ADDENDUM #1

Permit:	General Surface Water Discharge Permit for Pesticide Activities in South Dakota
Permit Number:	SDGA10000
Permit Type:	Response to Comments

DESCRIPTION

On January 21, 2011, the South Dakota Department of Environment and Natural Resources (SDDENR) provided public notice of a new permit for the discharge of a pollutant from a point source associated with the application of a pesticide into waters of the state. During the public notice period, the department received questions and comments from five sources: the city of Sioux Falls, David Richards, South Dakota Aviation Association, United States Department of the Interior – Fish and Wildlife Service, and Mike Larson with Larson Helicopters. The Administrative Rules of South Dakota (ARSD) Section 74:52:05:20 states the following:

> ***Response to comments.*** *At the time that any final permit is issued, the secretary shall issue a response to all written comments received during the period of public notice.*

This addendum provides the department's response to each of the comments received.

COMMENTS

The city of Sioux Falls submitted the following comments and requests for clarification:

1. Will a letter of physical permit be sent to all City/County programs so that we have something on file or to hang on the wall to verify that we are working under the appropriate State regulations?

   The general permit will provide automatic coverage to all applicators. It will be each permittee's responsibility to demonstrate compliance with the permit to SDDENR or the general public. Individual authorization letters and copies of the general permit will not be sent to each permittee. However, a final copy of the general permit will be available on SDDENR's webpage: http://denr.sd.gov/des/ws/PesticidePermit.aspx and will be available upon request from SDDENR.

2. Will we be required to write a summary or provide information to the State at the end of the season indicating the areas treated etc? Would the head of the program be the one to do that? Will there be a form or template for this information?

   If a permittee meets one or more of the annual report thresholds in the Pesticide General Permit, the permittee will be required to submit a summary to SDDENR at the end of the year in the form of an annual report. This report must be submitted by either a principal executive officer, a ranking elected official (such as the mayor), or a duly authorized

representative, and is due by February 28th of the following year. An example form will be made available by SDDENR if applicators wish to use it; however, use of the form will not be required.

3. We did some work out in the County in the area surrounding the Sioux Falls city limits – if we did any treatments out there, would we need a separate permit?

   No, the city would not need a separate permit. The Pesticide General Permit is written to cover the entity doing the pesticide application, in this case, the city of Sioux Falls. The permit will cover all city employees discharging pesticides into waters of the state, regardless of whether the work is done in the city limits or under contract with another agency. However, please be aware this work will also need to be counted towards the city's thresholds for annual reporting.

4. I am the coordinator for the mosquito control program for the City of SF and, as far as I know, am the only one overseeing a program or any staff in the application of pesticides to waters... therefore I would be the one responsible under the terms of the permit as I understand it. Do I personally need to do anything? If I do – I am assuming my affiliation with the City of Sioux Falls then would cover all other employees in the City for applications to water if they in fact did any, right?

   As noted above, the Pesticide General Permit covers the entity doing the pesticide applications, such as the city of Sioux Falls. Any city staff responsible for pesticide applications into waters of the state, including supervisors, are expected to ensure compliance with the requirements of the general permit.

   The city of Sioux Falls may want to develop a single standardized procedure for the recordkeeping and reporting requirements under the general permit. The city could also develop a single Pesticide Discharge Management Plan for all employees to use.

   Please note all applicators will still be required to follow any other state or federal requirement, such as being certified by the Department of Agriculture for certain types of applications.

5. If we were to realize that we would exceed the area requirements, would the application for an additional permit then cover treatments on a per application basis? Any treatments up to a defined amount? How would that work. EXAMPLE: If it were August and we realized that we still have a good month or more of the program left before the end of the season and, according to our records we have hit the area limit as outlined in the permit, what would be specifically need to do to make sure that we could continue treating areas needed within the city limits through the seasons end….there would likely be several areas of different sizes and overall area that we wouldn't yet know about. Would we contact you and say…We approximate that we will need to treat and additional x amount of area for the remaining months of the season and you would then send us a permit ok'ing that additional area?

The thresholds or "area requirements" in the permit are ***not*** *limits on the amount of pesticide applied or the size of the application area. The thresholds simply trigger the requirement for a permittee to submit an annual report at the end of the calendar year. In your example, if you were to exceed the threshold, the city would still continue to treat for pests without the need to notify SDDENR or obtain permission. However, by February 28th of the following year, the city would then need to submit a report to DENR.*

The annual report and thresholds do not serve as a limit or penalty. Thank you for the opportunity to clarify this condition.

