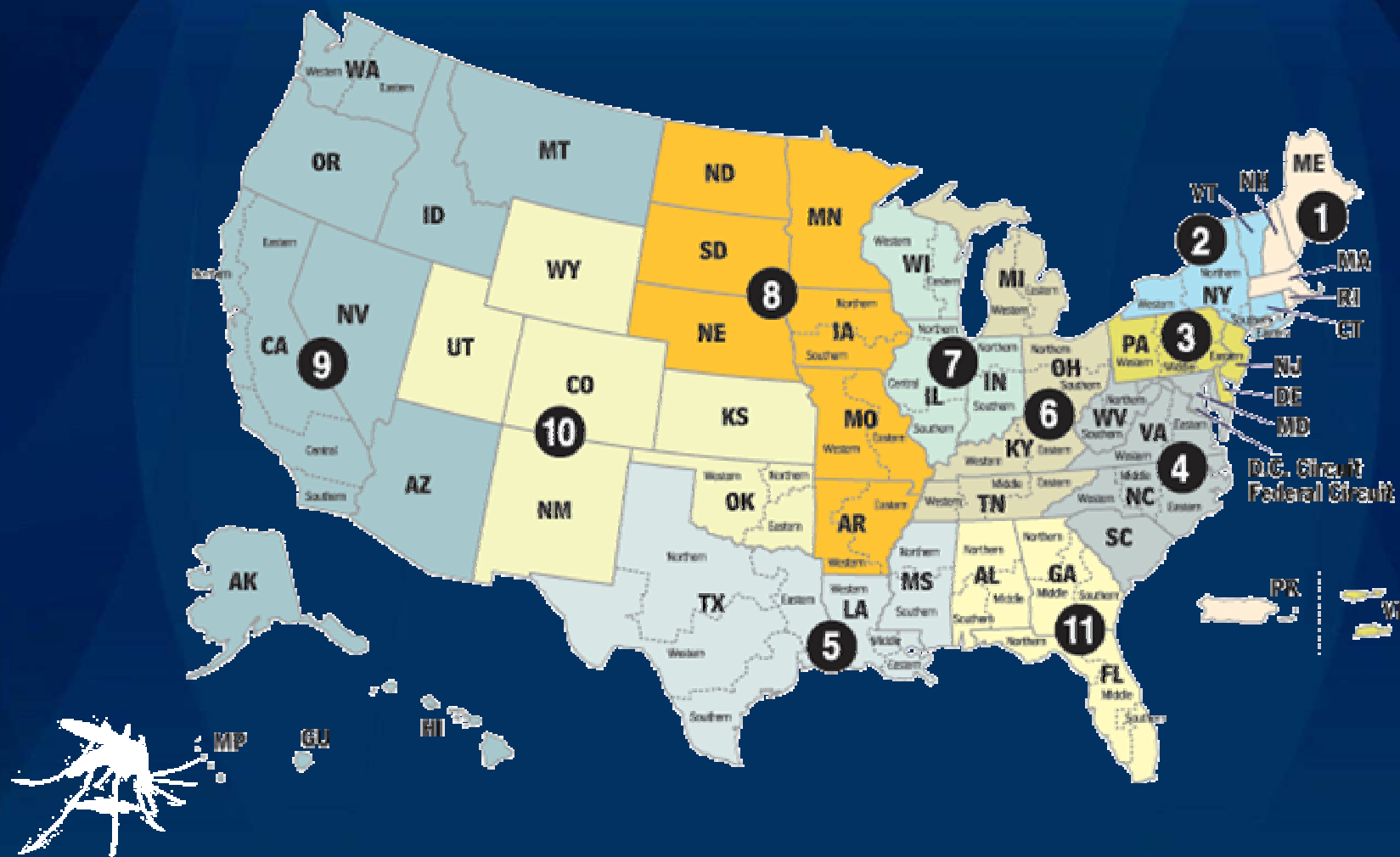


Public Health Pesticides and the Clean Water Act: Quo Vadis?

Joseph M Conlon
Technical Advisor



Circuit Courts of Appeal



History and Key Dates

- **1972** Congress Passes Clean Water Act (CWA) to restore & maintain chemical integrity of “Navigable Waters of the US”
 - Prohibits discharges of any pollutant into waters, except under NPDES permit.
 - States may also issue permits if authorized by EPA
 - Ag runoff and irrigation return flow exempt



Clean Water Act Jurisdiction

- **1973** - EPA defines “Navigable Waters”
 - Tributaries
 - Interstate waters
 - Intrastate lakes, rivers and streams utilized by interstate travelers for recreational or other purposes
 - Intrastate lakes, rivers and streams from which fish or shellfish are taken and sold in interstate commerce.



