Clean Water Act Permitting of Discharges from Pesticide Applications

October 7, 2009

NPDES Pesticide Permitting Topics to be Discussed

- Purpose
- Background:
  - NPDES Permitting
  - 2006 EPA Rule
- Schedule and Activities Conducted to Date
- Prototype Permit Contents:
  - Scope
  - Notices of Intent
  - Effluent Limits
    - Technology-Based
    - Water Quality Based
  - Monitoring
  - Reporting
  - Recordkeeping
- Summary and Next Steps

Purpose of Webcast

- To provide early insight into the Agency's latest thinking on the contents and structure of the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) pesticides general permit (PGP) in preparation to the Agency's PPDC meeting being held on October 14, 2009.

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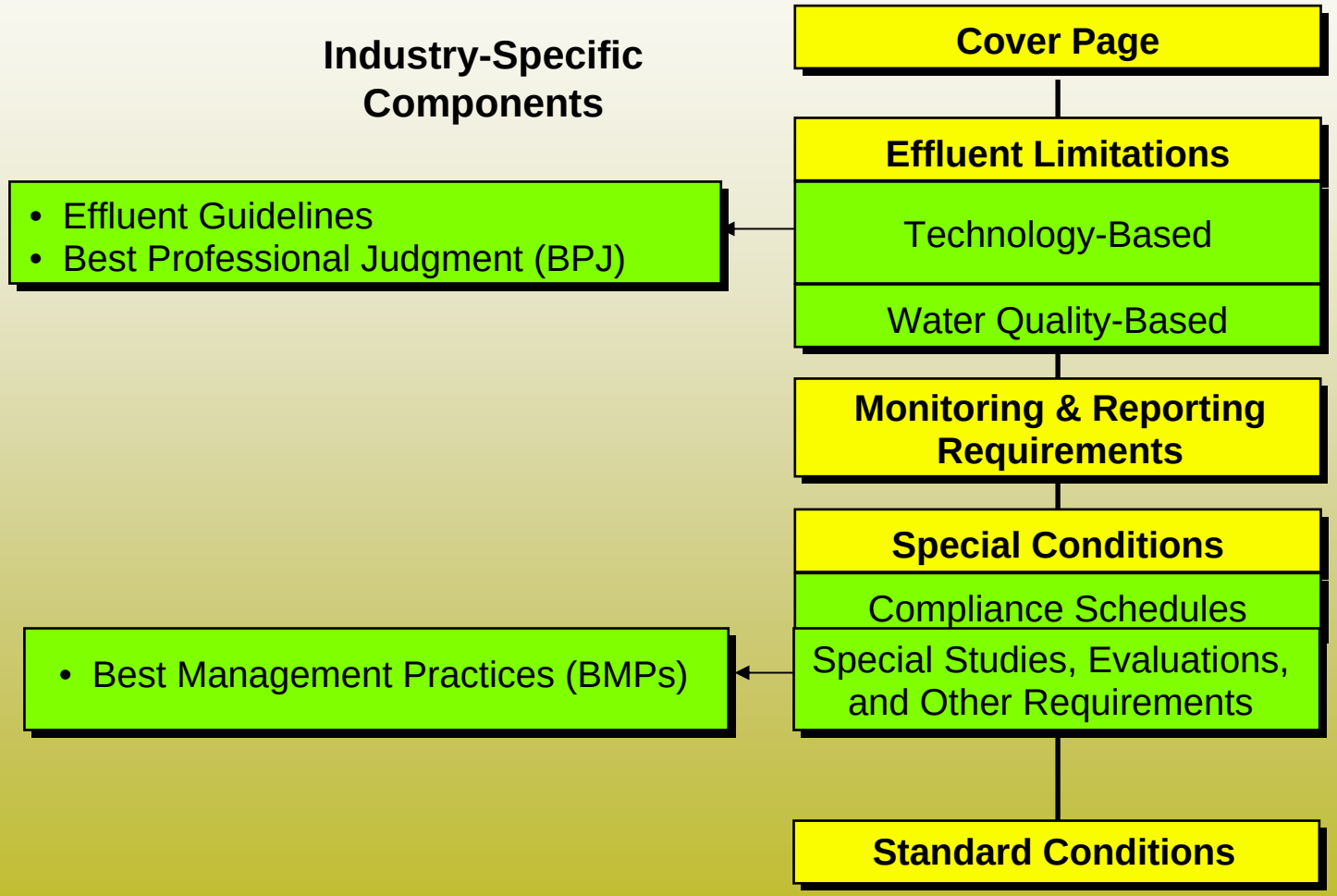
Background: NPDES Permitting
NPDES CWA Statutory Framework

- All “point” sources
- “Discharging pollutants”
- Into “waters of the U.S.”

Must obtain NPDES permit coverage from EPA or an NPDES- authorized State

Background: NPDES Permitting
NPDES Permit Components



Background: NPDES Permitting
NPDES Fact Sheet Components

- NPDES regulations require permits to include a fact sheet.

- What type of information is contained in a permit fact sheet?
  - Principal facts and significant factual, legal, methodological, and policy questions considered in preparing the permit.
  - Brief description of types of activities covered.
  - Types of discharges covered.
  - Rationale for permit requirements, including calculations and analysis.
  - Brief summary of the basis for permit conditions.

  - Complete list of contents available at 40 CFR 124.8 and 124.56.

Background: NPDES Permitting
Types of NPDES Permits

- Permitting Authorities use both Individual Permits and General Permits to control discharges to waters of the United States
  - Individual Permits
  - General Permits

Background: NPDES Permitting
Types of NPDES Permits – Individual

- Individual Permit
  - 1 application submitted ⇨ 1 permit issued
  - Application includes detailed information describing the specific discharges to be covered under the permit, including the nature and concentration of discharges

