

## **Response to Comments – MTG870000**

The public comment period for the Pesticide General Permit (PGP) closed on March 2, 2011. The Department reviewed comments from twenty-two commentors in the development of the final PGP. The specific responses follow this brief overview.

During consideration of the comments for this PGP, as well as related changes proposed as part of the Fee Rule package, the Department made several larger-scale improvements. The major shift is that **all** pesticide applications to or over state surface waters will be required to submit a Notice of Intent (NOI) and obtain coverage under this General Permit. This requirement would supersede the existing authorization required under 75-5-308, MCA.

As a result, the requirements of the PGP are separated into two categories:

- Tier I - Requirements for all owner/operators.
- Tier II – Additional requirements for owners/operators that apply pesticides to an area greater than the treatment area annual threshold.

In addition, an owner/operator can request coverage for either a Single-county authorization, unchanged from the draft, or a Multi-county authorization, which has been revised to reflect up to twenty contiguous counties instead of the district proposal.

The PGP effluent limits, monitoring, recordkeeping, and reporting requirements were all streamlined to correlate with the appropriate “Tier” as well as with existing pesticide application requirements under MDA.

In addition, the Department corrected Part I.C of the draft permit to reflect the activities that are ineligible for coverage as outlined in the Fact Sheet Section III.D.

### **COMMENTOR #1**

1-1. *Section I B 2. Weeds and Algae. Look at increasing the 64 acre threshold.*

RESPONSE: Based on this and other comments, the Department has increased the weed & algae threshold to 100 acres in the Pesticide General Permit (PGP). The Department’s reason for increasing the threshold is based on the fact that Montana’s final PGP now covers **all** pesticide applications to state surface water (“Tier I”), rather than covering only a subset of owners or operators that qualified for coverage based upon the thresholds in the draft permit. DEQ’s decision to issue a final permit that will provide coverage to all owners or operators eliminates DEQ’s reason for keeping the thresholds low. That is because, under the final permit, the thresholds are no longer used as a basis for requiring coverage, but are used to impose additional requirements on the larger pesticides applications that exceed the thresholds in the final permit (Tier II). The additional requirements imposed on Tier II owners/operators are intended to address the potential increased impacts from larger operations.

1-2. *Section I B 5.2 (classified A-closed). These waters have zero tolerance for pesticides. There needs to be a provision that would allow for application if the pesticide application was to prevent degradation of water quality due to pests or to improve water quality by removal of the pest.*

RESPONSE: The water quality standards for A-closed waters is “No increases of carcinogenic, bioconcentrating, toxic or harmful parameters, pesticides, and organic and inorganic materials, including heavy metals, above naturally occurring concentrations, are allowed” [ARM 17.30.621(3)(h)]. In order to ensure that pesticide applications achieve this standard, the PGP imposes a “>0 acres” threshold for any application of pesticides that discharges to A-Closed waters. Imposing the “ >0 acres” threshold does not mean that no pesticides may be used in A-

closed water, as your comment suggests, but simply that any application of pesticides to A-Closed waters, no matter how small, must obtain coverage under the PGP and comply with Tier II requirements. The Department assumes that, by complying with Tier II requirements, the water quality standards for A-Closed waters will be met. After considering comments on the PGP, the Department is modifying the draft permit so that coverage under the final permit is also required for any biological pesticide application.

*Section II A 2. This section should keep to FIFRA requirements as coordinators it would be impossible for us to measure things such as pest resistance.*

RESPONSE: The Department acknowledges that it is unrealistic to assume weed and mosquito control districts will be able to determine appropriate application rates consistent with reducing the potential development of pest resistance. The Department further agrees that following FIFRA requirements will be adequate to protect the water quality in the receiving stream. Under FIFRA, the EPA issues a "label" for each registered pesticide, indicating the manner in which it may be used and the appropriate application rates.

The Department is therefore modifying the draft permit to eliminate a consideration of pest resistance and instead require the following: "Apply pesticides within labeled rates and/or in accordance with pesticide use directions under FIFRA and other state pesticide requirements."

1-3. *Section II B 1. Integrated Pest Management program should be Best Management Practices.*

RESPONSE: Several commentors brought to the Department's attention the fact that Integrated Pest Management (IPM) is a pest management approach that may currently be beyond the scope of most applicators and many weed and mosquito control districts. As such, IPM is a desirable management tool but is not a requirement of this permit. The Department will modify the pesticide management plan requirements to reflect that IPM is one of many planning options, but is not required.

1-4. *Section II B 1. (Pesticide discharge management team) Putting all liability on the permit holder will discourage multi-county projects. Could a team permit be signed/agreed upon by all parties involved. Multiple certification lines for example that would require all the counties, agencies involved to sign off and assume responsibility for their own treatments but still be under one permit.*

RESPONSE: Based upon prior experience, the Department will not consider allowing more than one entity sign an NOI for coverage under the PGP. The Department was not successful in past attempts to permit multiple entities under one permit, because the permitting process became extremely cumbersome and responsibilities became unclear.

There needs to be one legally responsible party. We recommend that, whenever possible, the primary decision-maker should be appointed as the NOI signatory, and written agreements between all of the underlying decision-makers (most likely the counties) would prescribe individual responsibilities. Barring that, each county could obtain their own coverage under the PGP – thus limiting liability to the relevant activities in their county – but all planning could be conducted jointly.

1-5. *Section II B1. (Description of control measures) Instead of requiring all management tools be evaluated and implemented prior to pesticide application, the Best Management Practice should be made. The time required to implement all the control methods prior to application would be too time consuming, labor intensive, and unpractical.*

RESPONSE: The Department acknowledges that requiring a full evaluation of control measures in every situation could be an onerous requirement with no tangible environmental benefit. Therefore, the evaluation of control measures by Tier II owner/operators has been modified to require only feasible options, based on the best professional judgment of the owner/operator.

- 1-6. *Section II B 3. Beaverhead County does quite a bit of weekend applications where a 24 hour notification would be impossible to adhere to due to office hours kept by departments. Could this be changed to 2-3 business days?*

RESPONSE: The requirement to provide a 24-hour verbal (or electronic) notification to the Department is a basic requirement for an owner/operator who becomes aware of a problem. The phone call to the Department at (406) 444-3080 (or email) should be made as soon as possible after the owner/operator becomes aware of a problem, even though the message may not be received until the next business day.

This requirement, from ARM 17.30.1342(12)(f)(1), is universal for all MPDES permits. No change will be made from the 24-hour oral reporting requirement.

- 1-7. *Section II B 3. As coordinators it would be impossible for us to determine the number of affected species. Unrealistic expectation for reporting.*

RESPONSE: After considering yours and other comments, the Department has generalized the 5-day reporting requirements so that a reasonable evaluation by owner/operators will satisfy the information requirements.

- 1-8. *Section II D and E: and Section III A-F Cross-reference with the Montana Department of Agriculture and determine what reporting is already done.*

RESPONSE: In order to avoid duplication of record and reporting requirements that are already imposed by other laws on pesticide applications, the Department made the following changes in the final permit:

**Section II.D. Recordkeeping Requirements:** The Department streamlined the Tier II recordkeeping requirements and clarified that other existing records can be used.

**Section II.E. Reporting Requirements** Only the Tier II facilities will have annual reporting requirements, and the Department commits to revising the proposed Form AR-3 in order to streamline as much as possible. The first routine report will be due January 28, 2013 for the 2012 calendar year.

**Section III.A – F:** these are standard requirements for all MPDES permits and will not be changed. The requirement for annual reports in Part III.A only states the deadline for the report and does not dictate the content.

- 1-9. *The issue of having an accident in vehicle containing pesticides across county lines that the individual is not permitted for needs to be addressed. This is an issue that is unpredictable and unforeseen. Permitting for this type of accident is unrealistic.*

RESPONSE: Authorization under the PGP is limited to planned pesticide applications that result in a discharge to state surface waters. A vehicular or other accident whereby pesticide is released (including into the water) during transportation between locations is required to be reported, as laid out in the spill reporting policy found @ <http://deq.mt.gov/enf/spillpol.mcp> but would not be regulated in the PGP.

As part of the pesticide management plan that is required for pesticide applications above the annual threshold, the draft plan required owners/operators to plan for spills that might occur on the site. The final permit will clarify that this is intended to reflect activities required at a location used to prepare or undertake pesticide application.

- 1-10. *Section VI 20. The definition of near water needs to be more clearly defined.*

RESPONSE: The Department's intent for including "near water" was to ensure the PGP satisfied the 6<sup>th</sup> Circuit Court of Appeals' January 2009 decision reversing EPA's November 2006 Aquatics Pesticides rule. The Sixth Circuit held that CWA permits are required for all biological pesticide

applications and chemical pesticide applications that leave a residue in water when such applications are made in or over, *including near*, waters of the U.S.

However, based on the number of comments and the level of confusion caused due to the phrase “near water,” the Department is issuing the final permit with language clarifying that this MPDES permit regulates only owners or operators that discharge to state surface waters through the application of (1) biological pesticides or (2) chemical pesticides that leave a residue (collectively “pesticides”). This clarification should eliminate the need to determine how “near” the water the pesticide must be in order for coverage to be required. In addition, the clarification is consistent with the Sixth Circuit’s Order. According to the Sixth Circuit, the essential fact to be determined is whether the pesticide actually enters surface water and leaves a residue. How the pesticide enters the water is not essential for this determination. Because the Department is issuing the final permit without requiring a consideration of “to or over” or “near”, the definitions of “near water” and “to or over surface water” have been removed from the final permit.

- 1-11. *Other issues: How will non-compliance be addressed. As a state law, treatment may be required on private lands on or near water. The Montana County Weed act needs to be incorporated.*

RESPONSE: The Department has committed to focusing on education, outreach and program development for the next several years. The goal for the first several years will be to promote awareness and understanding of the PGP in order to minimize future noncompliance.

## COMMENTOR #2

- 2-1. *General Coverage of the Permit. – I believe that anyone applying pesticides should be covered under this permit, not just the 5 categories listed. If this permit doesn’t cover all pesticide applications, you will have people that need coverage not obtaining it because the single user permit system is too cumbersome and costly.*

RESPONSE: The Department has considered this request from you and another commenter, and agrees that it would be prudent to add an “other” category to allow an unforeseen pesticide use pattern to be covered by the PGP. The objective of this permit is to allow similar activities to be regulated in the most efficient manner possible, which the Department has identified as the NOI process. It is not our intent to exclude anyone due to lack of foresight.

- 2-2. *In section II page 7 number 1. How are we to know what the applicable numeric and narrative water quality standards are? Water quality standards can change do to environmental activities in the area, run off, someone spraying up stream. We have no control over this.*

RESPONSE: The assumption is that compliance with the PGP demonstrates compliance with applicable water quality standards. We agree with your comment, and Part II.A.1 will be clarified to read:

“Control the discharge as necessary to meet applicable numeric and narrative water quality standards by complying with this permit; and”

- 2-3. *Page 8 Action Threshold – We are mandated by law to control Noxious weeds, so our tolerance is 0.*

RESPONSE: Any permittee who is above the threshold will need to identify the Action Threshold and description of how the threshold was developed for each specific target pest. If the action threshold for a noxious weed is > 0, then “>0” is what would be included in the plan for that target pest. This will be clarified in the permit language.