David Richards submitted the following comments:

1. The proposed rules are too long, they should be condensed to a couple of pages.

   The use of pesticides is a complex issue and is already regulated by a number of state of and federal regulations. Unfortunately, the Sixth Circuit Court felt another level of regulation was necessary. In 2009, the court ruled anyone applying pesticides into waters of the United States must obtain a permit under the federal Clean Water Act. If pesticide applicators do not have a permit by April 9, 2011, they could face lawsuits from environmental groups or fines from the federal government. This general permit was drafted to meet the requirements laid out by the Sixth Circuit, the federal Clean Water Act, and the US Environmental Protection Agency. In addition, where possible, we tried to ensure consistency between existing state and federal requirements for pesticide applications.

   It is always SDDENR's goal to create permits that are as condensed and straight forward as possible. SDDENR made this permit as streamlined as we could while still fulfilling the requirements of state and federal law.

2. Landowners care about the environment. Treating them with respect and showing people how to do things in a better way is the best way to protect the earth. Seeking cooperation and working with them as partners will be far more effective.

   The penalties imply that landowners are the enemy, potential criminals who have no concern for safe water or the welfare of their neighbors. That is untrue. People who live on the land have a great respect for the soil and water, their livelihood depends on healthy land and clean water, they also care deeply about the welfare of others. They want to do the right thing and you can show them how to do that.

   Eliminate the penalties. Most people will heed a warning and maybe a $100 fine for a second offense. We can accomplish a whole lot more by working together.

   We agree South Dakota's citizens care deeply about our natural resources. Hunting, fishing, agriculture, and tourism are South Dakota's biggest industries, and all rely on clean water and fresh air.

In light of the court's decision referenced above, a permit is necessary for continued pesticide use into South Dakota's water bodies. SDDENR agrees we need to work together as partners to make this as smooth a process as possible. This general permit is a way to ensure South Dakota's landowners can continue to manage our resources in a safe way.

Throughout SDDENR's development of the general permit, we worked with the SD Department of Agriculture to ensure our requirements were consistent with existing state and federal requirements. The Department of Agriculture assisted SDDENR by sending emails and providing contact information to hundreds of South Dakota's pesticide applicators. SDDENR invited these applicators to review the permit and provide input prior to formally offering the permit for public comment. This informal comment period provided SDDENR with excellent feedback on the best approach for moving forward with the permit. Once SDDENR had a final draft prepared, these same applicators were invited to review and provide formal comments on the general permit. In addition, SDDENR provided notice in every daily paper in South Dakota, collaborated on articles for trade publications, and presented information to hundreds of people across the state. All of this outreach was intended to work with South Dakota's applicators to craft a permit that made sense for South Dakota.

As part of our authority to issue these types of permits, the federal government requires SDDENR have the ability to enforce the conditions of these permits and assess penalties. SDDENR has been granted authority by the Legislature to issue fines up to $10,000 per day per violation. SDDENR does believe it is important to make permittees aware of their liability under these permits. Therefore, the provisions about fines and other enforcement language will be included in the final version of the permit.

However, SDDENR does have enforcement discretion and fines are only one tool we have available to us to ensure compliance. Fines are used as a last resort or in extreme cases. When a violation occurs, SDDENR determines what action to take. We consider if there was damage to human health or the environment or negligence on the part of the permittee. In addition, we consider any steps that have been taken to mitigate the impacts of the violation. Since this general permit is very new and unfamiliar to many, SDDENR will focus on compliance assistance and training to address minor violations of this permit.

The South Dakota Aviation Association (SDAA) submitted the following comments:

1. **Discrimination**

   SDAA is questioning why aerial pest control as an application method is singled out for a cumulative thresholds (5.2)? Wouldn't it be fair if all application methods (ground irrigation, etc.) had the same thresholds? If not, why don't all other "*activities covered*" (2.1) have cumulative thresholds? Can aerial applications have a per application threshold like the other "*activities covered*"? Nearly all aerial applications in South Dakota are to agricultural lands "*without water present at the time of applications*" rather than to the "waters".

Aerial applications are typically used for larger or more inaccessible areas. The method of applying the pesticide is inherently different. As a result, SDDENR believes it is important to evaluate this method separately from ground applications. This is the reason aerial applications were listed as a separate and distinct application method under the permit.