6th Circuit Court Decision

- **Jan. 7, 2009** 6th Circuit Court of Appeals in *Natl. Cotton Council of Am. et al. v. EPA* overturned EPA 2006 Final Rule - argued 4/29/08
 - Environmental Petitioners - Argued EPA exceeded authority to exempt pesticides in CWA
 - Industry Petitioners – Argued rule too narrow in scope



6th Circuit Court Decision

- **Basis for the holding:**
 - CWA includes “biological pesticides” and “chemical pesticides” with residuals within its definition of “pollutant.”
 - **Chemical Pesticides**
 - Application of chemical pesticides that leave no excess after performing its intended purpose is not the application of a pollutant, and does not require an NPDES permit. However, chemical pesticide residuals are pollutants and, if they were applied by a point source, would require an NPDES permit.
 - **Biological Pesticides**
 - All applications of biological pesticides, regardless of whether the application results in residuals or not, are considered a pollutant



6th Circuit Court Decision

- **May 20, 2009** Orders DoJ (EPA) to respond to industry petition for rehearing *en banc*
- **June 3, 2009** EPA did not seek rehearing:
 - Strongly argued merits of the case during initial hearing
 - 3 – 0 Court ruling was clear on the Law
 - No legal base to meet the standard for another review.



6th Circuit Decision - Rehearing

- **June 3, 2009** - EPA requests stay of mandate
- **June 8, 2009** Stay granted until April 9, 2011
- **August 3, 2009** - Rehearing denied



Permit Development Process

- **Core workgroup holding monthly meetings**
- **Steering committee meeting weekly**
- **Three EPA workgroups meeting weekly**
 - **Water quality**
 - **Technology**
 - **Monitoring, reporting, recordkeeping, NOIs**
- **EPA HQ meet with State workgroup**
- **EPA HQ meet monthly with USDA**
- **Meet with industry/environmentalists**
- **Prototype General Permit is under development**
 - **MA, NH, AK, ID, NM and territories**



Permit Development Process

- **Prototype Development**

- **Purpose – to test process & stakeholder reactions to two pesticide uses:**

- **mosquito adulticides/larvicides**

- **aquatic herbicides in ponds and lakes**

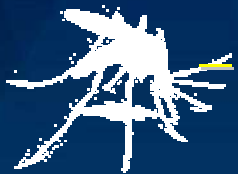
- **Not full scale NPDES permit**

- **Review draft – originally August, now October**

- **Share with FACAs (PPDC) & other stakeholders**

- **Webcast – 7 Oct**

- **PPDC – 14 Oct**



- **Determine necessary permit changes**

EPA NPDES Permits

- **Individual and general**
- **Specifies acceptable level of a pollutant in discharge from “point source”**
- **Limits on what can be discharged, monitoring, and reporting requirements**
- **Requires public comment period**
- **Time to Process is 6 months – 1 year**
- **Permits last up to 5 years maximum**



General Permit – “FIFRA Plus”

- **“Notice of Intent” (NOI)**
 - **Type or scale of application – water-acres?**
 - **Identify the responsible entity**
 - **Contact information - address, phone, email**
 - **Description of entity - e.g., government, homeowner association, applicator**
 - **Type of discharges (pesticide use patterns)**
 - **Receiving stream(s)**
 - **25 (B) not “exempt”**



General Permit – “FIFRA Plus”

- **Technology-Based Effluent Limits (TBEL)**
 - **IPM - BMPs based on Best Available Technology (BAT)**

- **Water Quality-Based Effluent Limits (WQBEL)**
 - **Water Quality Standards (WQS)**
 - **If all TBELs met by adherence to BATS – WQS are met**
 - **The permit will include a narrative WQBEL, “Your discharge (e.g., chemical residual) must be controlled as necessary to meet applicable WQS.” and narrative WQS such as “no toxics in toxic amounts”.**



General Permit – FIFRA Plus

- **Monitoring – required**
 - “visual monitoring” of “application area”
 - “enhanced visual monitoring” for some applications
 - Frequency and timing
 - No ambient water quality testing foreseen – yet
- **Annual reporting**
 - Types, amounts, locations, etc
 - Online using EPA-templates
 - Accessible by public