2-4. *Page 8 Water Quality Standards –I wonder how are we to know these things, let alone predict something that hasn't happened yet.*

RESPONSE: Part II.B.1 (page 8) the Department will remove the requirement for water quality standards. In the Department's opinion, any temporary use of pesticides that is in compliance with FIFRA requirements and this permit will not have any effect on the impairment status of any surface water bodies.

2-5. *Page 10 number 3 Adverse Incident Assessment – I believe that the following language should be removed, because you are asking for the impossible "Records of all visual inspections", even for situations that do not require reporting must be kept on site with the permittee.*

RESPONSE: The Department considered your request and modified the requirement to clarify the situations when records need to be maintained.

2-6. *Page 10 first bullet point Notification – this could be a task that can't not be made in that time frame. If this was to occur on the last day of the work week in late afternoon, we would be out of compliance because of offices not being open in the 24 hour period, we also have some weed district that work on Saturday this would defiantly make us in violation.*

RESPONSE: SEE COMMENT # 1-7.

2-7. *On Page 10 when you talk about monitoring, you want us to be able to tell you about microbial activity, you are asking for scientific data that we are not able to provide without a lot of cost to the counties.*

RESPONSE: SEE COMMENT # 1-8.

### **COMMENTOR #3**

*We are in support of the proposed fee structure. We are in support of the 20 contiguous counties for multi-county*

The Department is continuing to pursue the proposed revised fee structure, as discussed after the public notice period ended for the Fee Rule. The Board of Environmental Review will need to adopt this Rule as amended in order to finalize it.

*We recommend the following:*

3-1. *The thresholds should increase from the current 64 acres to at least 100 acres and from 640 acres to 1000 acres*

RESPONSE: Based upon the reasons provided in DEQ's Response to Comment 1-1, the Department increased the thresholds in the final permit for weed & algae and larval chemical control from 64 to 100 acres, and aerial pest control and chemical adulticide to 1,000 acres. In addition, the Department applied the same reasoning to increase the thresholds for all but the biological control categories.

3-2. *The records of applications should remain at the applicator's site for inspections*

RESPONSE: Based on this comment and others related to the different roles for decision-makers and applicators, the Department added the following to the beginning of Part II.D in order to clarify the responsibilities for maintaining records:

"This may necessitate owners/operators that are decision-makers only make appropriate arrangements with contracted for-hire applicator(s)."

3-3. *EQ will use the same format is MT Dept. of Ag to eliminate duplication of forms*

RESPONSE: See Comment #1-9.

3-4. *DEQ uses the FIFRA label as a method to evaluate.*

RESPONSE: See Comment #1-3 and 2-2.

3-5. *Remove section II A, 2 due to the complexity of determining the amount of chemical or be specific to which this rule applies to*

RESPONSE: See Comment #1-3

3-6. *DEQ should work closely with Dept. of Ag, as that agency currently monitors the applications of pesticides and would be a wealth of information to simplify the process.*

RESPONSE: The Department notes your comment.

3-7. *Simplify the language in the propose general permit so it is easy to understand and comply with*

RESPONSE: Effluent limitations language under Part II.A. 1. and 2 and the Pesticide management plan have been revised to be more straight-forward. We have attempted to provide definitions for the unique or confusing concepts and terms. The rest of the clarification will need to be implemented in outreach and training, including on the Department's pesticide webpage.

3-8. *Delete language on page 10, section 3. Adverse incident assessment last two parts on the page 10 and top two of page 11*

RESPONSE: See Comments #1-8 and #2-5.

#### **COMMENTOR #4**

4-1. *The first and foremost concern is the liability related to the fact that commercial applicators may be exempt from the permit and that county, state, and federal agencies may be required to hold the permit and be responsible for applicators and others within their jurisdiction. We are especially concerned that as the county weed coordinators across Montana will no doubt be greatly affected by this proposed permit, that DEQ made little attempt to contact MACo attorneys to obtain their involvement. If counties are required to get permits that cover river projects, the liability issues involved will, in all likelihood, end weed control in riparian areas. This would be devastating to all of the efforts we've undergone to work those areas. In addition, we believe that by not treating for invasives in riparian waterways, you are adversely affecting water quality.*

RESPONSE: The concern over potential liability for persons that discharge pesticides into surface waters is the very reason that Montana developed the PGP. According to a federal court's interpretation of the federal Clean Water Act (CWA), any activity that discharges into surface waters (1) biological pesticides or (2) chemical pesticides that leave a residue (collectively "pesticides") is an activity that requires a CWA discharge permit. Since the federal interpretation applies broadly to any application of pesticides that discharges into surface waters, the Montana PGP provides a convenient mechanism for an owner or operator of such discharge to avoid liability under the CWA.

By filing an NOI to be covered under the PGP, the owner or operator is assured that its discharge will not result in a violation of CWA's permit requirement. As your comment points out, however, the owner or operator assumes responsibility for complying with the terms of the permit upon filing the NOI. The Department is fully aware of these concerns and is committed to working with the newly regulated pesticide applicators to avoid any problems in achieving compliance with the terms of the PGP.

4-2. *We still do not have concrete definitions of "near" and this needs to be further clarified.*

RESPONSE: See Comment #1-11.

- 4-3. *The threshold of 64 acres is too low, it needs to at least match federal requirements or we would suggest 100 acres as a threshold.*

RESPONSE: See Comment #1-1 and 3-1.

- 4-4. *The "team" concept being proposed is vague in this permit and still does not address who is the responsible party. This needs to be definitively clarified.*

RESPONSE: Ultimately, the responsible party is the owner/operator who submitted the NOI and certified compliance with the PGP. After receiving comments, the final permit will be revised to reflect that any permittee that is above the annual threshold is required to identify a pesticide management team as part of the pesticide management plan. The owner/operator is responsible for designating the team including identifying roles and responsibilities for each individual. The Department revised the description in an effort to clarify the purpose of the team.

- 4-5. *The term IPM (Integrated Pest Management) needs to be changed to more accurately address riparian weed control and we would endorse BMP (Best Management Practices) as better wording.*

RESPONSE: See Comment #1-4

- 4-6. *Coverage Under the General Permit, B. "Owners/operators that apply pesticide to or over, including near state surface waters and fall into one of the identified pesticide use patterns are covered by the PGP if they exceed any one of the annual treatment thresholds as follows..." There is concern that with current language, if you are under the threshold of 64 acres, you are not covered and you would be required to obtain an individual permit or a 308 permit. This language causes issues through the permit, because it is modeled after the federal permit that does give coverage if you are under the thresholds.*

RESPONSE: After consideration of this issue, the Department has revised the General Permit to encompass the requirement for an NOI and compliance with minimum requirements in the PGP for anyone that applies pesticides to state surface waters. This will provide legal coverage for those applicators that are below the annual treatment threshold. In this manner the 308 Authorizations become moot.

The larger "above threshold" applicators will be required to submit supplemental information and comply with additional requirements such as the pesticide management plan.

- 4-7. *Much of the information being asked for in reporting and monitoring (or surveillance) is entirely too scientific for many laymen to understand, much less be able to complete. To know several instructions and definitions in this permit is not reasonable: for instance, what are "action thresholds", including "ambient water data" in a report, knowing the "potential for development of pesticide resistance", "monitoring must be conducted according to test procedures approved under part 136..." What are those? Language needs to better fit the common man, not an MSU scientist.*

RESPONSE: After considering the comments received, the Department removed some of the definitions you mentioned; others are part of the planning process and need to be addressed by the applicant. Specifically, the Department agrees to remove references to pesticide resistance and ambient water quality standards.

The test procedures approved under part 136, which is part of the Standard Conditions "Monitoring, Recordkeeping, and Reporting Requirements" in Part III.B. will remain but it does not apply to the monitoring required for this General Permit. During the interim between the

issuance of the final PGP and the effective date of November 1, 2011, the Department will provide outreach and training on the monitoring requirements.

Action threshold is defined in Part VI of the permit and is a pesticide management requirement that needs to be included. However, the Department has attempted to clarify this requirement.

- 4-8. *It seems that much of the language in this permit could be easily covered under FIFRA and is unnecessary. Furthermore, as the Montana Department of Agriculture requires extensive reporting on the application of pesticides, it would be reasonable to expect the two agencies to work closely together and use as much information required by MDA in DEQ reporting.*

RESPONSE: The requirement to create a pesticide permitting program resulted from the Sixth Circuit Court of Appeal's finding that any application of (1) biological pesticides or (2) chemical pesticides that leave a residue (collectively "pesticides") requires a permit under the Clean Water Act. DEQ has responded by developing the Pesticide General Permit in conformance with the requirements contained in ARM 17.30.1342, Conditions Applicable to All permits, and ARM 17.30.1344 Establishing Limitations, Standards and Other Permit Conditions. The Department evaluated various options for the permit conditions, and the one that made the most sense was simply to require compliance with the existing requirements under FIFRA.

After review of the various comments, the Department has streamlined much of the reporting process and clarified that any applicable existing records will suffice.

- 4-9. *If an adverse incident does happen, a 24-hour period of time to complete everything currently required in this permit is simply not enough time.*

RESPONSE: See Comment #1-7.

- 4-10. *Lastly, we do not believe DEQ understands the extensive amount of time it will take to not only review documents and approve or disapprove of them in a timely fashion, especially without electronic availability; nor do we believe DEQ will be able to handle adverse incidents in a timely fashion, as outlined in this permit. This is cause for great concern as EPA will fine individuals or agencies an exorbitant amount of money if they are found to be in violation of the Clean Water Act.*

RESPONSE: As far as the submittal of the NOIs, the Department designed the permitting program for pesticides to allow for immediate authorization. Once the applicant submits a completed NOI package (forms, signature, and fee) the authorization is valid. The Department intends to issue an acknowledgement letter within a week. This is the same type of program used for storm water construction which authorizes many more applicants than we expect with the pesticide program.

Since DEQ recognizes it will take time to for owners and operators to develop a compliance strategy for meeting the conditions of the PGP, the final General Permit will include a delay until November 1, 2011 before the NOI process is required. After that, any of the reporting and adverse incident investigations will be processed in accordance with the Department's existing procedures.

#### COMMENTOR #5

- 5-1. *The annual treatment area threshold for weeds and algae are listed at 64 acres. I feel this is too low and should be brought up to a minimum of 100 acres.*

RESPONSE: See Comment #1-1.

5-2. *Page 7, A. 2. refers to pest resistance and again on page 8 under Description of control measures. Pest resistance is not measurable in the instance of invasive plant species and therefore sets an unattainable standard.*

RESPONSE: See Comment #1-3.

5-3. *The definition of "near water" is not explicit enough, there is too much gray area from one person's interpretation to another.*

RESPONSE: See Comment #1-11.