When proposing the thresholds listed in the general permit, SDDENR did consider how best to address this issue. Ultimately, SDDENR proposed thresholds that matched those initially proposed by the US Environmental Protection Agency in their draft permit. SDDENR believes this offers a more consistent approach for applicators that work in different states or on reservations in South Dakota. SDDENR did consider modifying the proposed cumulative threshold to a per application threshold. However, this resulted in a significantly smaller annual threshold. In SDDENR's conversations with the President of the SDAA, Bryan Hauschild, Mr. Hauschild felt those changes would not be in the best interest of aerial applicators. Therefore, SDDENR is not proposing any further changes to the thresholds

Fact: Ground applications contribute to approximately 75 percent of drift complaints in South Dakota, leaving only 25 percent to aerial application. We hear these statistics each year in our required currency training from the Department of Agriculture. Aerial application is **not** more likely to have "*pesticide … unavoidably discharged into waters*" as the draft suggest (2.1, 3).

Pesticide drift and other indirect releases of pesticides into water bodies, such as storm water runoff from a field, are nonpoint sources of pollution. As such, the federal Clean Water Act does not require a permit for these activities. The general permit does not cover discharges that, by law, are not required to obtain permit coverage. Therefore, this general permit does not address, authorize, or otherwise regulate pesticide drift. Any drift complaint, whether it was due to aerial or ground applications, will continue to be handled by the SD Department of Agriculture.

South Dakota's definition of waters of the state is listed in statute at the South Dakota Codified Laws at Section 34A-2-2. The definition includes, in part, streams, lakes, ponds, waterways, irrigation and drainage systems, and other bodies or accumulations of water. SDDENR believes it would be difficult for an aerial applicator to determine if "waters of the state" exist from the air. It may also be difficult for aerial applicators to determine if water is present during an application. In these cases, it would be unavoidable that some of the pesticides will be deposited into water to effectively target the pests.

If SDDENR removes aerial application from coverage under the general permit, aerial applicators would be required to obtain an individual permit. Any discharge of pesticides without a permit could be subject to enforcement and possible penalties. It is therefore, in the best interest of applicators for SDDENR to provide coverage under a general permit to avoid liability for unpermitted discharges and unnecessary delays for individual permits.

2. **Categories**

The "*Activities Covered*" (2.1) is confusing because you have aerial application categorized with mosquito and other flying insects, weed and algae, ditch and stream bank, and declared pest emergency. We can see how aerial application would be in a category with like forms of application such as ground or irrigation application but not in a common category with targeted pest as are the others.

When developing this general permit, SDDENR determined the five categories included in the general permit would best encompass the majority of pesticide applications that would result in point source discharges to waters of the state. These uses are similar to the uses addressed by EPA's 2006 rule (which has now been vacated). However, SDDENR also considered how best to develop this permit to meet the types of pesticide applications typically seen in South Dakota. Ultimately, SDDENR proposed the approach outlined in the general permit. However, SDDENR did not offer much explanation for the approach used. In response to the comment provided by the SD Aviation Association, SDDENR determined it would be best to provide more details on the department's rationale for the uses detailed in the general permit.

Mosquitoes and Other Flying Insects:

There are over 2,500 different species of mosquitoes throughout the world, with approximately 150-200 species occurring in the United States. Mosquitoes can be a source of annoyance in work and leisure activities and a factor in decreased agricultural productivity (e.g., animal weight loss/death and decreased milk production). However, the primary concern with mosquitoes is the spread of disease such as malaria, encephalitis, and West Nile Virus. Therefore, control of mosquitoes is an important public health issue.

Numerous strategies exist to reduce the impact of mosquitoes. A comprehensive approach using a variety of controls is necessary for any mosquito control program. It is important to note that all mosquitoes must have water in which to complete their life cycle. Therefore, a key component to any control strategy involves targeting mosquitoes in and above water bodies.

To effectively control mosquitoes in these circumstances, it is necessary to place pesticides in or over water bodies. Other flying insects are targeted in a similar manner. This practice results in the discharge of pesticides into waters of the state, triggering the need for a permit based on the Sixth Circuit Court's ruling. There are several methods for managing mosquitoes and other flying insects. To control these insects early in the life cycle, larvicides such as briquettes or tablets are placed into water bodies. If it becomes necessary to control adult mosquito populations, adulticides are often applied by aircraft or with truck-mounted sprayers.