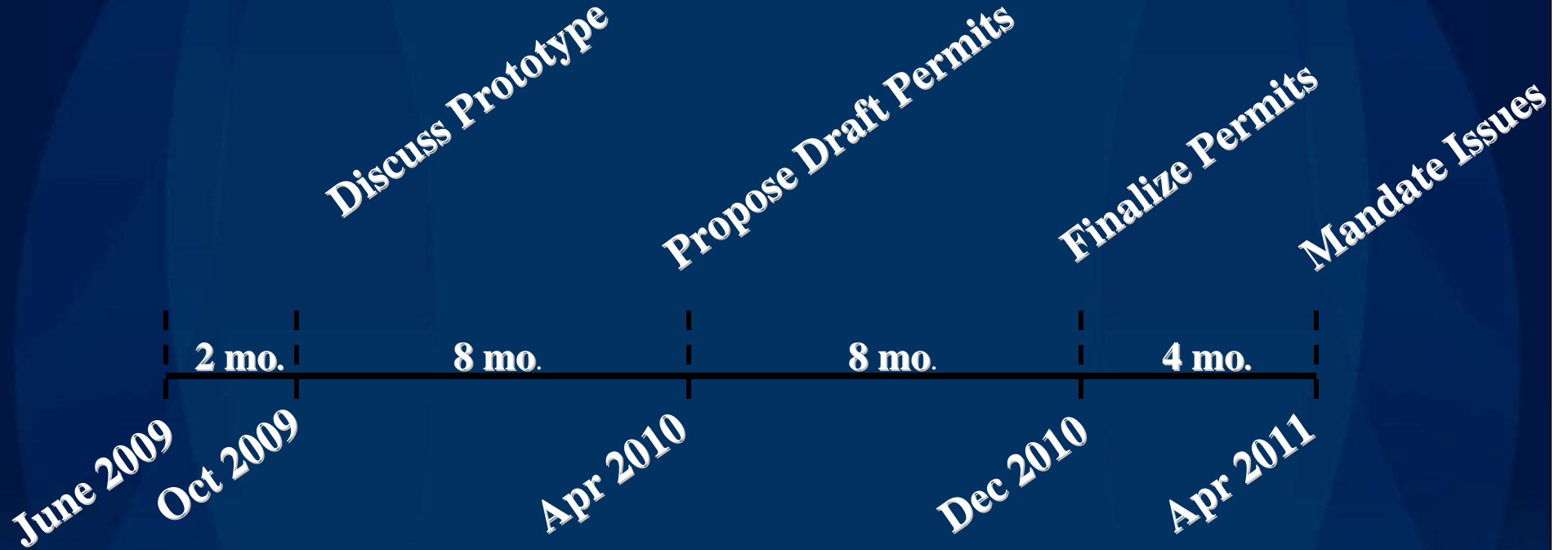


General NPDES Permits

- **Based upon writer's best professional judgement**
- **EPA maintains oversight**
- **Citizens can challenge**



Schedule



Writing NPDES Permits

- **EPA NPDES Training Website**
www.epa.gov/npdes/training
- **click on “NPDES Permit Writers Training”**
 - **“Introduction to the NPDES Program”**
 - **“Overview of the Clean Water Act and the NPDES Program”**
 - **“Scope and Regulatory Framework of the NPDES Program”**



Mosquito Control Concerns

- **Costs – unfunded mandate**
- **Practicality and timing issues – night ops**
- **Based upon sound science**
- **WQS – quantitative and narrative**
- **If lowest rate is used to meet WQS, not efficacious, promotes resistance**



Mosquito Control Concerns

- **Monitoring – how, when, what triggers investigations**
- **Tripwire for NOI**
- **Clearly defined concepts – IPM, etc**
- **Citizen lawsuits – who can be sued?**
- **Will it actually provide enhanced environmental protection?**



Clean Water Restoration Act

- **June 16, 2009** Baucus, Klobuchar, Boxer Amendment
- **Republicans to block floor consideration**
- **EPA seeking NAS study to improve jurisdictional determinations**
- **Gov. Schweitzer (D – MT) withdraws support**



Update

- **Cert petition appealing 6th CCA decision to SCOTUS by 3 November**
 - **CropLife, RISE, American Farm Bureau Federation, American Forest and Paper**
 - **National Cotton Council, Agribusiness Association of Iowa, Southern Crop Production Association**
- **AMCA is filing *amicus curiae***
- **AMCA IMM Policy Document**



Integrated Mosquito Management AMCA IMM Policy Document

- What mosquitoes to be controlled and why**
- Mosquito surveillance and monitoring practices**
- Threshold criteria for spray treatments**
- Record-keeping and reporting**
- Spray notifications for public**
- Maintenance and calibration**
- Insecticide use practices – why, where, when and how:**



Integrated Mosquito Management AMCA IMM Policy Document

- Control efficacy monitoring**
- Resistance management**
- Minimization of non-target impacts**
- Biological controls**
- Source reduction practices**
- Applicator training and certification**
- Public education**