#### COMMENTOR #6

6- 1. *We are still confused about whether we need the permit or not. We do not plan to intentionally apply herbicides to water; however, we do apply herbicides occasionally in riparian areas which would qualify as near water. During the webinar (2/24/2011) It was mentioned that as an example spraying Milestone (which is approved for use up to the water's edge) in a riparian area would not require the PGP **but** it was not explicit in the permit. This type of application needs to be made explicit.*

RESPONSE: See Comment #1-11. In addition, the Department is clarifying Part I.C.6, which is the exclusion from the PGP for any pesticide application not labeled for use in or over water.

6- 2. *The fact that this permit opens up permit holders to civil lawsuits is daunting. Can we potentially be sued for inadvertently allowing spray drift to enter surface water? Under definition 36 (page 27) "**unavoidable discharge of chemical pesticides**" "any pesticide or pesticide residue that enters the water is considered a pollutant" Seems like we could be sued either with or without the permit.*

RESPONSE: In response to the comment on potential liability, please refer to the Department's Response to Comment #4-1. In addition, DEQ disagrees that the definition of "unavoidable discharge of chemical pesticides" is so broad that a person may be liable for applying a pesticide that becomes airborne and inadvertently enters surface water. Rather than expand liability, the definition clarifies that nonpoint sources, such as chemical spray drift that moves through air rather than being directly applied to or over water, do not require coverage under the PGP. Since nonpoint sources are not required to obtain a permit, no liability may arise for the discharge of airborne chemical spray drift. Similarly, the introduction of pesticides into surface water from storm water runoff does not require coverage under the PGP because it is also considered a nonpoint source.

6- 3. *Section II A. Effluent Limitations -Seems like this section has the same requirements outlined in FIFRA. Why duplicate?*

RESPONSE: See Comment #4-8.

6- 4. *Are equipment maintenance and calibration required to be reported? If so this would be excessive...*

RESPONSE: Neither equipment maintenance nor calibration will need to be reported as part of routine reporting requirements.

6- 5. *B. Special Conditions. 1. Pesticide Discharge Management Plan. This needs clarification: The description of the PDMP is very similar in a lot of ways to County Weed management plans. Major differences are cumbersome reporting requirements. Could the county weed management plan be submitted as a PDMP? Do annual evaluations and revisions to the PDMP have to be reported to DEQ? Weed management plans are revised and submitted to Dept of Ag biennially this would be excessive.*

RESPONSE: The Department requires that any permittee over the threshold have a pesticide management plan that includes specified core material. The Department has clarified that a County Weed Management Plan would suffice as long as it covered the core requirements – or a supplement could be added to address only the missing items.

The pesticide management plans need to be maintained and accessible for inspection, but are not routinely required to be submitted to the Department. The plans are living documents. The General Permit requires that you review your plan annually to ensure that it is up-to-date, but you are not required to revise or submit updates to the Department.

- 6- 6. *Pesticide Management Discharge Team- At a county level who is on the team for the PDMP? Only county employees, commercial applicators, private applicators, other governmental (state and federal) applicators? Counties **will not** assume liability for anyone that is not a county employee.*

RESPONSE: Appendix A of the Fact Sheet describes the requirements for a team. It can be an individual or a team of individuals, who are responsible for planning and implementing pesticide activities. The purpose is to clarify responsibilities between the various decision-makers and applicators. This should help to remove future liabilities between the county and for-hire applicators and other interested parties.

- 6- 7. *Monitoring and reporting requirements for maintenance, calibration, equipment inspections, non target organisms, pest resistance, etc... are cumbersome.*

RESPONSE: After consideration of comments, the Department has removed the requirement to monitor or report each maintenance activity, including equipment inspections, and has removed pest resistance from the permit. Records of calibration will need to be maintained, or accessible, but are not routinely required to be submitted.

The requirement to observe and report any adverse impacts is an important facet to ensuring that the pesticide application was successful in targeting only the desired pests and not impacting non-target organisms, but the requirement was revised to clarify that only incidents that are readily visually observed need be included.

- 6- 8. *2. Corrective Action and PDMP Updates. Yearly review and revision of PDMP may not be practical for most county weed districts again very similar to county Weed Management Plans which are updated biennially.*

RESPONSE: The PGP will require that the permittee review the pesticide management plan annually. If there are no changes there does not need to be a revision. If personnel have changed; or the pests, treatment areas, or pesticide application methods have changed; the specific changes need to be noted in the plan.

- 6- 9. *Who polices the permit? DEQ? How is this accomplished?*

RESPONSE: See Comment #1-12.

- 6- 10. *After filing a complaint in 2010 about the misuse of herbicide to control curly leaf pond weed in a pond we were informed that DEQ cannot follow up on complaints. (We are not saying this to be critical but it is a concern about more regulation that cannot be enforced).*

RESPONSE: Comment noted.

- 6- 11. *C. Self monitoring requirements. 1. How can anyone determine the amount of pesticide use that causes pesticide resistance? This seems like an after the fact determination.*

RESPONSE: See Comment #1-3.

- 6- 12. *D. Recordkeeping Requirements 1. Description of project treatment area in acres- this is really difficult to determine while spot spraying.*

RESPONSE: The pesticide applicator should know, or be able to calculate, the total acreage of treatment area based on the volume and concentration of the pesticide applied. This is one of the daily recordkeeping parameters required by MDA per ARM 4.10.207. If the area is a mixture of wet and dry, the applicator will have to make an estimate of the percentage of the area that was wet.

- 6- 13. *Are we required to report every time we do routine maintenance on each sprayer or piece of equipment? What about commercial applicators hired by the county?*

RESPONSE: See Comment #6-4.

- 6- 14. *Definitions 34 and 36 appear to be somewhat contradictory.*

**34. "To or over surface water, including near such waters,"** refers to the application of pesticides where a portion of the pesticides will unavoidably be deposited into waters of the state. The intention of the application is to target pests in, over, or near the water. It is up to the owner/operator (and applicator, if separate) to determine whether their pesticide application will be close enough to any surface water that pesticide will be considered unavoidably discharged to the water. The PGP does not include "spray drift" – the airborne movement of pesticide sprays away from the target application site into a water of the state – or application of pesticides to terrestrial agriculture crops where storm water may pick up residual. As non-point sources, spray drift and stormwater runoff are not covered by the PGP.

*In order to be considered an application 'to or over surface water including near such waters' that is subject to the PGP, the applicator must be allowed per the FIFRA label to spray into the water. If the FIFRA label prohibits application into water, the pesticide cannot be covered under the PGP. (Any pesticide that is prohibited from use in water is excluded from the PGP since its use in this manner is illegal.)*

**36. "Unavoidable Discharge of Chemical Pesticides"** means the application of chemical pesticides to control pests that are present on or over surface water, including near such waters, where a portion of the pesticides will unavoidably be deposited into waters of the state. For any pesticide applied over water (e.g., adulticide mosquito control or aerial application of insecticides to a forest canopy where surface water may be present below the canopy), any pesticide or pesticide residue that is incidentally deposited in state surface waters is considered a pollutant since the intended purpose of the application is to target pests above the water.

*Any spray drift is considered a pollutant (36) but spray drift not covered under PGP (34)*

RESPONSE: See Comment #6-2.

#### COMMENTOR #7

- 7-1. *While I agree to the intent of protecting Montana's water quality, I am not sure that the proposed process is a feasible method to accomplish that end result. After reviewing the documents it appears that there is a lack of clarity in the definitions and/or parameters to which the proposed rules would apply. In my opinion this effort can in many instances conflict with current FIFRA and Montana statutory efforts. Under existing statutes there are requirements for the proper use of pesticides in accordance to the product label; and requirements for training/reporting/recordkeeping.*

RESPONSE: The requirement to create a pesticide discharge permitting program originated with the federal Sixth Circuit Court of Appeal's January 2009 decision, which found that discharges of pesticides into U.S. waters were pollutants and, therefore, require a permit under the Clean

Water Act. As a delegated state, the Department is required to implement the permitting of any pesticide discharges to surface waters that leave a residue in state waters.

In an effort to provide consistency with the EPA, the Department developed a program that was similar to the one proposed by EPA in June 2010. One of the key requirements is to “follow the pesticide label” in order to demonstrate compliance. This does not supersede the MDA pesticide applicator training, reporting, or recordkeeping – it supplements it with a focus on only those discharges to water. The Department intends to continue to work with MDA at their training sessions to conduct outreach on this program.

- 7-2. *In my opinion if the intent of the proposed permitting system is to protect water quality; a more effective commitment to expand existing training opportunities to private applicators of pesticides may be a much more effective method to accomplish those goals. Categorical exemption based on product risk to commercial and certified governmental applicators for permit requirements may also be considerations to minimize possible legal conflict, and/or liability. In addition, the potential agricultural economic losses and reduced environmental quality caused by increased levels of invasive species due to the additional levels of compliance should be considered as well.*

RESPONSE: The Department has streamlined much of the recordkeeping and reporting requirements, and has committed to focusing on education, outreach and program development for the next several years. See Comment #1-12.

- 7-3. *As an invasive plant management specialist, it is my opinion that FIFRA adequately addresses the boundaries of responsible pesticide application to minimize potential pollutant contamination of natural waters. Though as I stated previously, additional training and ongoing sampling should be emphasized in an effort to monitor and protect our natural resources.*

RESPONSE: See Comment #7-1.

#### COMMENTOR #8

- 8-1. *MGGA believes that pesticides applied following the rules and regulations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) are sufficient to protect land, water and air concerns. We do not believe an extra MPDES permit will produce any additional value in protecting these environmental concerns.*

RESPONSE: See Comment #7-1.

- 8-2. *MGGA also believes that requiring producers to apply for a MPDES general permit for farm applications would not be practical, and would be virtually unenforceable. The additional burden to state regulatory agencies responsible with enforcing pesticide laws would be unmanageable and could very well cause a lapse in overall enforcement of current regulations more crucial to the protection of the environment as well as the health of applicators and the general public.*

RESPONSE: If Congress withdraws the NPDES permitting requirements for pesticides, the Department will similarly withdraw the Montana pesticide general permit. However, even if this were to occur, Montana has an existing program (“308 Authorizations”) that requires persons applying pesticides in surface water to obtain an authorization to temporarily exceed water quality standards. (See, § 75-5-308, MCA) The majority of pesticide applicators that would be subject to the PGP would also be subject to the existing program provided under §75-5-308, MCA, if the pesticide permit program is withdrawn.

In considering the comments on the PGP, the Department made some considerable changes that should alleviate much of the concerns raised by the comment:

- All applicators to all state surface waters will need to be authorized under the PGP. However, for those permittees that are below the annual treatment threshold (of surface water area), the requirements are simply to submit a complete NOI package with basic information and comply with FIFRA.
- Permittees above the annual threshold will need to comply with extra planning, recordkeeping, and reporting requirements but the burdens have been stream-lined.

8-3. *We are concerned about possible legal jeopardy producers may face due to this permit. Ultimately, it could jeopardize jobs, the economy and human health protections across America as regulators and permittees struggle to implement and comply with these permits.*

RESPONSE: See Comments #1-12 and #4-1.