While each of these methods of control is unique, the common practice is to control insects that spend much of their life cycle in or near water. Therefore, EPA proposed to consider this type of control as one use. SDDENR adopted a similar approach in its draft permit.

Weed and Algae Control:
Aquatic weeds and algae can negatively affect water systems and human health and can have negative economic impacts. Aquatic weeds and algae can prevent the growth of certain aquatic species and cause unbalanced aquatic populations and species development. The presence of weeds or algae in irrigation waters can increase costs or reduce crop production. The recreational value of a water body can be reduced by algae or weeds. In some cases, aquatic weeds have been declared an invasive species, and the spread of the weed must be managed and controlled. Some types of algae have been identified as a human health concern.

Therefore, it often becomes necessary to control weeds and algae. In many cases, it is necessary to target the pest species in the water, which would result in a discharge of pesticides into waters of the state, triggering the need for a permit under the Sixth Circuit Court's decision.

South Dakota's general permit applies to pesticide discharges associated with management of weed and algae into waters of the state. This includes, but is not limited to, lakes, ponds, rivers, streams, irrigation canals, and drainage systems. In addition to these aquatic pests, the general permit also applies to the application of pesticides to control other types of weeds, if pesticides may be unavoidably discharged into waters of the state.

Weed and algae control is a unique and separate method of controlling pests. Both the methods of control and the pests targeted are different from the other uses detailed in the general permit, warranting a separate use category. SDDENR chose to adopt an approach similar to that outlined by EPA. However, as noted above, this is not specific to just aquatic pests or aquatic pesticides. The control of pests not otherwise identified in the general permit is covered by this use category.

Ditch and Stream Bank Control:
South Dakota's statutes protect drainage systems as waters of the state. This can include ditches and other dry drainages, as they do accumulate, store, and convey water to larger water bodies, such as streams and lakes, during certain times of the year. When water is present, livestock, wildlife, migratory birds, and other animals will often use the water. Therefore, South Dakota provides a level of protection to these drainage systems.

Weeds or other pests can be present in the ditches or along the bank of a stream. While the targeted pests are not necessarily aquatic pests, pesticides may still be unavoidably discharged into waters of the state as a consequence of these pest control activities. Therefore, SDDENR believes it is important to include this type of pesticide application in the general permit.

Declared Pest Emergency Situation:
At times, it may be necessary for a public entity to declare a pest emergency. This could be in response to an insect infestation, flooding concerns, or other economically significant events. In these cases, it may be necessary for public entities and applicators

to act quickly to respond to the situation, especially in light of human health concerns related to the emergency.

SDDENR does not want the requirement to obtain a Clean Water Act permit to be a burden or delay in responding to a declared pest emergency. Therefore, SDDENR has included this category of pesticide application in its general permit. Providing coverage under the general permit for the discharge of pesticides into waters of the state during an emergency will ensure the Clean Water Act requirements are clearly outlined ahead of time and will not result in unnecessary delays.

Aerial Pest Control:
Most of the pesticide applications outlined above deal with either a common pest and/or a common application method. Three of the uses – control of flying insects, control of algae and weeds, and control of weeds in ditches and near streams – all have a high potential for pesticides to be placed into waters of the state. In fact, in most cases, the pesticides will be intentionally applied to waters of the state.

Aerial application is a little different. Aerial application includes the application of a variety of pesticides targeting a variety of pests, not just pests in water. Therefore, SDDENR determined it needed separate consideration. First of all, the application method is different than most of the applications outlined above, as the pesticides are exclusively applied by aircraft. Second, it may be difficult to avoid waters that are considered by statute to be "waters of the state." In this case, SDDENR felt aerial applicators may be vulnerable to third party lawsuits and decided to include this use under the general permit.

Aerial applicators have stated they have the technology to avoid water bodies. SDDENR believes this to be true when the water bodies are easily identified from the air, such as the Big Sioux River or the Missouri River. However, smaller water bodies, such as drainage ways, prairie potholes, etc., may be more difficult to identify and avoid. In some cases, these areas may be actively farmed. Another issue would be in heavily forested areas. It may not be possible for an aerial applicator to see the exact location of water bodies beneath the forest canopy.

EPA and the courts have stated that if pesticides from any type of aerial application are directly deposited into or over waters of the state, a permit is required. Therefore, SDDENR has included this use under the general permit. There is no way for SDDENR to exempt aerial applications from permit coverage as things currently stand. The only other option would be to obtain an individual permit, which could result in substantial delays for the applicators and the landowners.