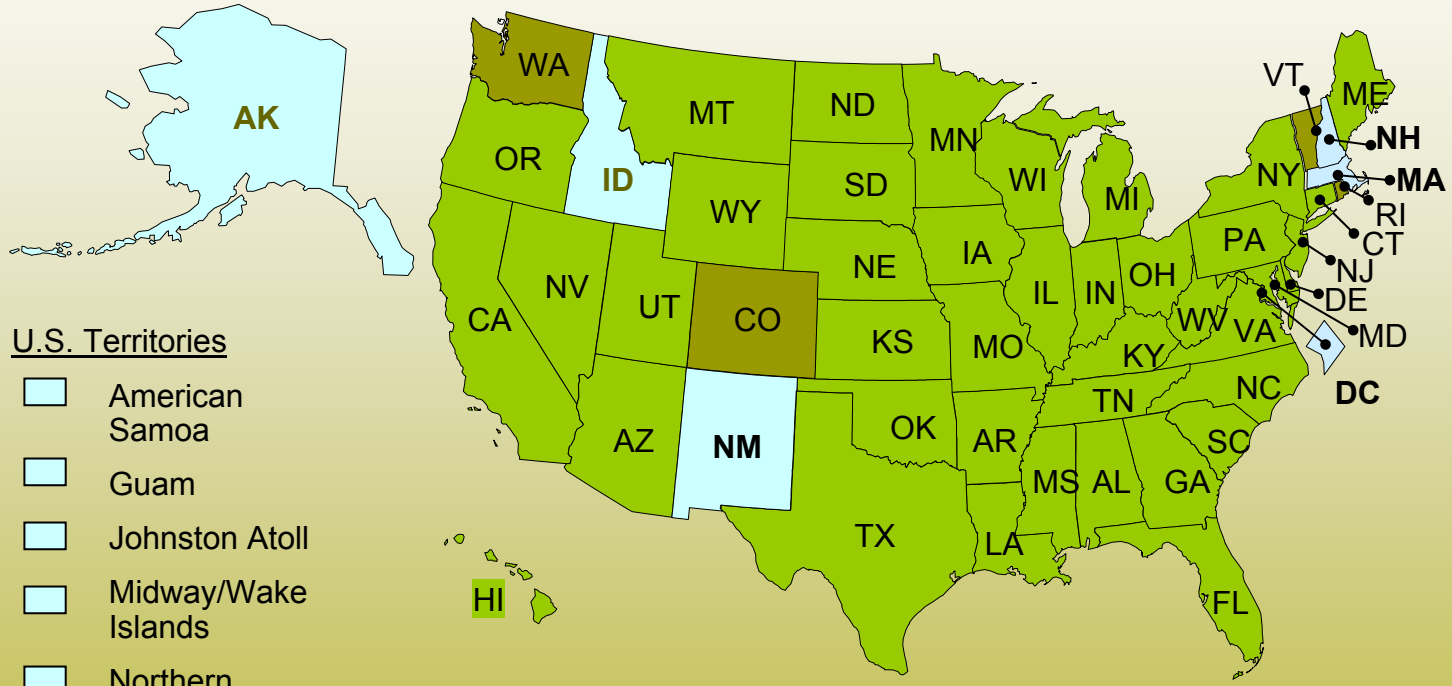
Background: NPDES Permitting
Types of NPDES Permits - General

- General Permit (40 CFR 122.28)
  - 1 permit issued ⇨ NOI submitted by each permittee
  - Permit must identify:
    - area of coverage
    - sources covered
    - other information
  - NOI typical includes basic information on discharger, the type of discharges, and receiving water.

Background: NPDES Permitting
NPDES General Permit Authority

- Issuing general permits for pesticide applications by the EPA or State NPDES permitting authorities (typically DEQ/DEP type agency). 46 States and Virgin Islands are authorized.
- Does not override any existing state or federal requirements: should work in tandem with those requirements.
- Issuing general permits for discharges from pesticide applications is consistent with how EPA has regulated discharges from other activities.

Background: NPDES Permitting
NPDES Program Authorizations



Background: NPDES Permitting
EPA as Permitting Authority

- EPA's Pesticide General Permit will cover areas where EPA remains the NPDES permitting authority (i.e., MA, ID, NH, AK, and NM, as well as most territories, tribal lands, and certain federal facilities).
- During the stay, EPA will work closely with the NPDES authorized States to concurrently develop their permits.
- EPA and States will provide outreach and education to the regulated and environmental communities.

Background: NPDES Permitting
NPDES General Permit Authority

- State-issued general permits must meet all CWA requirements that the Federally-issued permit must meet but can be more stringent.
- Permits are written based on a permit writer's best professional judgment.
  - Judgments may differ, so how each permit satisfies the CWA requirement may differ in some respects.
- EPA does maintain an oversight role.
  - If EPA determines that a specific state condition fails to satisfy a particular CWA requirement, EPA could object to that permit.
- Citizens have the right to challenge NPDES permits.

Background: NPDES Permitting
Considerations in Permit Development

1. Provides environmental protection
2. Complies with statutory and regulatory requirements
3. Builds on experience from states and programs
4. Consists of an efficient and effective process
5. Uses resources effectively
6. Is transparent and understandable

Background: NPDES Permitting
Introduction to NPDES Permits

Go to EPA's NPDES Training Website:

www.epa.gov/npdes/training

and click on "**NPDES Permit Writers Training**"

Look for the heading:

"**Introduction to the NPDES Program**"

Two 30-minute presentations (with audio):

- **Overview of the Clean Water Act and the NPDES Program**
- **Scope and Regulatory Framework of the NPDES Program**

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Background: EPA 2006 Rule
2006 Final CWA Pesticides Rule