8-4. *MGGA urges that the DEQ stipulate within the final permit that agricultural land and the ditches, swales, and nuisance or seasonal wetlands contained within those lands that can be potentially encountered by farm applications are not subject to the final MPDES general permit or the Clean Water Act. Failure to specifically exempt agricultural lands in the final permit could cause producers to be subjected to burdensome and time-consuming nuisance citizen lawsuits, and could very well force smaller producers out of business.*

RESPONSE: Although agricultural applications of pesticides that discharge to surface waters cannot be categorically exempt from the Clean Water Act's requirement to obtain a permit, the Department believes that many agricultural applications will not require coverage under the PGP for the following reasons: (1) the discharge is considered a nonpoint sources (i.e., spray drift or storm water runoff); or (2) the pesticide never reaches state waters. See also, Comment #4-1.

#### **COMMENTOR #9 - #11 (combined)**

9-1. *It needs to state (according to the herbicide label) concerning the definition of spraying by a body of water. We feel that a clear definition of near water is needed. Commercial applicators need to be exempt mainly because of potential frivolous law suits that could arise from the way the policy is currently written. If the wording near a body of water is not defined insurance companies may chose to walk away because of potential law suits from the uniformed public or environment activists.*

RESPONSE: See Comment #1-11 addressing the concern for determining when pesticides are used "near water".

9-2. *If enacted as written, control of invasive weed species' terrestrial and aquatic could cease because of exposures to law suits. No way can the Montana weed districts be expected to assume the liability for persons spraying weeds under their grant programs.*

RESPONSE: See Comments #4-1 and #8-3. Any pesticide application to surface water is required to have a MPDES permit. It is up to the decision-maker (usually the hiring party) and the applicator to determine who needs to be the responsible party. That person would be responsible for submitting the NOI and for complying with the permit.

9-3. *As written currently the MPDES leaves latitude for activist groups to pursue frivolous litigations' against private applicator, commercial applicators, and county, state and federal agencies that are involved in the control of noxious weeds and the administrators of weed control programs. (I.E. FWP, DNRC, DOT, NRCS, BLM, USFS, COUNTY WEED DISTRICTS, AND ALL OTHER GROUPS FIGHTING NOXIOUS WEEDS.)*

RESPONSE: See Comments #4-1 and #8-3.

9-4. *We feel that the weeds and algae threshold should be raised from 64 acres to match federal standards' of 100 acres.*

RESPONSE: See Comment #1-1.

9-5. *The issue of having an accident in a vehicle containing pesticides across county lines that an individual is not permitted needs to be addressed. This is an issue that is unpredictable and unforeseen. Permitting for this type of an accident is unrealistic.*

RESPONSE: See Comment #1-10.

9-6. *Descriptions of control measures should be changed to the best management practices.*

RESPONSE: See Comment #1-6.

9-7. *With the many concerns we have brought forth in this letter we feel that additional time and thought may be needed to make a fair policy on this matter.*

RESPONSE: The Department intends to have a final PGP permit in place by April 9, 2011 as per court order; however, we have decided to delay implementation of the NOI process until November 1, 2011 to allow time to provide outreach on the new program.

#### **COMMENTOR #12**

12-1. *We feel that an explicit definition of "near" is needed when referring to applying pesticides near state surface waters. Herbicides that are labeled for use to waters edge will definitely be applied near water but are being applied according to the label and the label is the law.*

RESPONSE: See Comment #1-11.

12-2. *It needs to also be clearer if you are using an aquatic herbicide on land only and that land may be near water. Will it fall under a PGP?*

RESPONSE: See Comment #1-11 and #6-1.

12-3. *The threshold should be increased from 64 acres to at least match federal requirements. We would like to see the threshold be at least 100 acres.*

RESPONSE: See Comment #1-1.

12-4. *The term IPM (Integrated Pest Management) needs to be changed to BMP (Best Management Practices). It is not reasonable in terms of time to explore all IPM possibilities.*

RESPONSE: See Comment #1-4.

12-5. *We feel that it is reasonable to expect MDA and DEQ to work together and share reports, as MDA already requires extensive reports. Integrate the reporting.*

RESPONSE: See Comment #1-9.

12-6. *Putting all liability on the permit holder will discourage multi-county projects. Could a multi-county permit be signed /agreed upon by all parties involved? All agencies and/or counties, and commercial applicators involved would hold the responsibility for their treatments.*

RESPONSE: The Department's experience shows that it isn't feasible to have a multi-party permit. However, DEQ encourages multiple parties that would like to share responsibilities under the PGP to enter legally binding agreements documenting their respective responsibilities.

12-7. *If a vehicle that is traveling across county lines is involved in an accident it is unrealistic to think that they could possibly foresee this and have permitting for this county. It need to be much*

clearer as to the monitoring requirements of the permit holder and may require some training for “weed” folks.

RESPONSE: See Comment #1-10.

12-8. *Define “Mixing Zone”. Where CAN it be?*

RESPONSE: A definition of “mixing zone” will be added to Part VI. However, it is not possible to allow mixing zones for General Permits because they are site-specific. In addition, mixing zones cannot be allowed for pollutants with acute toxicity.

12-9. *An “action threshold” does not apply to noxious weeds. 0 plants is the only acceptable number of pests.*

RESPONSE: See Comment #2-3.

12-10. *Would like to see and comment on a revision!*

RESPONSE: The Department held a stakeholders meeting to discuss proposed changes on March 25<sup>th</sup> and obtained very little negative feedback. In addition, the Department does not believe that a second round of comments on the revised final permit would result in additional changes to the revised permit. Given that the Department has made considerable changes to streamline, simplify, eliminate impracticable or duplicative requirements, and clarify language in the final permit, the Department does not consider it necessary or practical to seek additional comments on the revised permit.

### COMMENTOR #13

13-1. *Part I, Section B (page 4). The thresholds should reflect what is in the federal permit. I also believe that if the DEQ does decide to use its own thresholds that Chemical Adulthoodicide and Biological Control should be much different. For example, the Cascade County Mosquito Management District uses Kontrol 4-4, a ready-to-use chemical, in our adulthoodiciding applications from the ground. It is sprayed at 8 fluid ounces per minute at 10 miles per hour creating a 300 foot swath. This comes out to 6.06 acres per minute. In other words, the chemical adulthoodicide threshold would be met in under 2 hours. I understand that it only includes when sprayed “over” water but it seems a very low number for a threshold. If the number was increased to 3200 acres this would translate to nearly 9 hours, a much more reasonable number. Cascade County adulthoodicided nearly 200 hours from June through early September 2010.*

*The Biological Control threshold on the other hand I believe either needs to be drastically lower or done away with. At the labeled rate of 7-10 lbs per acre for most BTI and BS products this falls between 640 and 900 lbs of total product necessary to exceed the threshold. My position would be to eliminate Biological Control from the permit entirely. Research and experience using BTI and BS show an incredible target specific larvicide with little or no effect to non-targets. The same can be said for methoprene, a product that should definitely be included in this group but has not yet been. But if DEQ and EPA feel it necessary to monitor Biological Control pesticides than the threshold should be much lower – probably under 1,000 acres. If the DEQ is charged with monitoring “pollutants” and BTI, BS, and methoprene are listed as pollutants then I believe it important to truly monitor through accurate recordkeeping and reporting.*

RESPONSE: See Comments #1-1 and #3-1. The Department left biological control at 6,400 acres, which is the largest threshold. Any biological control (including methoprene) below this threshold is a Tier I applicant, subject to the base

requirements. Since the information to the Department indicates this pesticide application is the least risk to non-target species, we determined that it was advantageous to allow the largest size threshold, and only require significantly larger applications to comply with the extended requirements.

- 13-2. *Part V, Section G, 1.c. (page 18). "For a municipality, State, Federal, or other public agency: by either a principal executive officer or ranking elected official."*

*This should include what the following section 2 contains "or duly authorized representative of that person." I can only speak for Cascade County but I feel confident that the commissioners have placed that responsibility on me as a department head. I don't think they would object to delegating that responsibility to my position.*

RESPONSE: The signatory requirement for a permit application, including a Notice of Intent (NOI) is a regulatory requirement under ARM 17.1323(1) and cannot be changed in the PGP. However, any subsequent correspondence and reports can be signed by a duly authorized representative.

- 13-3. *Part VI, Section 6 Biological Pesticide (page 22 and 23). I don't know if you need to be very specific but methoprene should be considered a biological pesticide under the biochemical pesticide definition. Methoprene is a juvenile growth regulator used in mosquito control which disrupts the normal growth of a mosquito. It can be applied directly to the water as a granule, liquid, pellet, or briquet or as a pre-treatment in the solid form. Its mode of action is that it prevents a mosquito pupa from properly forming into an adult mosquito. The mosquito usually dies during the transition time between pupa and adult. Methoprene is target specific to mosquitoes similar to BTI and BS.*

RESPONSE: The Department will modify the definition of biological pesticide in Part VI to clarify that methoprene will be regulated as a biological control.

- 13-4. *Part VI, Section 34 and 36 "Definitions" (pages 26 and 27). There is a large amount of confusion surrounding this permit when it comes to mosquito adulticiding. First, there aren't any mosquito adulticide labels that I am aware of that allows an applicator to apply directly to water. As I have looked at a number of labels, all specifically read that the product is toxic or extremely toxic to fish and should not be applied to water. Therefore one should not even need to obtain a MPDES permit since it is not allowed through the FIFRA label. Although you do make the point for adult mosquito control in section 36, it needs to be noted that adult mosquito control is often done around or up to the water's edge. The only time adult mosquitoes are over water is when they have emerged from the pupa stage or are returning to water to lay eggs. Adult mosquitoes do not live on the surface of water but move quickly onto the banks and into the vegetation and beyond searching for a blood meal. Although chemical may be released/sprayed over water it is intended to kill mosquitoes before it reaches the water or, in rare instances, to move over water to an unreachable area on the other side. In summary, in a chemical application for adult mosquitoes, the sprayer/applicator's intent is to have the chemical complete its purpose by coming in contact with adult mosquitoes before reaching the water's edge where mosquitoes are less likely to be.*

RESPONSE: See Response to Comment 1-10.

- 13-5. *Pesticide General Permit Fact Sheet page 24. Biochemical pesticide should include methoprene. See comments above.*

RESPONSE: See Comment #13-3.

#### COMMENTOR #14

14-1. *Multi-county permits should consist of 20 non-contiguous counties.*

RESPONSE: The Department has modified the multi-county to reflect up to twenty contiguous counties. Since this program is brand new, we are concerned with our future ability to conduct compliance evaluations with the "multi-county" approach. Allowing non-contiguous counties would introduce even more potential confusion. However, the Department did lower the fees so that it should not be unreasonable for a state-wide operator to submit two or three multi-county NOIs.

14-2. *There should be no required record keeping for maintenance.*

RESPONSE: See Comment #6-4.

14-3. *The thresholds for all mosquito control use patterns (4a, 4b and 4c) should be 6,400 acres.*

RESPONSE: See Comment #13-1.

14-4. *The fee for the general permit should be \$100.00 per mosquito control district.*

RESPONSE: Comment noted.