If an aerial applicator does not apply pesticides into any water body that would meet the statutory definition of waters of the state, the permit is not needed. If the applicator does apply pesticides to waters of the state but water is not present at the time of the application, the pesticide application would not count towards the thresholds listed in the

permit. The general permit is simply intended to cover the aerial application of pesticides into or over waters of the state.

3. **Communication**

SDAA offered unsolicited input from the aerial application industry near the middle of January 2010. Were other stake holders allowed input and not aerial applications? We were not contacted by your office about the web cast either. In the January 18, 2011 letter from SD DENR, it states, "**For more information, including … frequently asked questions and answers, and PowerPoint slides about the permit, please visit our website …"** The FAQ's and PowerPoint became available 2-16-11. We would like to see the comment period extended because of that fact.

On January 9, 2009, the Sixth Circuit Court ruled in the lawsuit National Cotton Council of America v. EPA, 553 F.3d 927 (6th Cir., 2009). *The Court determined that "chemical pesticides" with residuals and "biological pesticides" meet the definition of "pollutant." The intentional application of these "pollutants" to water bodies was considered a point source of pollution. Therefore, the Sixth Circuit Court ruled that a Clean Water Act permit was required. EPA requested a delay in implementing these permitting requirements, which the court granted on June 8, 2009. As a result, the court said a permit was needed by April 9, 2011.*

Since that time, EPA has been working to develop a general permit, which EPA intended to be a template or guidance for states to use. On June 2, 2010, EPA offered a draft of its pesticide general permit for public review and comment. To date, EPA has not finalized its general permit.

Although EPA has not finalized its general permit, SDDENR began moving forward to ensure applicators in South Dakota would have a permit available prior to April 9, 2011. Unfortunately, the delay in issuing the national permit has left states with little time to develop their own general permit.

Since the Sixth Circuit Court's decision, SDDENR has received questions and input about the permitting issue. However, SDDENR did not formally seek input until our draft general permit was ready for review on December 1, 2010. SDDENR believed we needed to have a draft permit available for review to better facilitate a discussion about the requirements. To that end, SDDENR held a public meeting on December 1, 2010, over the state's digital videoconference network. During the meeting, SDDENR explained the proposed draft and accepted questions and comments from the public. SDDENR also placed a draft of the permit on its website at that time and invited feedback.

During this informal comment period, SDDENR received a number of good questions, comments, and feedback. As a result, SDDENR made changes to the general permit and offered it for formal public comment on January 21, 2011.

There are a large number of individual applicators, private entities, and public agencies potentially impacted by the provisions of the permit. SDDENR made every effort to solicit

input and notify people of the availability of the draft permit. In addition, since December 1, 2010, SDDENR has provided additional presentations and attended meetings with a wide variety of applications and groups in an effort to make the public aware of the proposed general permit. Unfortunately, due to the large number of potential permittees and the relatively short time available to develop this permit, SDDENR was not able to personally solicit input from every agency, entity, or individual impacted.

SDDENR did not extend the comment period on the general permit, as the South Dakota Aviation Association requested. The original comment period ended on January 20, 2010. Under the Administrative Rules of South Dakota, Section 74:52:05:19, SDDENR must notify all commenters of its final permit decision and allow 30 days to contest the issuance of the permit. SDDENR needed time to carefully consider any comments received. There was not adequate time to extend the comment period, respond to comments, and issue a final permit decision prior to the April 9, 2011, deadline. Therefore, SDDENR closed the comment period on January 20, 2011, as originally planned.

4. **Interpretation**

SDAA believes this draft, as written, will create misinterpretations of the permit. This will increase our legal vulnerability to anti-pesticide groups and 3rd party lawsuits. If the applicator is given an order to cease and desist while a legal challenge evolves, it would put them out of business regardless of fault.

The South Dakota Aviation Association did not provide any specific details on which aspects of the general permit might create misinterpretations. SDDENR does acknowledge there is a potential for citizen lawsuits for violations of this permit. However, the federal Clean Water Act and South Dakota statutes give SDDENR the primary authority to act on violations of this general permit. A citizen group or other third party can not pursue a lawsuit under this general permit without first notifying SDDENR of their intent to file a suit and providing the state with the opportunity to investigate, and if necessary, act on any violations. SDDENR has designed this permit with a goal of allowing pesticide applicators to continue applying pesticides in South Dakota and protect applicators under the Clean Water Act.