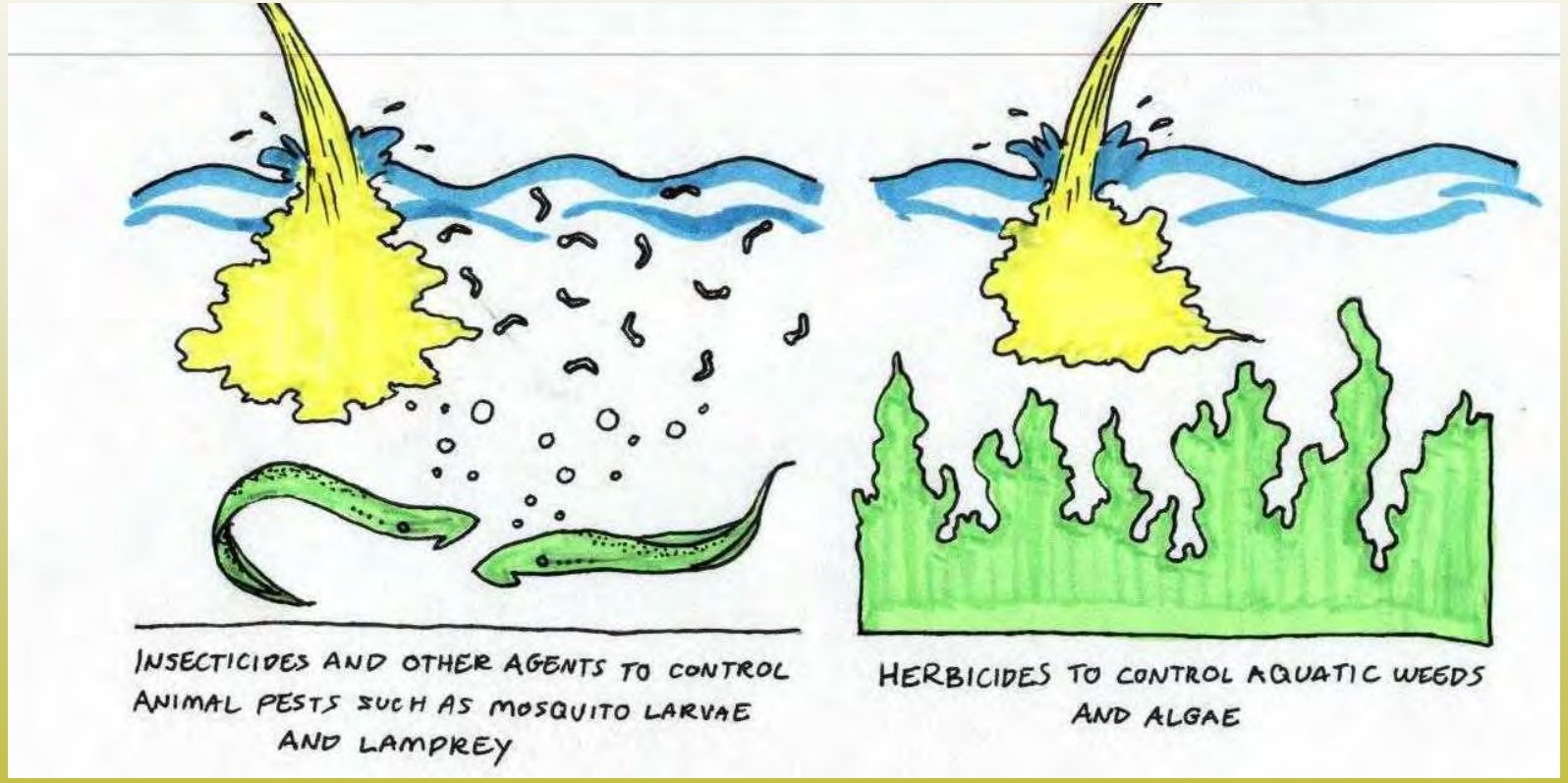
- Rule published on November 27, 2006

"The application of a pesticide to waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires an NPDES permit in the following two circumstances:

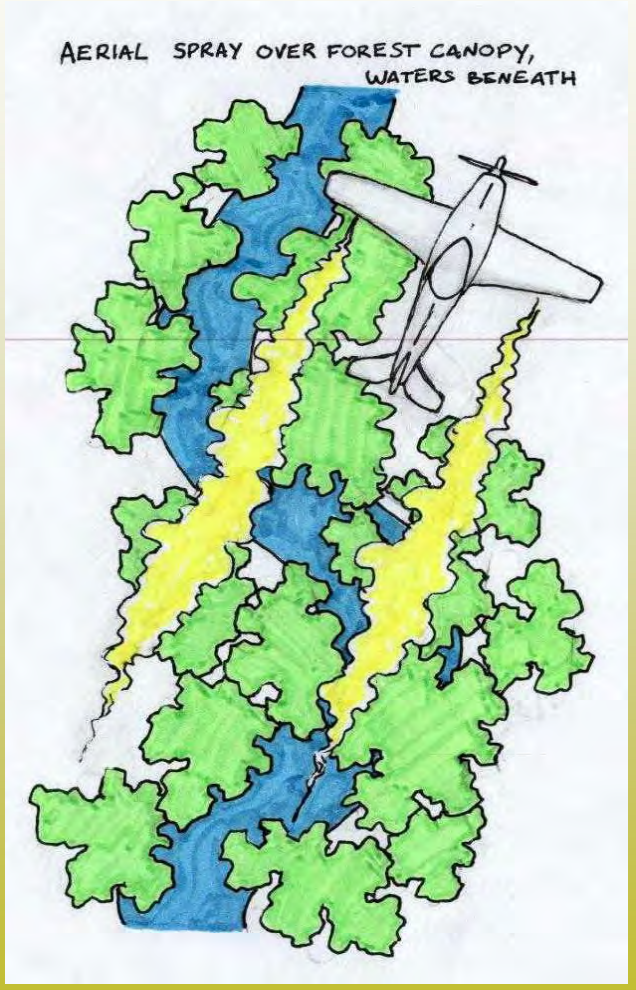
1. The application of pesticides **directly to** waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in waters of the United States; and

2. The application of pesticides to control pests that are present **over waters** of the United States, **including near** such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests."

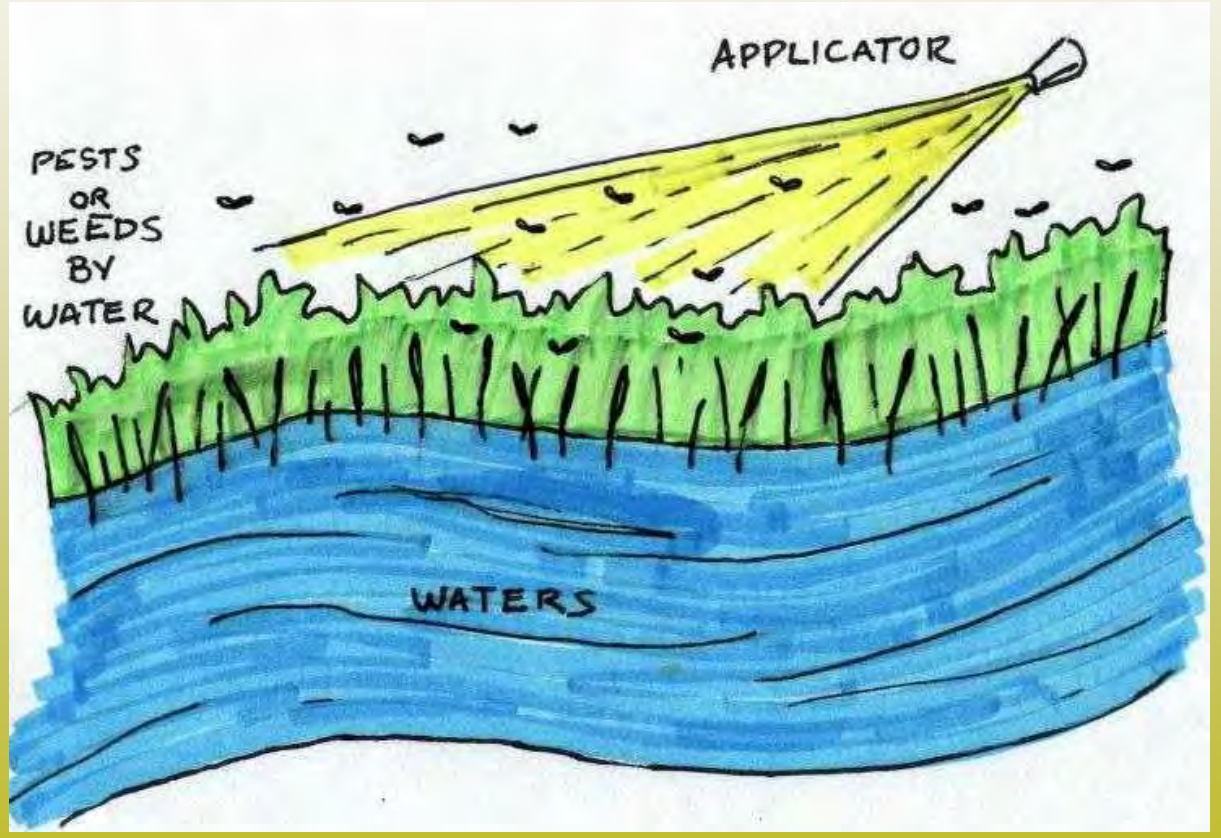
Example: Direct Application to Water for Aquatic Pests ("To") – Covered by 2006 Rule