#### COMMENTOR #15

15-1. *We firmly believe that the Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) is the appropriate federal act to govern the regulation of pesticide registration and use. The court decision that shifted some level of regulation to the Clean Water Act (CWA), in our mind, was misguided. FIFRA clearly addresses the use of pesticides in, on or near water and the FIFRA determinations are made on sound science. Recommendation: State in the rule that compliance with FIFRA is all that is necessary to comply with the Federal Clean Water Act.*

RESPONSE: See Comment #4-8.

15-2. *Based on the language on page 5, Section I C. 6 that states "6. The pesticide is prohibited by the Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) from use in water." and language on page 26, Section IV. 34 that states "In order to be considered an application 'to or over surface water including near such waters' that is subject to the PGP, the applicator must be allowed per the FIFRA label to spray into the water. If the FIFRA label prohibits application into water, the pesticide cannot be covered under the PGP. (Any pesticide that is prohibited from use in water is excluded from the PGP since its use in this manner is illegal.)" it is our understanding that the PGP only applies to the use of pesticides that are approved by FIFRA for use in water. This is not clear in the permit. Recommendation #1: On page 4, Section 1.B the term "aquatic" be inserted prior to weeds and algae so that it is clear that the use of pesticides to control upland weeds is not covered by the PGP and to make the Montana rule consistent with the federal pesticide use patterns ([http://www.epa.gov/npdes/pubs/proposed\\_pgp.pdf](http://www.epa.gov/npdes/pubs/proposed_pgp.pdf)).*

RESPONSE: The Department is clarifying that pesticides, which are prohibited from use in water by FIFRA, cannot obtain coverage under the PGP. Additional language will be included in Part I.B of the PGP. The Department declines to insert the term "aquatic" prior to weeds, because this modification may limit an operator's ability to obtain coverage under the general permit. The final permit is intended to allow coverage for all owners/operators that may need coverage, so that no one will need to apply for an individual MPDES permit.

Recommendation #2: On page 27, Section VI. 37 (b) should be removed from the definition so that “crops and animals treated” are not referenced as these are clearly upland uses.

RESPONSE: This definition of “Use Pattern” was taken from the Montana Department of Agriculture Pesticide Rules. However, after consideration, the definition does not appear to lend any value to the PGP and will be removed.

- 15-3. *The Draft PGP does not clearly delineate who must apply for the permit. On page 5, Section 1.D. it states that the NOI form must be “signed by the appropriate signatory”. This same subsection provides that “An owner/operator may choose to obtain coverage at any number of locations within the boundaries of one county (“single county”), or any number of locations in multiple counties that are located within one of the five districts (“multiple county”). See Figure 1 in this PGP for a map of the districts. Once the threshold for one pesticide use pattern is exceeded, the NOI package must request coverage for any pesticide use patterns that are the responsibility of the owner/operator in that area.*

*The term “owner/operator” is defined on page 24, Section IV.22 “Owner/operator” means a person who owns, leases, operates, controls, or supervises a point source [75-5-103, MCA and ARM 17.30.1304(38)]. This could include:*

- *Entity with control over the financing or decision to perform pesticide applications, or*
- *Entity with day-to-day control (pesticide applicators). (emphasis added)*

*On page 7, Section II.B. 1 Pesticide discharge management team. The permit provides that “The owner/operator must identify a qualified individual (small entities) or team of individuals (most entities), **including the pesticide applicator (the owner/operator must indicate whether a for-hire applicator will be used)** as the team. (emphasis added). Based on the page 7 reference it appears that a “for hire applicator” is not considered an owner/operator. We would agree with this determination. Recommendation: Amend the definition of owner/operator on page 24, Section IV. 22 to make it clear that the term “owner/operator” does not include a for-hire applicator.*

RESPONSE: The Department declines to amend the definition of “owner or operator” to remove a “for-hire applicator,” as requested by the comment, because the basic definition is found in state law and cannot be changed to accommodate the PGP. Moreover, the examples of “owner or operator” following the basic definition were inserted by the Department to illustrate that separate entities may equally share responsibility for complying with the PGP as an “owner or operator” under the definition. In the Department’s view, the definition of “owner or operator” allows the entities to determine among themselves which entity will be responsible for submitting the NOI and complying with the terms of the permit. It will be up to the regulated community to determine, through contractual or other arrangements, who will ultimately be responsible for complying with the terms of the permit by submitting an NOI.

- 15-4. *Page 5, Section 1.D. states that “Once the threshold for one pesticide use pattern is exceeded, the NOI package must request coverage for any pesticide use patterns that are the responsibility of the owner/operator in that area.” This section is unclear without a clear definition of owner/operator and it requires a PGP for use patterns for which the threshold has not been or will not be exceeded. Essentially, by making this requirement, anyone who exceeds the threshold for one use pattern (hence the need to even get a PGP) will have to have an NOI for all use patterns regardless of whether or not they exceed the threshold. In other words, anyone who gets a PGP is going to have to do an NOI for all the use patterns regardless of the treatment area. This will greatly increase paperwork and burdens for the owner/operator as well as DEQ. Recommendation: Remove this language so that an NOI is only required for the use patterns for which the threshold has been exceeded.*

RESPONSE: Since receiving comments on the draft PGP, the Department has modified the permit to require NOI submittal for any pesticide application to surface water regardless of the area. If all of the pesticide use patterns are under the threshold, then only basic requirements will apply to the responsible owner/operator. If any of the pesticide use patterns are over the threshold, the owner/operator will have additional requirements. They should indicate all of the patterns they are responsible for on the NOI (or else second NOI is required).

- 15-5. *Page 26, Section VI. 35. defines treatment area as ““Treatment Area” means the area of land including any waters, or area along water’s edge, to which pesticides are being applied. Multiple treatment areas may be located within a single “pest management area.” The “treatment area” includes the entire area, whether over land or water, where the pesticide application is intended to provide pesticidal benefits. In some instances, the treatment area will be larger than the area where pesticides are actually applied. For example, the treatment area for a stationary drip treatment into a canal should be calculated by multiplying the width of the canal by the length over which the pesticide is intended to control weeds. The treatment area for a lake or marine area is the water surface area where the application is intended to provide pesticidal benefits.”” (emphasis added). It is not clear that the inclusion of upland acreage values when determining a treatment area is beneficial to water quality. Recommendation: The treatment area should be defined in such a way that actual application “to water” (eq a lake) is based on acreage and the actual application to an area on “waters edge” be based on linear miles.*

RESPONSE: The Department has corrected the definition to reflect the meaning as used in the body of the permit – it includes acreage of application to water, not land.

- 15-6. *The footnote associated with the Pesticide Use Patterns table in Section 1. B. states “Calculations should include the area of the applications made to: (1) state surface waters and (2) conveyances with a hydrologic surface connection to state surface water at the time of pesticide application. Many of Montana’s streams are intermittent streams and often do not hold water. The requirement that there be water “at the time of pesticide application” should apply to streams as well as conveyance systems. Recommendation: Amend footnote 1 to make it clear that the requirement that water be present is applicable to all applications including intermittent streams and conveyance structures.*

RESPONSE: The Department agrees and has corrected the footnote.

- 15-7. *Pursuant to 75-5-203, MCA, the board may not adopt a rule to implement chapter 5 that is more stringent than the comparable federal regulations or guidelines that address the same circumstances. The board may incorporate by reference comparable federal regulations or guidelines. The inclusion of “Research and Development” as a pesticide use pattern that is subject to the PGP is an expansion beyond federal law. The Proposed Federal Pesticide General Permit provides for the following types of pesticide use patterns. ([http://www.epa.gov/npdes/pubs/proposed\\_pgp.pdf](http://www.epa.gov/npdes/pubs/proposed_pgp.pdf))*

*“1.1.1 Activities Covered. This permit is available to operators who discharge to waters of the U.S. from the application of (1) biological pesticides or (2) chemical pesticides that leave a residue (hereinafter collectively “pesticides”), when the pesticide application is for one of the following pesticide use patterns:*

*a. Mosquito and Other Flying Insect Pest Control – to control public health/nuisance and other flying insect pests that develop or are present during a portion of their life cycle in or above standing or flowing water. Public health/nuisance and other flying insect pests in this use category include but are not limited to mosquitoes and black flies.*

*b. Aquatic Weed and Algae Control – to control invasive or other nuisance weeds and algae in water and at water’s edge, including irrigation ditches and/or irrigation canals.*

c. *Aquatic Nuisance Animal Control –to control invasive or other nuisance animals in water and at water’s edge. Aquatic nuisance animals in this use category include, but are not limited to fish, lampreys, and mollusks.*

d. *Forest Canopy Pest Control - aerial application of a pesticide over a forest canopy to control the population of a pest species (e.g., insect or pathogen) where to target the pests effectively a portion of the pesticide unavoidably will be applied over and deposited to water.”*

Recommendation: Remove the Research and Development pesticide use pattern from the PGP.

RESPONSE: By expanding the activities covered for the PGP, the Department is not increasing stringency compared to the federal requirements. The ability to be covered under the PGP is an effort-saving permitting structure. The alternative for ANY pesticide application to water, including R&D and potentially unknown pesticide use patterns, is to obtain an individual MPDES permit which is a much more cumbersome process. By expanding upon the universe of potential permittees, the Department is designing a pesticide permitting program that is more effective and less invasive than the other permitting alternative.

#### COMMENTOR #16

16-1. *Section I. Page 4, paragraph B. Weeds and Algae threshold should be increased to 100 or more acres. Given that some project operators may submit a Notice of Intent (NOI) that encompasses several counties, a greater acreage would relieve them somewhat from the burdens required from implementing a larger project.*

RESPONSE: See Comment #1-1.

16-2. *Section I Page 4, paragraph B. The Research and Development treatment area annual threshold is set too low (>0 acres). The acreage should be the same as is provided in each of the pesticide use patterns. R&D programs should not be burdened with additional requirements that could potentially discourage field research activities.*

RESPONSE: The nature of R&D pesticide applications to water is unknown at this time, and could potentially present the greatest risk to the environment – therefore, the Department is maintaining a “>0” threshold for this pattern use at this time. This may be re-evaluated during the next PGP renewal cycle.

16-3. *Section II. Page 7, A. paragraph 2. This paragraph should be changed to recognize using suggested label rates.*

RESPONSE: See Comment #1-3.

16-4. *Section II. Page 7, A. paragraph 3. Paragraph 3 is vague and in many ways covered in paragraph 4. Paragraph 3 should be deleted.*

RESPONSE: The Department agrees. The final permit will have preventative maintenance (PM) requirements only for the “above threshold” applicators and it will be clarified to include only inspecting, cleaning and repairing equipment, and a second requirement for calibration of equipment.

16-5. *Section II. Page 7, B. paragraph 1. Strike Integrated Pest Management (IPM) for an “effective management program”.*

RESPONSE: See Comment #4-5.