Without this general permit, pesticide applicators are at a much greater risk of lawsuits from third party groups and SDDENR would be unable to provide protection to the applicators.

5. **“Waters” Fine Line**

SDAA would appreciate a fine line designation between water standing on an agricultural field and “waters of the state” or “water present at the time of application.” If a rain wet agricultural field is not “waters of the state” or “water present at the time of application” then we have little to fear from the Clean Water Act and requirements of the NPDES permit. But if interpreted as such, it will dramatically increase our record keeping requirements. We ask that you add a link to your site or provide SDAA with maps or other information showing these “"waters"” so we can look at them before the application

begins. It is not a welcome sight to be in a loaded aircraft and get to the application site and find out you cannot make the application. If there are GIS maps (shape files) available, many of us can incorporate those into our onboard GPS systems and have the “"waters"” show up on our moving maps, allowing us to avoid them. They could also be incorporated into our mapping software so when we print an application map it will show up on there.

SDDENR would like to first provide a clarification in response to this comment. This permit does ***not*** *prevent the application of pesticides to waters of the state. In fact, the Pesticide General Permit authorizes a pesticide applicator to discharge pesticides into waters of the state of South Dakota, provided the applicator complies with the conditions and requirements set forth in the permit.*

There are two issues in this comment that SDDENR wishes to respond to and clarify. First, the definition of “waters of the state.” South Dakota has adopted a legal definition of “water of the state” in both statute and rule. The definition of waters of the state is found in South Dakota Codified Law at 34A-2-2 and in the Administrative Rules of South Dakota, Section 74:52:01:01 (54). Based on these statutes and rules, the following definition was included in the Pesticide General Permit:

> *“**Waters of the state**” all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, situated wholly or partly within or bordering upon the state, but not waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA other than cooling ponds as defined in 40 C.F.R. § 423.11(m) (July 1, 1991).*

While this definition seems very broad, SDDENR has been consistently applying this definition in our implementation of the state’s water quality programs. If we have any question about the presence of “waters of the state,” SDDENR relies on the National Wetland Inventory maps developed the U.S. Fish and Wildlife Service. SDDENR will make the National Wetland Inventory GIS shapefile map of South Dakota available for download to assist in determining if an area meets the definition of “waters of the state”.

The second issue involves the presence of water in areas that are waters of the state. If something meets the definition of waters of the state, the next “test” is whether water is actually present. Oftentimes, drainage systems, dry draws, prairie potholes, etc. do not contain water at all times. While the permit covers the discharge of pesticides into all waters of the state in South Dakota, the thresholds and other conditions of the permit only apply if water is present at the time of the application. If pesticides are applied into waters of the state AND water is present, the permittee is required to record the surface acres or linear miles to determine if the thresholds have been exceeded.

6. **Priorities**

In aerial application, flight safety is a priority. We prioritize these safety issues in this order:

1. First and foremost, the health of the pilot is paramount. Adding the NPDES permit requirements to an already heavily work-loaded environment is a dangerous proposition. Each regulation added to the pilot's workload increases the distraction from the basic flight skills and increases the risk of accidents. It also makes for shorter sleep periods that the pilots need to retain his/her alertness for the following day.
2. Second is the airworthiness of the aircraft. Many times to prepare the aircraft for the following days work can take an hour or two after the pilot has already flown a long day during the peak application season.
3. Third is the required Department of Agriculture paperwork for that day's work. This can take one to two hours to complete as well.
4. Finally, to prepare a game plan for the following day's workload by checking weather forecasts and organizing those maps that will work best for that days' weather, and ensure you have enough product on hand for the following day. Also, you will have customers who are expecting return phone calls.

If you are an owner operator you are dealing with all of these issues without the aid of an employee. More paperwork means less time for the owner operator to be able to apply products in an efficient manner. In the last three years, we have had the added task of looking out for unmarked MET towers which are being built at a rapid pace and are major aviation safety flight hazard.

Our point is, at some point the operator or pilot has to give up doing one of these operations to ensure the safety of the flight.

SDDENR understands the challenges and level of regulation involved with safe pesticide application. As noted above, we have no other option but to issue a permit at this time. Throughout the development of the permit, SDDENR made every effort to ensure consistency with existing pesticide regulations, while still meeting our requirements for issuing an effective NPDES permit. Much of the required recordkeeping can be incorporated with existing state or federal requirements.