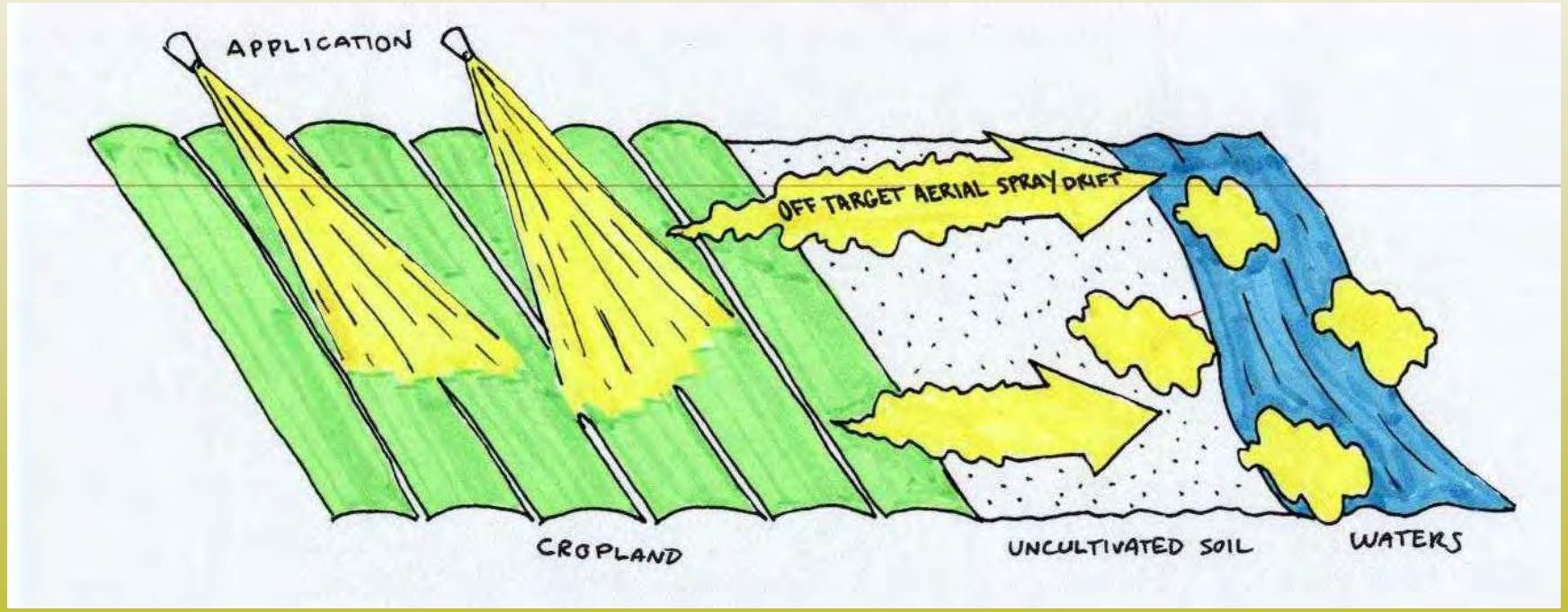
Example: Aerial Mosquito Control ("Over") – Covered by 2006 Rule



Example: Weed and Insect Control Near Water ("Near") – Covered by 2006 Rule



Example: Off-Target Spray Drift. Not Covered by 2006 Rule



Background: EPA 2006 Rule
Litigation on Rule

- In December, 2006 petitions for review were filed in 11 Circuit Courts. Petitions were consolidated in 6th Circuit.

- Environmental groups argued:
  - Judicial review of rule belonged in district courts;
  - EPA exceeded its authority under CWA;
  - EPA may not exempt FIFRA-compliant applications of pesticides from the requirements of the CWA.

- Industry petitioners argued final rule was arbitrary and capricious because it treats pesticides applied in violation of FIFRA as pollutants, while treating the same pesticides as non-pollutants when used in compliance with FIFRA.

Background: EPA 2006 Rule
6th Circuit's Decision and Rationale

- On January 7, 2009 the 6th Circuit Court of Appeals vacated the CWA pesticides rule, stating that the rule was not a reasonable interpretation of the CWA.
  - Biological pesticides – Court considered "biological materials" from list of pollutants in Sec. 502 CWA – stating all biological pesticides are pollutants because they "undeniably alter the physical integrity of the waters."
  - Chemicals pesticides – Court considered "chemical wastes" from Sec. 502 – stating that chemical pesticides are pollutants if they leave a residue (or "waste").

Background: EPA 2006 Rule
EPA Response to Court's Decision

- On April 8, 2009, EPA requested a two year stay of the mandate during which time EPA would:
  - Develop general permits for areas where EPA is permitting authority.
  - Work with NPDES-authorized states to develop their general permits.
  - Provide education and outreach to stakeholders.

Background: EPA 2006 Rule
Court Decision on Stay Request

- On June 8, 2009, the 6th Circuit granted EPA's request and ordered a stay of the mandate until April 9, 2011.
- Industry petitioned for a rehearing en banc.
  - On August 3, 2009 the Court rejected this request.
  - It is unknown if Industry will petition the Supreme Court.
- Thus, EPA's rule stating that NPDES permits are not required for pesticide applications applied to or over, including near waters of the U.S., remains in effect until April 9, 2011.
- As of **April 10, 2011**, discharges into a water of the U.S. from pesticide applications will require coverage under an NPDES permit.

