakota Department of Agriculture prior to application of pesticides.

Dealers who sell pesticides must be licensed, except for applicators who sell pesticides as an integral part of their business, doctors, pharmacists, and veterinarians under very limited conditions.

Reasons for which any licenses or permits may be revoked or suspended include:

- Making false claims or reports;

⁴⁵S.D. CODIFIED LAWS ANN. §38-20A-1 *et seq.* (1996), S.D. CODIFIED LAWS ANN. §38-21-1 *et seq.* (1996), S.D. ADMIN. R. 12:56 (revised June 6, 1996).

⁴⁶Chapt. 38-20A, Chapt. 38-21, Art. 12:56 (Revised June 6, 1996).

⁴⁷ S.D. CODIFIED LAWS ANN. § 38-21-1 *et seq.* (1996).

- Recommending an off-label use;
- Applying a known ineffective material; or
- Aiding or abetting a violator.

Any persons who violate the statute are guilty of misdemeanors and may be subject to civil penalties in the maximum amount of \$5,000 per violation. Any person claiming damage from pesticides must file a written statement of the occurrence with the Department within 30 days of the time the damage occurred.

b. Pesticide Worker Training

Under South Dakota rules, all applicators who own or operate a defined operational area must provide yearly training to current employees concerning use, hazards, and other pesticide requirements, and within three days to new employees engaged in the handling and use of pesticides.⁴⁸ An operational area is deemed to be an area where the applicator:

In addition, special containment provisions are required for certain operational areas that:

- Handle more than 1,500 pounds per year of pesticides and engages in washing or rinsing of concentrated or diluted pesticides from containers or handling, storage, or application equipment more than 30 days per year;
- Operate within 150 feet of a lake, stream, wetland, or well;
- Operate within 200 feet of an occupied building that is not owned or controlled by the applicator; or
- Operate within 500 feet of a public water supply well.

Such containment areas are to be constructed in accordance with professional engineering practices, and must be of sufficient strength to bear the weight and movement of loaded vehicles. All seams and cracks must be sealed, floors must be constructed of concrete or other approved materials, and must be sloped to collect and recover fluids. If the pesticide is handled in a dry state, the containment area must extend beneath all open augers and conveyors.

⁴⁸ S.D. ADMIN. R. 12:56:17:04 (1993).

2. Chemigation

South Dakota defines chemigation as "any process whereby chemicals are added to irrigation water applied to land or crop, or both, through an irrigation system."⁴⁹ Persons who use irrigation systems for chemigation must comply with all rules regarding standards, performance, installation requirements, and requirements for location and use of antipollution devices. In this context, antipollution devices include mechanical equipment used to reduce hazards to the environment in case of malfunction or shutdown of chemigation equipment, such as check valves, chemical line shutoff valves, automatic low pressure drains, and interlock equipment. Chemigation laws are administered by the DENR.

Violators of any rule or regulation are subject to criminal misdemeanor prosecution, civil penalties, and may lose any water permits or licenses they hold.

Producer Note: Since the penalties for violation of the chemigation and pesticide statutes are serious, proper care and regular preventive maintenance of all equipment used in those operations is highly recommended.

⁴⁹ S.D. CODIFIED LAWS ANN. § 34A-2A-1 *et seq.* (1992 & Supp. 1996).

⁵⁰ 16 U.S.C. § 1531 *et seq.* (1994).