16-6. *Section II. Page 12, D. Bullet 6. Requiring copies, or access to, maintenance and calibration records (Recordkeeping Requirements) is a burdensome requirement. Maintenance can be both*

*planned and unplanned. Establishing a formal recordkeeping process for maintenance and calibration is a costly and unnecessary requirement that should be deleted. Professional applicators and associated staff carry out maintenance and calibration routinely during the application season as needed and in the off season to ensure equipment operates safely and efficiently when used.*

RESPONSE: The Department agrees that recordkeeping for maintenance is burdensome and unnecessary. The Department has removed the requirement to keep records on equipment inspections and maintenance. The final permit will include the requirement to perform PM in the pesticide management plan, but will not require maintenance recordkeeping.

The Department does not agree that requiring calibration records is burdensome. The requirement to maintain calibration records remains. However, the Department clarified that the records need to be *accessible* to the permittee (but could remain with the applicator). Under certain circumstances, such as the result of a compliance inspection or investigation, the Department may request copies of the calibration records.

- 16-7. *Section IV. Page 14, B. paragraph 1. CFR procedures cited are not appropriate for visual observations. That wording should be deleted.*

RESPONSE: See Comment #4-7.

- 16-8. *Page 16. F. paragraph 1 and 2. The meaning of these paragraphs should be clarified in the body of the permit as it is not clear how, or if, pesticide applications are affected when used at label rates?*

RESPONSE: Part IV.F. (and G.) are standard conditions that must be included in every MPDES permit. These conditions, however, are not applicable to pesticide applications made in accordance with the terms of the Pesticide General Permit (PGP).

- 16-9. *General. Should a USEPA final version of the NPDES Pest General Permit contain requirements that are less restrictive than the MPDES (i.e. acreage thresholds, recordkeeping and monitoring requirements, etc.), then the MTDEQ should reopen the MPDES permit at it's earliest convenience to amend it accordingly.*

RESPONSE: The Department has made several changes from the Draft permit to align with what we believe the USEPA PGP permit will likely contain. Although the Department typically issues permits that are effective for a period of five years, the Department will, if necessary, reopen this permit during the 5-year period to ensure that the PGP is not more stringent than EPA.

#### **COMMENTOR #17**

- 17-1. *We strongly believe that compliance with FIFRA label requirements for forestry and agricultural operations should be exempt from this permitting for the purposes of control of insects that do not live in the water (i.e., that live in or on trees or other foliage). In discussion with colleagues across the U.S., we have heard that many states are taking this approach for these land uses. Montana forest landowners should not be subjected to this permitting requirement if it is not absolutely necessary, and being undertaken by every other state. Recommendation: Compliance with FIFRA label should be deemed compliance with the Clean Water Act point source discharge permitting requirements for forest canopy applications. Montana should not be adopting permit regulations that exceed what is required by other states.*

RESPONSE: See Comment #4-8.

- 17-2. *Should Montana continue down the path of requiring a PGP, even if an application is in compliance with FIFRA labeling, we support the development of annual treatment thresholds,*

*below which permitting would not be necessary. Such a threshold would seem to be a practical necessity for DEQ in keeping the process manageable, and for applicators to avoid an arduous permitting hurdle for smaller projects. Projects below the proposed thresholds are unlikely to result in impacts, since applicators must always comply with product label requirements. Recommendation: Treatment thresholds below which no permit is necessary are important and should be retained.*

RESPONSE: In view of the Sixth Circuit's finding that all pesticides applications into surface water require a permit under the CWA, the Department is issuing the final permit requiring all pesticide applications to surface waters to obtain permit coverage under the PGP. However, to address the concerns raised by you and other commentors, the final permit imposes minimal requirements on the smaller applicators (Tier I). The larger applicators (Tier II) will be the only ones required to submit the more cumbersome planning and recordkeeping requirements.

- 17-3. *Based on conversations I have had with permitting staff at DEQ, the intent of the row in Table I.B. for Aerial Pest Control is that the 640 acre treatment area threshold applies to stream surface area and does not include adjacent upland areas. However, this conflicts with the definition of "Treatment Area" on Page 26 (Definition #35) of the draft permit. The definition of Treatment Area states that this includes "land" as well as water. I could foresee a situation where a forest landowner would like to aerially apply to a 1000 acre forest canopy, which may be 99.99 percent upland and only have a very small amount of overspray over a stream (1/10th of an acre in this case). Under the current definition of Treatment Area, and the thresholds provide in Table I.B., this would require that a permit be obtained before such a project could proceed. Recommendation: Treatment thresholds should be based on area of stream affected, not total land area treated. This is especially important in Montana, which tends to be arid with lower stream densities than in other parts of the US. Modern tools, such as GIS make calculation of these areas fairly straightforward.*

RESPONSE: See Comments #15-5.

- 17-4. *Treatment area thresholds for aerial application should give consideration and allowance for canopy interception, which would reduce the area of stream surface affected. It is not uncommon for canopy density to be 90% over small streams. As such, the treatment area threshold in these areas would logically be higher than direct applications to surface waters with no cover. Recommendation: The calculation for treatment area should give consideration and credit to situations where forest canopy would intercept chemical before it reaches the stream surface.*

RESPONSE: The Department agrees that fewer chemicals would be expected to reach surface water from canopy treatment than from direct application to water. That is why the threshold for aerial pest control was proposed at 10 times the threshold for weeds and algae, which is a pesticide use pattern consisting of direct application to water. The final general permit will continue to have the aerial canopy treatment to be 10 times the weed and algae threshold, at 1,000 acres.

- 17-5. *Table I.B. includes Footnote 1, which indicates that the treatment area calculations include "the area of applications made to (1) state surface waters and (2) conveyances with a hydrologic surface connection to state surface waters at the time of pesticide application." As I read this, the treatment area calculation would include both surface waters and conveyances to surface waters (probably intended to mean ditch return flows). While this seems reasonable, there is no exception made for surface waters that are not flowing at the time of application. In Montana, a high percentage of the stream network is intermittent, and would not be flowing during a summer aerial application. If a state water is not flowing at the time of application, it should not be included for purposes of calculating the treatment area. Recommended Action: Revise the*

*footnote to clarify that surface waters that are not flowing at the time of application are not included in the treatment area calculation.*

RESPONSE: See Comment #15-6.

- 17-6. *The language in Definition 34 related to “To or over surface water, including near such waters” contains important clarifications regarding applications adjacent to state waters, non-point sources, and labeling. Recommended Action: Keep Definition 34 intact*

RESPONSE: See Comment #1-11.

#### **COMMENTOR #18**

- 18-1. *I would like to start off by stating that we believe that the Federal Insecticide, Fungicide, Rodenticide Act has adequate guidelines for pesticide registration and use. FIFRA addresses the use of pesticides in, on or near water. We would therefore recommend that it state in the rule that compliance with FIFRA is all that is necessary to comply with the Federal Clean Water Act.*

RESPONSE: See Comment #4-8.

- 18-2. *On page 5, Section 1 C.6 it say “The pesticide is prohibited by FIFRA from use in water.” It further states on page 26, Section IV. 34 that application “to or over surface water including near such water” that is subject to the PGP, the applicator must be allowed per the FIFRA label to spray into the water. If the FIFRA label prohibits application into water, the pesticide cannot be covered under the PGP. Any pesticide that is prohibited from use in water is excluded from the PGP since its use in this manner is illegal. We suggest that on page 4, Section 1.B the term “Aquatic” be inserted prior to weeds and algae to make it clear that the use of pesticides to control upland weeds is not covered by the PGP. Also on page 27, Section VI. 37 (b) should be removed from the definition so that “Crops and animals treated” are not referenced as these are clearly upland uses.*

RESPONSE: See Comment #15-2.

- 18-3. *We support the idea of thresholds for requiring a permit and suggest that the areas provided in the table on page 4 be retained. There is some confusion as to how those areas are to be determined. Previous discussions as to what constitutes treatment area seems to be different from the definition of treatment area in the draft document. Page 26, Section VI. 35 defines treatment area as meaning the area of land including any waters or area along water’s edge, to which pesticides are being applied. Multiple treatment areas may be located within a single “pest management area.” My recollection of the discussion is that it would be only to affected water. The treatment area should be defined in such a way that actual application to water is based on acreage and the actual application to water’s edge is based on linear miles.*

RESPONSE: See Comment #15-5. The Department has corrected the definition of treatment area to reflect the meaning as used in the body of the permit – it includes acreage of application to water, not land. However, the Department does not want to add the linear miles of bank to the treatment area definition. As regulators, we foresee that requiring applicants to choose to review either “X acres or Y linear miles” threshold will cause confusion. In addition, a 6” 20-mile swath has a great deal less impact than a 6-foot 20-mile swath; maintaining acreage as the determining factor provides consistency.

- 18-4. *There is still some confusion as to who has the duty to apply. Page 7, Section II B. 1 defines Pesticide discharge management team. The permit provides that “the owner/operator must identify a qualified individual or team of individuals including the pesticide applicator (the owner/operator must indicate whether a for-hire applicator will be used) as the team. This would seem to indicate that a for-hire applicator is not considered an owner/operator. We*

would recommend that it be made more clear as to who has the duty to apply, the owner/operator or a for hire applicator.

RESPONSE: See Comment #15-3.

- 18-5. *As a final note I am concerned that the Pesticide Discharge Management Plan (PDMP) has little to do with the protection of water quality. Instead it appears to be a particularly cumbersome paperwork juggernaut that deals with business practices and perceived adverse incidents. If the goal of the rules is to affect water quality it seems that the less burdensome that it can be would make applicators and owner/operators more willing to participate in the permitting process.*

RESPONSE: The Department has made several changes to the final permit regarding the pesticide management plan. First, we clarified that an existing management plan (weed control management, mosquito control management, etc.) is acceptable to meet the planning requirements as long as it contains the required information. Second, the specific requirements for evaluating control technologies and developing schedules and procedures has been broadened to allow flexibility in the extent that review and documentation are needed. Other changes were made to streamline the pesticide planning process, as well.

#### **COMMENTOR #19**

- 19-1. *The attached permit contains our specific comments on the proposed permit language. This letter is intended to be a summation of our discussions with DEQ and our understanding of how the permit will be further crafted and implemented, after the comment period.*

RESPONSE: See below comments #19-6 to #19-38.

- 19-2. *In order to provide coverage for applicators who do not exceed a threshold, DEQ has informally proposed a two tiered system. Applicators who fall under the threshold and apply pesticides in or over water will be required to sign a consent agreement/notice of intent that certifies they intend to uphold the effluent limitations and related best management practices set out in the permit. Applicators who apply above the threshold will be required to provide a Pesticide Discharge Management Plan, and will have to comply with all other permit requirements. This approach will allow DEQ to raise the thresholds so that the largest applicators are captured in the full permit, while providing coverage to all applicators. This approach also is supported by singling out our most active applicators, rather than specific types of applicators.*

RESPONSE: Comment noted. The final permit, however, requires all owners or operators to submit an NOI, not just the small applicators.

- 19-3. *Our understanding is that the permit will not cover pesticide applications that do not have a label allowing direct application to water. Therefore all pesticide applications that require coverage must have some reference to application to or over water, but the term near is not appropriate for inclusion in coverage, because the pesticide has not be registered for use in water.*

RESPONSE: The final permit, Section I.C. clarifies that pesticides that are not labeled for use in water are ineligible to coverage under the PGP.