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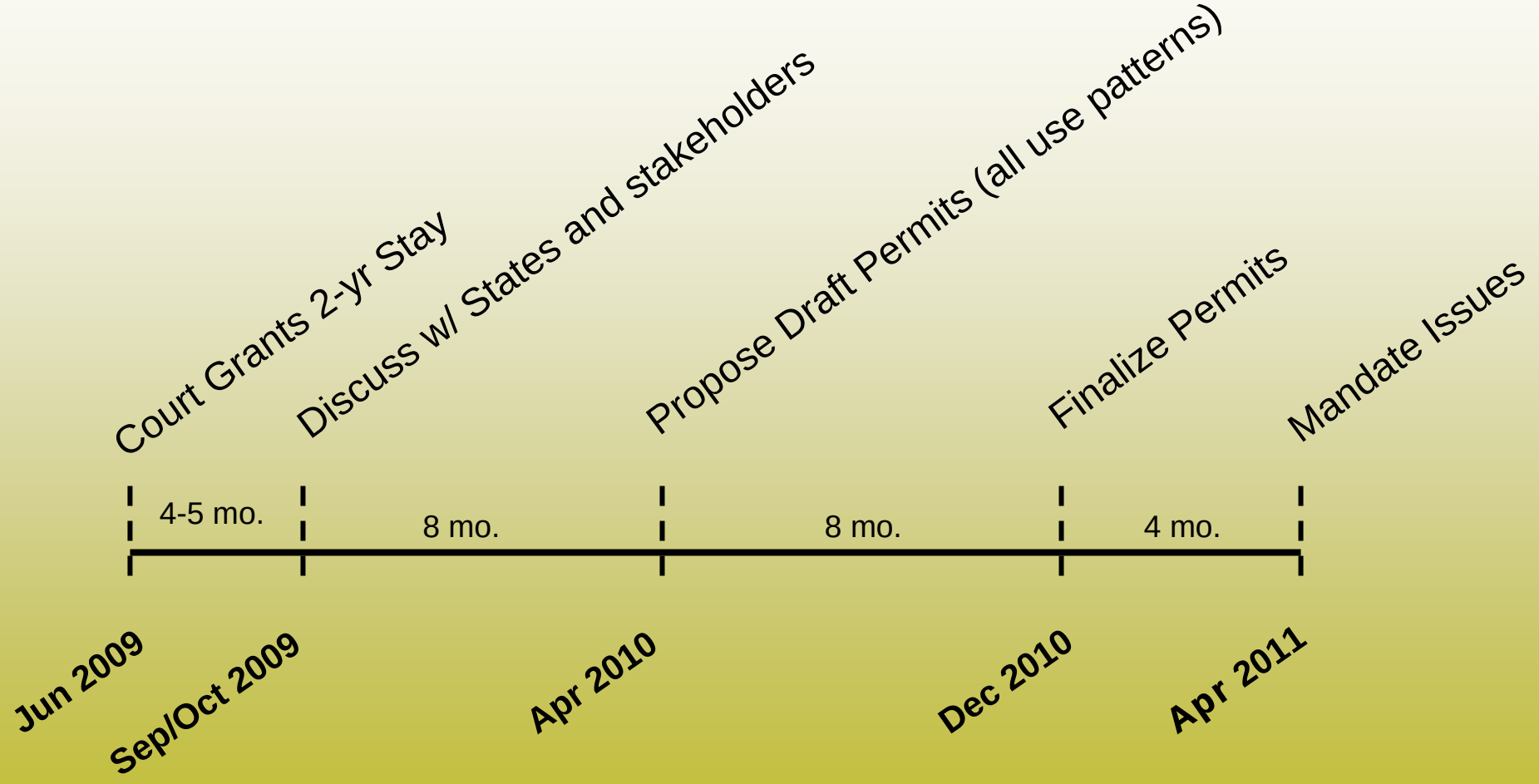
Schedule:
EPA Pesticide General Permit



Activities Conducted to Date: EPA Coordination

- Joint effort between EPA Offices (Water, Pesticide Programs, Enforcement and Compliance Assurance, Policy, General Counsel, Research and Development, and the Regions)
- Steering committee formed of managers across programs (weekly teleconferences)
- EPA workgroups were established for
  - Water quality, technology, and monitoring/reporting
- Periodic discussions with state regulatory representatives from ASIWPCA & AAPCO
- Regular meetings with USDA

Activities Conducted to Date: Stakeholder Involvement

- Presentations have been made at various industry and other stakeholder meetings, to include:
  - American Mosquito Control Association
  - SFIREG
  - Responsible Industry for Sound Environment
  - American Farm Bureau
  - State Agencies
  - National Cotton Council
- Information tours have been conducted (mosquito and weed control)

Activities Conducted to Date: State Dialogue Meeting

- Two-day meeting with state NPDES and pesticide program implementers

- Purpose of this meeting was to share initial permit concepts and seek feedback on EPA's draft general permit concepts for pesticide applications to waters of the U.S. for two pesticide use patterns:
  - (1) mosquitocides and
  - (2) herbicides in lakes and ponds.

Activities Conducted to Date: Prototype Pesticides General Permit

- What the prototype pesticides general permit is:
  - Preliminary concepts to better develop options
  - Concepts for discussion
  - A “reality check” prior to Agency option selection
- What the prototype pesticides general permit is not:
  - Not a final or even proposed permit.
  - Does not represent EPA decision-making.
- The prototype (concept) pesticides general permit does not involve formal public comment or response. Instead, it provides EPA an opportunity to discuss permit concepts with the FACA to improve Agency decision-making in the development of the proposed permit scheduled for proposal in April 2010.

NPDES Pesticide Permitting Topics to be Discussed

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Prototype Permit Contents: Scope
What does the Prototype PGP Cover?

- The PGP will cover the pesticide applications covered under the 2006 Final Rule (71 FR 68483, 11/27/06).
  - Pesticides applied to water (e.g., mosquito larvicides); or over water (e.g., forestry use); including near water (e.g., ditch bank vegetation control).
  - Additional situations may be considered and discussion on “other situations” would be appreciated.
- The PGP will cover pesticides authorized for use under FIFRA, including:
  - Pesticides registered under FIFRA §§ 3 or 24(c)
  - Pesticides authorized for use under FIFRA §§ 5 or18
  - Pesticides exempt from FIFRA requirements pursuant to FIFRA sec. 25(b)

Prototype Permit Contents: Scope

Pesticide Use Categories

- EPA will evaluate at least the following pesticide use categories, which fall under the 2006 rule:
  - Mosquito control
  - Aquatic weed control
  - Control of vegetation along ditch banks and irrigation canals
  - Pesticides used to control wide area insect suppression or aquatic invasive plant species
  - Pesticides used in forestry programs when applied over US waters; and
  - Products applied to water to kill fish, mussels, or other invasive aquatic species.