United States Department of the Interior – Fish and Wildlife Service submitted the following comments:

1. In section 3.1, "General Technology-Based Effluent Limits," we recommend that SDDENR, the South Dakota Department of Game, Fish and Parks (SDDGFP), and the U.S. Fish and Wildlife Service (Service) coordinate to include a general permit condition to evaluate whether State or Federal natural resources of concern may be unintentionally exposed as a result of pesticide application. Natural trust resources of concern would include State and/or federally listed species of concern, other rare non-listed species, and key habitats. The South Dakota Natural Heritage Program was developed by the

SDDGFP in coordination with the Service and includes a listing of at-risk species of concern that are globally or nationally most at-risk of extinction and which occur in South Dakota. Applicators could be directed to check an online list of federally listed species by county (http://www.fws.gov/southdakotafield office) or other online resources. Contact information for the Service's South Dakota Field Office and the SDGFP's Wildlife Diversity Program could also be provided for the applicator to obtain more detailed information on whether species of concern are within the application area.

SDDENR will provide a link to this information on its website prior to the effective date of the general permit.

2. In section 5.4, "Adverse Incident Reporting," we request that the SDDENR's or the South Dakota Department of Agriculture's notification of a suspected non-target pesticide die-off results in prompt notification to the Service's South Dakota Ecological Services Field Office. We can be contacted in office at (605) 224-8693, Extension 232, or by mobile telephone at (605) 222-2994. Notification should also include State and Federal law enforcement.

   SDDENR will also include this information on its website.

Mike Larson with Larson Helicopters out of Perham, MN submitted the following questions:

In regards to the Permit we must obtain for applying pesticides to and near state waters. I think the responsibilitie[s] for the reporting should fall in the hands of the person or public entities that hire the applicator to apply pesticides since they are the ones that deem it nessacary [sic] to be sprayed, And are the ones that would be the closest to the waters or land to see the effects of the application. Records from the applicator for the application would be sent to the person or entity that hired the application. We as applicators already do our part for reporting with our application records that we keep on file for the Department of Ag.

As Mr. Larson notes, applicators are already charged with the primary responsibility for compliance, recordkeeping, and reporting under state and federal law. SDDENR gave a great deal of consideration to how best to craft this permit and who to actually permit. Ultimately, SDDENR believed it provided the most consistent approach to regulate the applicators.

FINAL PERMIT DECISION

SDDENR will make the wetlands shapefile from the National Wetlands Inventory available from SDDENR's webpage. In addition, SDDENR will also provide links to information regarding the presence of endangered species and contact information for the US Fish and Wildlife Service on its webpage.

On March 6, 2011, EPA requested the U.S. Court of Appeals provide an extension to the permitting deadline to allow more time for pesticide operators to obtain permits for pesticide discharges into U.S. waters. EPA requested the deadline be extended from April 9, 2011, to

October 31, 2011. During the period while the court is considering the extension request, EPA has stated permits for pesticide applications will not be required under the Clean Water Act.

SDDENR has completed the process to issue a general permit for the discharge of pollutants from a point source associated with pesticide applications. The court may deny EPA's request, at which point, the state would be required to issue a permit by the original April 9, 2011, deadline.

Therefore, with this addendum to the Statement of Basis and response to comments, SDDENR is notifying all commenters, potential permittees, and the general public of its final decision to issue a general permit for the discharge of pollutants from a point source associated with pesticide applications by the deadline that is ultimately set by the court. If the court denies EPA's request for an extension, the permit will be promptly issued with an effective date of April 9, 2011.

If the U.S. Court of Appeals grants the request for an extension, the effective date of South Dakota's permit will coincide with the new date issued by the court. Although the permit is final and ready for issuance, SDDENR will hold the terms and conditions in abeyance until such time as the Court of Appeals sets a date for compliance.

In addition to the uncertainty with regard to the deadline for obtaining a permit, the United States Congress is also considering legislation to address the issue of NDPES permits for pesticide applications. This legislation, if passed, may alter the need for a permit. If Congress passes legislation stating NPDES permits are no longer needed, SDDENR intends to revoke the general permit and eliminate any permitting requirements for discharges to waters of the state resulting from the application of pesticides.

PERMIT EXPIRATION

A five-year permit is recommended.

PERMIT CONTACT

Any questions pertaining to this response to comments or the pesticide general permit can be directed to Jonathan Hill, Natural Resources Project Engineer for the Surface Water Quality Program, at (605) 773-3351.

March 10, 2011