- 19-4. *By allowing applicators to use one set of records, recordkeeping requirements are not duplicated and the likelihood of minor violations related to recordkeeping is reduced. The Montana Pesticide Act describes the required records that commercial, non-commercial and government applicators have to maintain. Private farm applicators do not typically have to keep the same records, but if a private farm applicator were to exceed a threshold, then that applicator would be required to keep the same records as described in the Montana Pesticide Act.*

RESPONSE: See Comment #1-9 and #19-5.

- 19-5. *Finally, our comments in the permit include suggestions to assert that commercial applicators are not required to have permit coverage, and that action thresholds, integrated pest management, and equipment maintenance records not be required in the permit.*

RESPONSE: The Department does not agree. Every pesticide application to state surface water will need to have permit coverage by the owner or operator. If more than one entity responsible for a pesticide application is included in the definition of owner or operator, then the entities can determine for themselves which one will retain ultimate responsibility for complying with the PGP by submitting an NOI.

Action thresholds will remain in the final permit as a requirement for the larger permittees, but will be re-defined to clarify that ">0" can be an action threshold and other methods such as personal experience can also be an action threshold.

The Department has removed any requirements for an IPM, although it is provided as an example of an existing plan that could be used in lieu of creating a second pesticide plan.

Planning for equipment maintenance will be required for larger permittees, but no records will need to be kept.

- 19-6. *Section I.B. - The permit should be revised so that any pesticide applicator whose application areas are under the thresholds, but who requires coverage, may be able to be covered under this permit rather than through an individual or 308 permit.*

RESPONSE: The Department agrees. The final permit was modified to require all pesticide applications into state surface water to obtain permit coverage. Pesticide applications over the annual treatment threshold will have more requirements than smaller entities. See also Comment #1-1.

- 19-7. *Section I.B. - Per discussions with DEQ, the current approach will contain a tier 1 and tier 2 level of treatment, with lower acreage treatments only requiring a signed compliance acknowledgement. In this model, the thresholds should be increased as much as can be justified, to ensure that the largest of the large are captured in the PDMP/NOI process, and so applicators under the threshold do not experience unnecessary burden. If the tier 1 and tier 2 model is not used, these thresholds should drop to zero for all use categories or another approach should be developed to ensure that all applicators may take advantage of the permit coverage.*

RESPONSE: The Department agrees. See Comment #19-6.

- 19-8. *Section I.B. - Pesticide Use Patterns should be expanded to include an 'other' category, for any types of applications that may have been overlooked during the permit development, or for additional uses that may be determined to require coverage in the near future. This is not the same thing as research and development.*

RESPONSE: See Response #2-1

- 19-9. *A-closed classified waterbodies should be explicitly listed if DEQ continues to require a full application for treatment to these waters. MDA does not believe that it is reasonable to assume that these waters (or banks) have not been subject to pesticide treatments in the past, with the goal of restoration or preservation of ecological health being the driver. We do not know all of the rationale used to include them in the threshold chart, and therefore cannot say if they should or shouldn't be there.*

RESPONSE: See Comment #1-2.

- 19-10. *This sentence also appears to allow biopesticide applications without an associated threshold. Is that DEQs intent?*

RESPONSE: See Comment #1-2 for a discussion on A-Closed waters.

19-11. *Part I.C.5 – Area of unique ecological or recreational significance. What is the significance of excluding these water bodies from permit coverage? In conversations with DEQ, it would appear that DEQs intention is that these waterbodies would be allowed to be treated under the general permit. In reading this section though, it appears that any application to these types of waters requires an individual or 308 permit, since this permit excludes them. MDA does not believe that these waters should be excluded from coverage. These waters are typically under great pressure from recreational use, and may be exposed to non-native weed and pest species at a higher rate than other waters in the state. It is essential for the preservation of the water's health that first responders have the ability to be responsive to these threats, rather than have to wait to obtain an individual or 308 permit before treatment.*

RESPONSE: The Department agrees. Outstanding Resource Water (ORW) is included in the PGP program. In addition, the Department corrected the Final permit Part I.C. to reflect the relevant activities excluded from coverage as originally proposed under the PGP from the Fact Sheet Section III.D.

19-12. *Part I.C.6. - FIFRA doesn't necessarily prohibit uses, therefore better language would be 'the pesticide is not labeled for use in or over water'. This also reduces confusion regarding state labels vs. federal labels.*

RESPONSE: The Department agrees and has made the revision.

19-13. *Part I.D. - The term 'declared pest emergency' was originally used in the federal permit to address concerns regarding the use of a pesticide under FIFRA Section 18, which allows an exemption from registration for a use that meets certain criteria that establish an 'emergency'. Section 18s are also known as Emergency Exemptions. Many entities had concerns that the NPDES permit was not flexible enough to allow unexpected uses, such as a Section 18 addresses. Since the permit is currently based more on thresholds rather than particular uses, this language may not be necessary at this time. Adding an 'other' category will further remove the requirement of a declared pest emergency for these uses. Through time the term became a mechanism to allow quick response on a Tier 3 water, but that does not square with the original definition of emergency. As written, it is unclear what constitutes an emergency outside of a Section 18 exemption. It is our understanding that the federal permit will not include this language or any additional restrictions on Tier 3 waters, and we request DEQ consider doing the same.*

RESPONSE: After consideration of your comment, the Department determined that the addition of an “other” category should be sufficient and will remove “declared pest emergency” references from the PGP.

19-14. *Part I.D. - The districts as described in the fee rule and map are not appropriate for Montana. We support DEQs current approach of allowing applicators to identify the 20 contiguous counties they anticipate working within, per permit. We support as much flexibility in determining areas of permit coverage as DEQ can provide.*

RESPONSE: The Department agrees.

19-15. *Part I.D. – “Once the threshold for one pesticide use pattern is exceeded, the NOI package must request coverage for any pesticide use patterns that are the responsibility of the owner/operator in that area.” This sentence is a bit confusing. Our understanding is that an applicator may request coverage for all use patterns in one permit. Although this sentence does not seem to contradict that approach, it is unclear what the sentence is saying.*

RESPONSE: See comment #15-4. The Department will clarify the intent.

19-16. *Part II.A.2 “Manage the amount of pesticide product per application and the frequency of pesticide applications necessary to control the target pest with the minimal amount of pesticide discharge, consistent with reducing the potential for development of pest resistance” This language, and all similar language in the permit, should be removed. Management of pesticide resistance, determination of rate, and frequency of application are contained within the pesticide label. Applicators should not be expected to be able to determine these precautions, nor should they be asked to. Rate and frequency of application should be determined by best professional judgment at the site of application, and will always be within label directions.*

RESPONSE: See Comment #1-3.

19-17. *Part II.B.1 - The term Integrated Pest Management, or IPM, should be removed from the permit. Although some land managers and decision makers have the ability to successfully implement IPM, many applicators do not, and they are not expected to do so.*

RESPONSE: See Comment #1-4.

19-18. *Part II.B.1 - The term 'pesticide discharge management team' was used as an attempt in the federal permit to ensure that IPM was implemented in the pesticide projects, while acknowledging the logistical difficulties in ensuring that all effluent limitations in the permit were met by everyone involved, as appropriate to their role. This is a bulky, cumbersome approach, that has little chance of success in reality. By taking out the requirement to implement IPM, and changing that to BMPs, the need for a management team is reduced.*

RESPONSE: See Comment #6-6. The Department does not agree that the requirement for larger permittees to identify pesticide management roles and responsibilities is bulky or cumbersome. For some owners/operators, the “team” could be one individual. For other owner/operators with larger projects and more people involved, clarification of responsibilities is important. In fact, the Department has required identification of individual responsibilities as part of the storm water pollution prevention plans (SWPPP) for industrial and mining sources.

19-19. *Part II.B.1. Asserting that commercial applicators do not need coverage under the permit in any situation puts the burden of permit compliance on the true decision makers. This approach is further rationalized by the fact that without a decision maker hiring a commercial applicator, that applicator would not be working and therefore the majority of the permit is duplicative by design. The primary role of an applicator, outside of compliance with pesticide law, is to ensure that the equipment has been calibrated, and that there is a record of the calibration, and that the equipment is in good working order. These requirements can be met within the context of the hiring decision and related documentation. Any additional violations that may occur as a result of the pesticide application itself are expected to be violations of pesticide law. MPDES violations that are found during the course of a pesticide investigation can be brought to the attention of DEQ. This represents one mechanism for handling the complex responsibilities of the permit.*

*How would this approach work if DEQ didn't want to single out specific entities for PDMP/NOI requirements, and instead wanted the determination of whether a PDMP/NOI is needed to be solely threshold based? In this scenario, there would potentially be duplicity and there would potentially be missed entities, but there may be a larger pool of applicants.*

*MDA asks that DEQ consider using thresholds for PDMP/NOI determinations, and consider asserting that because commercial applicators are not land managers or decision makers, they are not required to be covered by the permit. Combining these two approaches preserves the integrity of the permit by not requiring duplicative reporting while still capturing essentially the same data.*

RESPONSE: See Comment #15-3.

19-20. Part II.B.1 - Source of the pest problem is not a piece of information that is always available. There are many sources, some naturally occurring, and it can be very difficult to determine accurately. For source of the problem and source of data, perhaps DEQ can request that if the information is available and makes sense in the context of that particular use pattern, then it may be provided. To require it always be provided is prohibitive.

RESPONSE: The Department agrees and has made changes to the final permit.

19-21. Part II.B.1 - Action thresholds are an excellent way to manage limited resources and provide adequate pest control. In the context of this permit and the activities covered by this permit, action thresholds will not always be available or appropriate. For instance, noxious weeds do not have an action threshold. The county noxious weed law requires that all noxious weeds be managed by landowners. There is no acceptable amount. A common terrestrial example is if a weed, such as spotted knapweed, is present, but its priority is lower than a new invader, then best professional judgement is required by the land manager to make sure that the higher priority weed is managed before it can establish a population, even though knapweed may be well established. There is no real action threshold available for use, because site specific conditions are the primary indicator of the necessity and scale of treatment. Another example of the difficulty in using action thresholds is when different land managers are required to use different action thresholds. If a federal land management agency is required to treat west nile virus carrying mosquitos only after there has been confirmed west nile virus activity on that federal land, but a county requires treatment when the mosquitos are present to prevent disease transmission, then the county may not only conduct larval control activities, but may have to conduct adulticide control as well, due to the presence of adult mosquitos from the federal land. In this situation it could be argued that three different action thresholds are being utilized, but to detail them would be very difficult. Best professional judgement, combined with best management practices and education and outreach programs in the community are the best approaches in this situation.

The language in the permit could be changed to allow a description of action thresholds that are used by an entity if appropriate, but not require all entities to use them.

RESPONSE: The Department agrees to make the action threshold requirement more general.