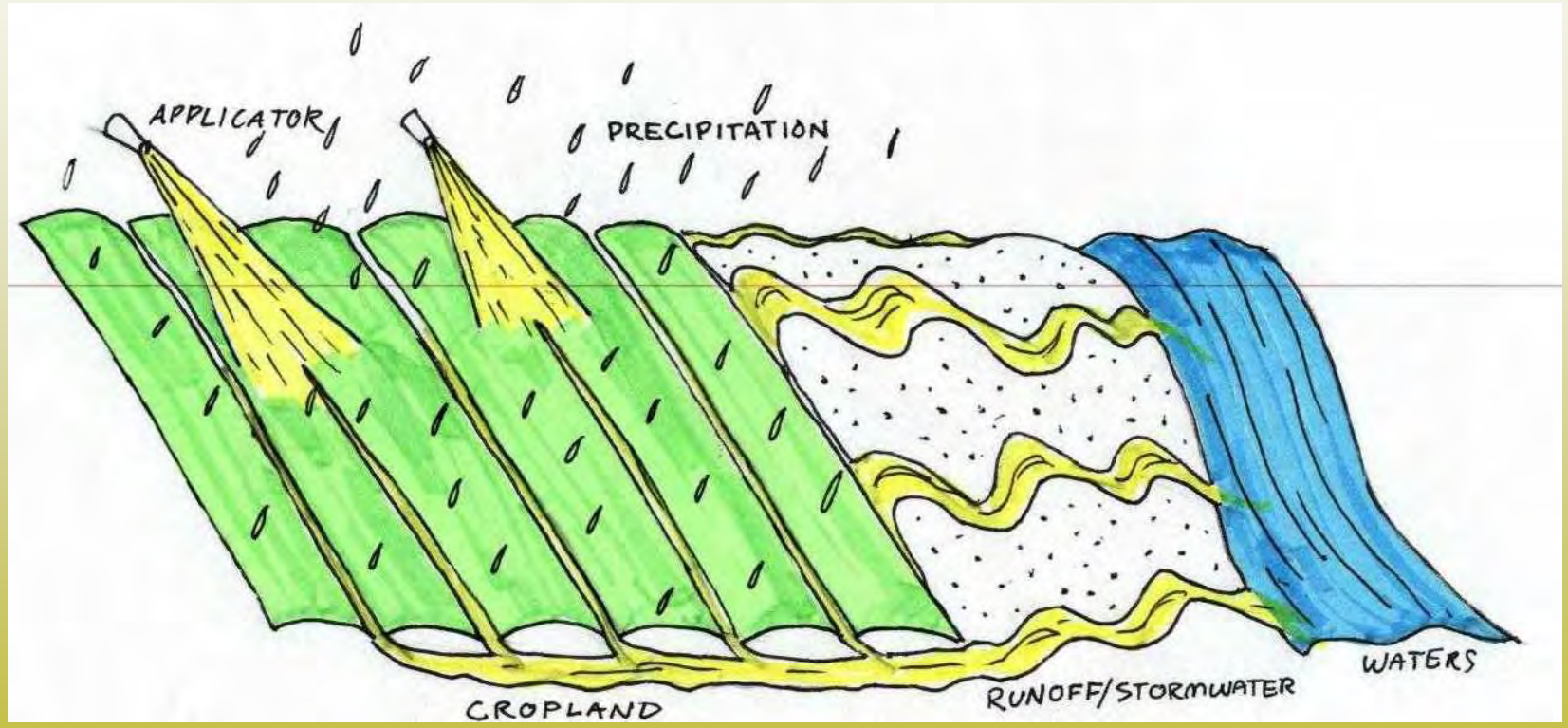
Prototype Permit Contents: Scope
Estimated Permitted Universe

- Estimated Universe of Affected Activities
  - Approximately 5.6 million such applications annually are performed by 365,000 applicators for these types of pesticide uses.
  - 500 different pesticide active ingredients are contained in approximately 3700 product labels.

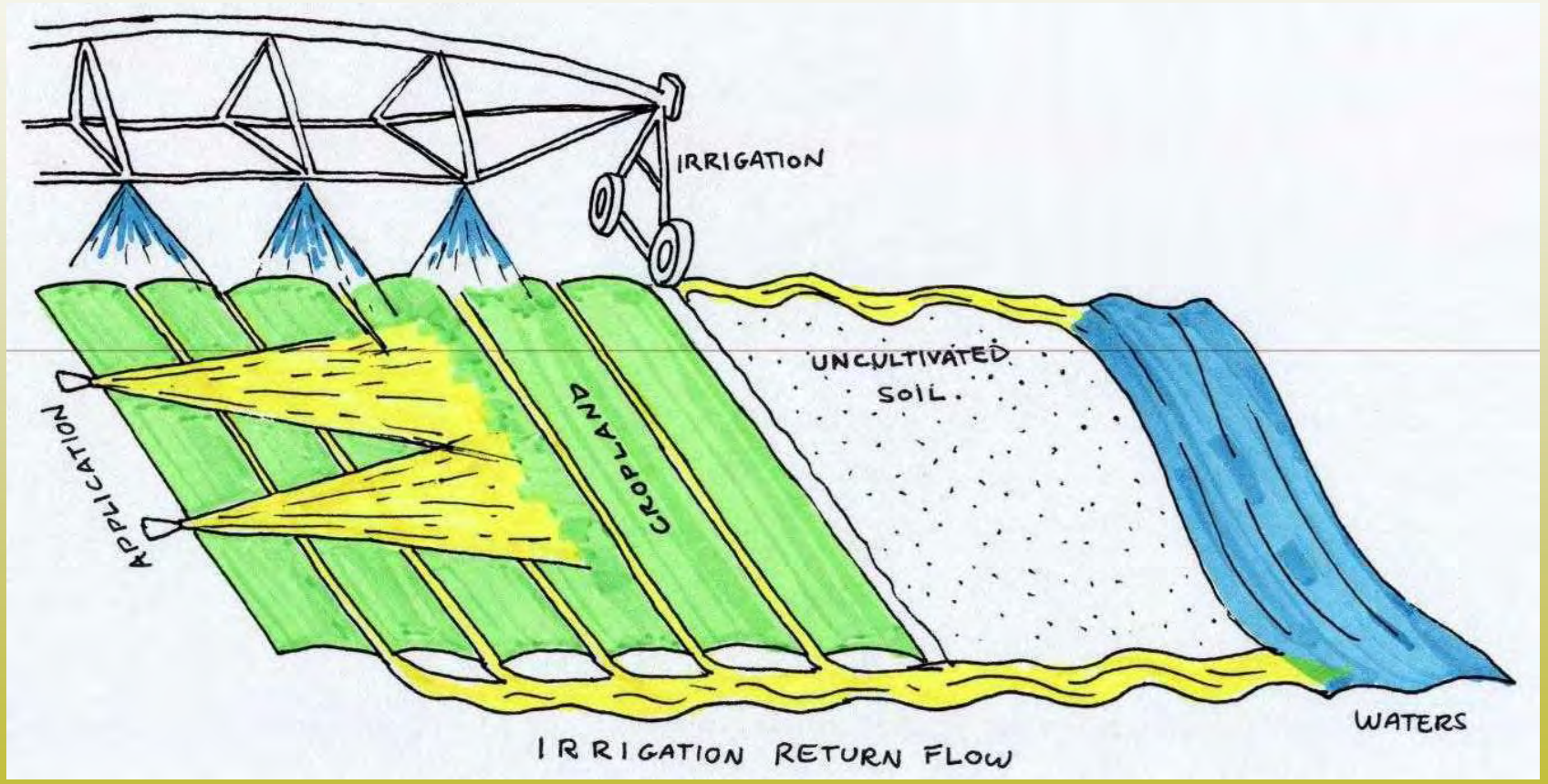
Prototype Permit Contents: Scope
PGP Exclusions