19-22. It may be unlikely that a pesticide applicator will be able to find a relationship between the water quality standards and the application rate for the pesticide that is being applied. What is the goal of compliance with the first part of this requirement? If a pesticide applicator is applying a pesticide per label directions, a water quality standard will not be exceeded. While we support expanded understanding of water quality standards, this may be out of reach for many applicators. Additionally, there are many types of standards and benchmarks available for some pesticides, including ecological benchmarks, but not all pesticides. This requirement is likely to be confusing.

Regarding the listed waterbodies, perhaps DEQ could identify them in the permit? There are only two waterbodies in Montana that have been identified as impaired by DEQ: Hauser Lake (DDT, Endosulfan, Endrin, Endrin Aldehyde) and Silver Creek (DDE). Since these are not currently used pesticides, there should be no issue with applicators wanting to apply them to these waters specifically. If additional waterbodies are listed for pesticides in the future, that information could be made known to the permit holders at that time.

Degenerates should be degradates.

RESPONSE: See Comment #2-4.

19-23. Part II.B.1. – Description of Control Measures. Depending on the changes that DEQ implements in the permit, this requirement may need to change as well. As currently written, this

*requirement cannot be met by a commercial applicator. In some situations it will not be able to be met by land managers as well. Simply changing the language to 'when possible, ..' or a similar term, will help reduce the burden associated with this requirement.*

RESPONSE: See Comment #1-6.

*Regarding control measures used at the site to reduce pesticide discharge; does DEQ have some examples of control measures? This is also likely to cause confusion.*

RESPONSE: The Department has revised this to provide more clarification.

19-24. *Part II.B.1 - Similar to the previous comment, rate and frequency are dictated by the label and the best professional judgement of the applicator.*

RESPONSE: Regarding the application rate and frequency in the "Schedules and procedures," the Department is maintaining the first part of the statement, since either the decision-maker or the pesticide applicator needs to be responsible for determining how much and how often to apply pesticides. Reference to pest resistance will be removed.

19-25. *Part II.B.1. - Calibration activities should not be tied to maintenance activities regarding pesticide application equipment. Calibration activities can be recorded, but general maintenance cannot since it is carried out daily and as needed.*

RESPONSE: The Department agrees and has revised these requirements in the final permit.

19-26. *Part II.B.1 – Action Thresholds: Inclusion of the terms, when possible and appropriate, will help reduce confusion regarding this requirement.*

RESPONSE: The Department has revised this requirement to minimize confusion.

19-27. *Part II.B.1 – Assessment of Environmental Conditions - To a degree, this requirement is captured in MDA required recordkeeping. If DEQ wants additional information, that should be explicitly identified.*

RESPONSE: The Department has amended this statement to clarify the MDA Form as one method of performing the assessment.

19-28. *Part II.B.1 - Pre- and post application visual monitoring is not something that can typically be provided by commercial applicators. Our understanding is that this requirement is only necessary if the applicator goes back to the site as part of the normal business process (page 12 of the permit).*

RESPONSE: The Department has amended this statement to provide clarity that it is only during normal business practices.

19-29. *Part II.B.3 - If there were a significant adverse incident, it is possible that the applicator will be very busy coordinating cleanup and could potentially be hurt. Since notification to local authorities and the MDA is already required, can DEQ lengthen the amount of time an applicator has to contact them regarding the incident? Is this requirement in place because DEQ needs to know that there has been an incident, or because DEQ intends to assist with cleanup (and depending on the situation, it is likely that DEQ's remediation program will have been notified by MDA per our MOU)? If the case is the former, then it seems logical to allow more time for reporting.*

RESPONSE: See Comment # 1-7.

19-30. *Part II.B.3 – EPA ID # should be EPA Registration Number, EPA Reg. No.*

RESPONSE: The Department will revise.

19-31. *Part II.B.3 – “A description of the circumstances of the incident including species affected, number of individual and approximate size of dead or distressed organisms” – add Per visual observation.*

RESPONSE: The Department will revise.

19-32. *Part II.B.3 – “Description of the habitat and the circumstances under which the incident occurred (including any available ambient water data for pesticides applied)” Since MDA will be notified in this situation, and any available ambient water data for the pesticide is most likely to be housed at MDA, this requirement may be difficult for the permittee to understand or meet, and is likely duplicative with MDA's follow up of the situation.*

RESPONSE: The Department has removed this requirement.

19-33. *Part II.B.3 – Rather than FIFRA label, Pesticide label is a more inclusive, accurate term.*

RESPONSE: The Department will revise.

19-34. *Part II.D. - MDA suggests that DEQ utilize the records required by the Montana Pesticide Act. These records capture similar information as detailed here, as well as information sited in other areas of the permit, such as environmental conditions. The current records are complete for investigations and follow up activities to ensure compliance, and do not require applicators to establish a second set of records. Certain data, such as action levels, are not captured in MDA records, but may not be appropriate for many situations in any case.*

RESPONSE: See Comment #1-9.

19-35. *Part II.D. - For consistency, MDA recommends the term Trade Name. Earlier in the permit the trade name is referred to as the product name. Trade name is the generally accepted way to describe the product. Registration Number should be capitalized.*

RESPONSE: The Department will revise.

19-36. *Part II.D. - Quantity of pesticide used is best described as 'rate'. The rate is then the amount of product (aka formulated product) divided by the amount of diluent. This is typically mixed on a per acre basis, but there can be variations.*

RESPONSE: The Department will revise.

19-37. *Part II.D. - Rationale for any determination that reporting of an identified adverse incident; and Any spills or leaks that occur under covered this permit. These sentences appear incomplete.*

RESPONSE: The Department will revise.

19-38. *Part III.B. - Is there a requirement that the Regional Administrator provide written approval of visual monitoring, in lieu of test procedures?*

RESPONSE: See Comment #4-7.

## **COMMENTOR #20**

20-1. *I think this permit does not take into account very well when dealing with a river as a county boundary, do both need the permits?*

RESPONSE: Under the definition of “owner or operator” in the PGP, the person who owns, leases, operates, controls, or supervises the “point source” (i.e., application of pesticides) that discharge into state waters is responsible for obtaining coverage under the PGP. Regardless whether the receiving water is a county boundary, the county that owns or supervises the application of pesticides that results in a discharge to the boundary water is responsible for obtaining coverage.

20-2. *The 24 hour notice is not a long enough time to complete all the reports and contact all the appropriate people, especially if it is on a Friday, weekend, or long weekend.*

RESPONSE: See Comment #1-7.

20-3. *It should be in the permit that we do not have to worry about the micro and macro-invertebrates when dealing with the effects of Pesticides in the water.*

RESPONSE: See Comment #1-8. The Department agrees it is unreasonable to require county pest control districts to have the expertise for determining adverse impacts on micro and macro invertebrates. The requirement has been modified to reflect only what is visually apparent.

20-4. *It is unreasonable to require maintenance records on equipment, information needed should be consistent with what Dept. of Ag already requires.*

RESPONSE: See Comment #1-9 and #16-6.

20-5. *Weed Coordinators are not scientists, though we are educated it should not be in this permit to determine problems prior to application or be able to fully diagnose the results of what has all happened to the environment after application.*

RESPONSE: See Comment #1-8.

20-6. *It should state that visual monitoring should be sufficient. It should say must use best professional judgement when dealing with Control measures.*

RESPONSE: See Comments #1-6 and #1-8.

20-7. *It does not take into effect...the liabilities of the county nor how the DEQ is going to handle complaints.*

RESPONSE: See Comments #4-1, #6-2, #8-3.

20-8. *There should be a better definition of "team"*

RESPONSE: See Comment #6-6.

20-9. *The overall process should be simpler.*

RESPONSE: Comment noted.

20-10. *Many of the words used in the permit need to be defined.*

RESPONSE: The Department has added definitions for A-1 classification waterbodies, mixing zone, and pollutant. We have removed Integrated Pest Management (IPM) and Use Pattern since these definitions are not helpful for the permit as written.

20-11. *If the federal permitting process is lessened, the state should immediately become less stringent as well.*

RESPONSE: The Department has made some changes to reflect the changes that EPA has proposed to make (examples include allowing Outstanding Resource Waters to be covered, and increasing the area thresholds for some of the pesticide use patterns). However, until EPA issues a final revised PGP, DEQ declines to make further revisions.

#### **COMMENTOR #21**

21-1. *We question the rationale for different thresholds for different activities, since one of the critical aspects of the 6<sup>th</sup> Circuit Court ruling was that discharge permits are needed because there are chemical residues (pollutants) remaining after any pesticide treatment. So, as an example of the effect of this, in the case of a type of pesticide where the threshold is 64 acres, someone who is only treating 63 acres without the need for a PDMP is actually discharging almost the same amount of pollutants than someone with 65 acres and a PDMP. If everyone was required to*

*prepare a PDMP, then one could argue that every user is taking necessary means to minimize the level of pollutants. A threshold does not change the fact that residues are being released, whereas a PDMP will affect the pollution releases. The current proposal may lead to legal challenges for those activities under the threshold, which will affect those that are submitting the PDMP. Why couldn't DEQ require everyone to file a PDMP, but make available some templates or generic plans that entities below the threshold could use?*

RESPONSE: The final PGP will reflect a change based on comments raised during the public comment period by you and others: all pesticide applicators will be required to submit an NOI for Tier I coverage under a "universal" part of the PGP. Larger applicators above a threshold (Tier II) will have additional requirements. The thresholds are designed to reflect risk to the environment based on the type of application: a direct application of piscicide is considered a higher risk than biological larval treatment to control mosquitoes, for instance. Coverage under the General Permit provides legal protection and minimizes liability for those pesticide applicators who discharge to water.

The requirements for the "less than threshold" Tier I applicators will be streamlined, but should be appropriate for the smaller size of this regulated universe.

Since everyone will be required to obtain coverage, the Department has increased some of the thresholds to reflect the upward threshold trend occurring at the federal level. While we agree that a 63-acre and 65-acre scenario are not different, there is no feasible alternative to selecting a "line in the sand" threshold. The other alternatives would be either *everyone* would be required to comply with *all* the requirements, or there would be some sort of sliding scale – neither of which is an option the Department is prepared to make.

## **COMMENTOR #22**

22-1. *I'd like to suggest that DEQ consider allowing PGP permits to be defined by river drainage in lieu of county boundaries for piscicide use. Any particular piscicide application to a water of the state will occur within 1 of 3 major river drainages in Montana – the Yellowstone Drainage, the Missouri Drainage, or west of the continental divide. If we can still meet the 20 county maximum within any particular major drainage this approach would make more sense for these projects. Thanks for your consideration in this matter.*

RESPONSE: The Department had considered drainage basins as a potential grouping. However, while this may be preferable for some of the pesticide use patterns, it would potentially cause problems for others that are designed on a county-basis. It was our intention that 20 contiguous counties should be flexible enough for most regional projects. After this permit cycle, we can revisit whether the "20 contiguous county" limit is satisfactory or if minor changes could alleviate permitting issued for FWP.

**Note:** The Department received comments from one interested person after the date for submitting comments had passed. A review of those comments indicates that the issues raised have already been addressed by the Department in responding to the comments above.