- This PGP will not cover activities exempt from permitting under the CWA
  - Agricultural Stormwater Runoff
  - Irrigation Return Flow

Agricultural Stormwater; Generally Exempt by Statute



Irrigation Return Flow; Generally Exempt by Statute



Prototype Permit Contents: Scope
PGP Eligibility

- This PGP may not cover certain discharges for which EPA will require coverage under an individual permit or another general permit:
  - Discharges of pesticides to waterbodies that are impaired under CWA §303(d) for that discharged pesticide
  - Discharges to Tier 3 waterbodies (i.e., Outstanding Natural Resource Waters)
  - Discharges that are not specifically addressed by the PGP

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Prototype Permit Contents: Notice of Intent Considerations to Obtain Coverage

- In determining the NOI requirements for the Pesticide General Permit, EPA is taking the following considerations into account:
  - The NOI should collect useful information from appropriate entities.
  - The burden on regulators and the regulated entities.
  - NPDES regulations allow general permit coverage without submission of an NOI in certain instances.
  - Duplicative submissions.

Prototype Permit Contents: Notice of Intent
What Activity Triggers the NOI?

- For mosquitocides and aquatic herbicides, for example, an entity might need to file an NOI if they conducted or authorized the application of pesticides resulting in more than X water-acre treatments/year, in the aggregate. (Two treatments of the same 1 acre water body = 2 water-acre treatments.)
- The value for X could be set at a level that excluded infrequent and/or small scale application activities and could set X, for example, at 25 or 50 water-acres or some other value.
- Other ways to identify groups – i.e., by amount of pesticides applied, etc?
- Challenging to identify large commercial or large public entity applications.
- Thresholds/triggers for an NOI could vary by use category

Prototype Permit Contents: Notice of Intent
Who Has to File an NOI?

- The NOI filer, in most cases, would be the organization responsible for deciding to conduct the pesticide applications, as opposed to the person performing the applications. Examples include: Mosquito Control Districts, states, municipalities.

- However, any applicator would need to file an NOI, if the applicator projects that it will treat more than X water-acre treatments per year or (per permit cycle?) for people who did not need to file an NOI individually.

Prototype Permit Contents: Notice of Intent
Timing of NOI Filings

- A person filing an NOI would be covered starting 10 days after receipt of a complete and accurate NOI form by the appropriate permitting authority (provided the permitting authority does not delay authorization to further assess the NOI).
- Filing an NOI provides coverage for all future pesticide application [in that category in that geographic area] that occur during the life of the General Permit (5 years).
- For entities that are required to file an NOI based on the aggregation of water-acres treated in multiple applications, the NOI should be filed at any time the operator determines that it will exceed the trigger of X water-acres treatments per year (or per permit cycle). Applications performed before the operator determined that it would exceed the threshold would be covered without the NOI.
- Emergency situations that require pesticide application can be performed in advance of an NOI submission, provided all other conditions are met in the permit.

Prototype Permit Contents: Notice of Intent
Content of the NOI

- The NOI should identify the responsible entity and provide the following information:
  - Contact information—address, phone, email
  - Description of entity—e.g., government, homeowner association, applicator
  - Type of discharges (pesticide use patterns)
  - Receiving stream(s)

- The discharger would be required to submit updated information to perform operations different than those identified in the NOI.

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Prototype Permit Contents: Effluent Limits
Technology-Based Effluent Limits (TBELs)

- For many applicators, implementing Integrated Pest Management (IPM) practices will be determined to be Best Available Technology (BAT) for many applicators.

Prototype Permit Contents: Effluent Limits
TBELs: Integrated Pest Management

- PGP effluent limits would include provisions to minimize pesticide discharges, including using non-chemical alternatives

- To the extent feasible, the permittee would:
  1. Identify/assess pest problem
  2. Consider if source reduction/habitat modification may significantly reduce sources
  3. Follow appropriate procedures for pesticide use (calibrate, maintain, etc.)
  4. Educate

Prototype Permit Contents: Effluent Limits
TBELs: Minimize Discharges

Minimize Pesticide Discharges into Waters of the United States

- Reduce discharges using control measures/BMPs.
- Use lowest amount of pesticide necessary to effectively control target pests while considering pesticide resistance.
- ***Mosquitoes***: Do not apply adulticides over water except to target areas where adult mosquitoes are present and weather conditions facilitate movement of pesticide product away from water.

Prototype Permit Contents: Effluent Limits
TBELs: ID Problem and Reduce Source

Identify the Problem

- ***Mosquitoes***: Locate breeding sites, mosquito biology, action threshold.
- ***Aquatic Weeds***: Locate weed areas; assess weed biology; identify possible sources of the problem (e.g., nutrients, invasive species, etc.); set action thresholds. Note that all of these are subject to a feasibility test.

Source Reduction and Habitat Modification *(Mosquitoes)*

[to the extent practical and in your control]

- Remove standing water including management practices to reduce populations or facilitate predator habitat;
- Use vegetation management practices to eliminate or reduce mosquito habitat,
- Promote biological control, e.g., larvivorous fish, aquatic insects, birds, and bats.

Prototype Permit Contents: Effluent Limits
TBELs: Use Alternative Practices

Mechanical and Biological Control, and Habitat Modification *(Aquatic Weeds) – When Environmentally Compatible*

- Use mechanical control (e.g. weed removal by hand or machine) when practicable;
- Maintain, enhance, and promote biological control(s);
- Use habitat modification practices (e.g., light attenuation); and
- Conduct control measures in a manner that minimizes impacts to non-target species.

Prototype Permit Contents: Effluent Limits
TBELs: Survey Pest Pressure

Pest Surveillance

Mosquitoes

- Conduct larval & adult surveillance using standard methods.
- Conduct disease surveillance to identify disease presence as an indicator of the need to initiate an adult control program.
- Conduct resistance surveillance.
- Analyze surveillance data to identify sources of mosquitoes.

Aquatic Weeds

- Conduct surveillance to assess the treatment area and to determine when pre-established conditions are met
- Pre-application and post-application.

Prototype Permit Contents: Effluent Limits
TBELs: Pesticide Use Practices

Pesticide Use

Mosquitoes:

- Use larvicides first, where appropriate, with adulticides as backup when action threshold has been met unless under emergency conditions (e.g. flooding, disease outbreak).

Mosquitoes & Aquatic Weeds:

- Minimize impact to non-target species.
- Train all pesticide operators in proper application of pesticides and in proper response to adverse incidents.
- Conduct maintenance activities to minimize potential for leaks, spills, etc.
- Calibrate and maintain equipment to ensure effective application and control.

Prototype Permit Contents: Effluent Limits
TBELs: Education and Prevention

Education and Prevention

Mosquitoes:

- Avoidance
- Source reduction (e.g., information on eliminating mosquito breeding sites)

Aquatic Weeds:

- The role of nutrient availability in weed occurrence and abundance
- Accidental weed introduction avoidance

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Prototype Permit Contents: Effluent Limits
Water-Quality Based Effluent Limits (WQBELs)

- Considerations and challenges:
  - Regulation of pesticides under both FIFRA and CWA. The two statutes share the goal for protecting water quality, but have different requirements and legal standards.
  - Different risk assessment methodologies under the two statutes.

Prototype Permit Contents: Effluent Limits WQBELs

- The permit will include a narrative WQBEL, “Your discharge (e.g., chemical residual) must be controlled as necessary to meet applicable WQS.”

- The permit will require permittees to meet all applicable numeric and narrative water quality standards (WQS). For registered pesticides, there are currently nationally recommended ambient water quality criteria, State adopted numeric WQS, and narrative WQS such as “no toxics in toxic amounts”.

- Before issuance, EPA permits require 401 certification from states, where states can add requirements to ensure consistency with State WQS.

Prototype Permit Contents: Effluent Limits WQBELs

- If at any time the permittee becomes aware, or EPA determines, that a discharge causes or contributes to an exceedance of applicable water quality standards, the permittee must take corrective action, document the corrective actions, and report the corrective actions to EPA.

- During the life of the permit, EPA may determine, after reviewing new information, that additional control measures are warranted.

Prototype Permit Contents: Effluent Limits WQBELs

- EPA expects that compliance with FIFRA in addition to compliance with the conditions in the permit will control discharges as necessary to meet applicable water quality standards.

- EPA has three “national” general permits (MSGP, CGP, VGP), all of which use a similar approach for addressing water quality-based effluent limits.

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Prototype Permit Contents: Monitoring
Self-Monitoring

- A ‘visual’ monitoring approach based on narrative WQBELs may be appropriate for assessing compliance with permit conditions.
  - Routine visual monitoring: spot checks for signs of adverse effects on non-target organisms during efficacy checks.

Prototype Permit Contents: Monitoring
Additional Monitoring

- Permit language will clarify that EPA may impose additional monitoring requirements on specific dischargers:
  - EPA notifies discharger in writing of its decision to exercise its authority to impose additional requirements and explains the basis for them.
  - Letter specifies that these will be enforceable permit conditions.
  - EPA provides a reasonable amount of time for the permittee to meet and discuss these new requirements with the Agency. After this time period, the letter should provide for the activation of the new requirements.
  - Permittee can either accept the new requirements, or elect to apply for an individual permit. This approach can be used either for dischargers already covered or those that are not yet authorized.
- Or EPA could use its separate enforcement authority to require additional monitoring or other information to verify compliance or a return to compliance.

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Prototype Permit Contents: Reporting
Annual Reporting

- Permit will identify permittees required to submit the annual report electronically:
  - May include: permittees submitting NOIs; permittees meeting some acreage treated threshold; permittees with certain responsibilities (e.g., public entities).
- Permit will outline what the annual report must contain, such as:
  - Names/pesticides used & associated EPA registration numbers; jurisdictions where applied; descriptions of locations treated; quantity applied directly to, over, or near waters; pests targeted.
- Annual Reporting template will be included as part of permit.
- Annual Report to be submitted to EPA no later than February 15 of the following year.

Prototype Permit Contents: Reporting
Adverse Incident Reporting

- Any adverse incidents caused by the pesticide application triggers: reporting, and in certain circumstances, corrective action, additional monitoring, or both
- Notify permitting authority within 24 hours of your discovery of the incident.
- May be required to notify local agencies (e.g., wildlife or natural resources, health department).
- Provide a written report of the incident to the permitting authority and to state pesticide registration office.
- Permit outlines what the written report must contain.
  - Includes date/location of incident; product name/application rate; species affected; symptoms or adverse effects; magnitude of effect; certification that the label directions were or were not followed.

Prototype Permit Contents: Reporting
Additional Reporting

- EPA retains authority to require additional information as necessary to assess compliance with permit or the Clean Water Act or to determine if need exists to modify, terminate, revoke, or reissue the permit.

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  - Effluent Limits
    - Technology-Based
    - Water Quality Based
  - Monitoring
  - Reporting
  - **Recordkeeping**
- Summary and Next Steps

Prototype Permit Contents: Recordkeeping
Plan Documentation

- Plan Development
  - Contents of the Plan include pesticide control team information, problem description, control measures description, pest surveillance, education and prevention efforts

- Activity Documentation
  - Includes records of inspections, significant spills, maintenance/repairs, monitoring, employee training, corrective action

Prototype Permit Contents: Recordkeeping
Recordkeeping Requirements

- Records – kept by permittee and EPA (applicable to those submitting NOIs)
  - A copy of the NOI submitted to EPA
  - A copy of the acknowledgment letter for the NOI submittal
  - A copy of the permit
  - A copy of any reports including corrective actions for adverse incidents
- Records – kept only by permittees submitting an NOI
  - Pesticide Application Logs
  - IPM Documentation
  - Reports and all corrective actions
- Public access to records through requests to EPA.

NPDES Pesticide Permitting Topics to be Discussed

- Purpose
- Background:
  - NPDES Permitting
  - 2006 EPA Rule
- Schedule and Activities Conducted to Date
- Prototype Permit Contents:
  - Scope
  - Notices of Intent
  - Effluent Limits
    - Technology-Based
    - Water Quality Based
  - Monitoring
  - Reporting
  - Recordkeeping
- Summary and Next Steps

Prototype Permit Contents: Summary
Environmental Benefits

- Additional limitations on pesticide use in impaired waterbodies (303d) and outstanding natural resources (Tier 3)
- Required use of Integrated Pest Management practices.
- Post-application surveillance and immediate notification of adverse effects.
- Expanded scope for who must report adverse effects on aquatic ecosystems.

Prototype Permit Contents: Summary
Additional Environmental Benefits

- Mandatory equipment calibration and maintenance programs.
- Mandatory education, training and prevention.
- Annual pesticide reporting – quantities and locations available to the public.
- Will be enforceable under the CWA as a permit violation.

Next Steps:
Key Milestones

- State/Stakeholder Input – Sep/Oct 2009
- Agency Option Selection – Nov 2009
- Final Agency Review ~ Jan 2010
- Public Notice of Draft Permit – Apr 2010
- Public Comment Period – Apr/May 2010
- Issuance of Final Permit – Dec 2010

For More Information

For more information:

www.epa.gov/npdes