

**RESPONSE TO PUBLIC COMMENT  
Construction Dewatering General Permit  
MPDES Permit No. MTG070000**

The Montana Department of Environmental Quality (DEQ) issued Public Notice MT-25-01 on January 13, 2025. The Public Notice provided the tentative determination to issue a statewide wastewater discharge permit renewal for the Construction Dewatering General Permit (CDGP) under the Montana Pollutant Discharge Elimination System (MPDES) permit MTG070000. The notice included the draft Permit, Fact Sheet, and draft Environmental Assessment (EA).

The notice required that all written comments be received or postmarked by February 13, 2025, to be considered in formulation of the final determination and issuance of the permit. A public hearing was also held on February 13, 2025, to accept public comments. DEQ did not receive comments during the public hearing. DEQ received written comments from the parties in the table below.

<b>Persons/Entities Submitting Substantive Comments on Public Notice Package of MPDES Permit MTG070000</b>		
<b>No.</b>	<b>Commenter</b>	<b>Receipt Date/Time</b>
1	Ryan K Mattick, The Law Office of Cusick, Farve, Mattick & Michael, P.C. on behalf of the Middle Creek Ditch Company (MCDC)	February 13, 2025 @ 4:02 PM
2	Lilly McLane, Gallatin Watershed Council	February 13, 2025 @ 7:52 PM

A synopsis of the submitted comments and DEQ’s responses are included below. DEQ has considered these comments in preparation of the final permit and decision. Copies of the original comment letters are available from DEQ upon request. This Response to Comments is an addendum to and supersedes relevant portions of the Fact Sheet to the extent further explanation is provided or any changes to the permit are described herein.

**Comments 1 – 6: from The Law Office of Cusick, Farve, Mattick & Michael, P.C.**

**Comment 1:**

Construction companies and/or developers frequently discharge their dewatering groundwater directly into MCDC’s private irrigation ditches. MCDC’s property rights, that is its water rights and ditch easement rights, are both damaged by the MDEQ’s grant of the CDGPs.

The discharge of water authorized by the DEQ to flow directly into MCDC’s ditch system is a direct violation of MCDC’s private property rights. A ditch right or ditch right of way is an easement. Easements and the use of them are property rights. DEQ, through the CDGP authorizes the developers to pump or flow water into MCDC’s ditches in order for the disposal of an undermined amount of groundwater.

On page 17 of the proposed CDGP Permit, “The issuance of this permit does not convey any property rights of any sort, or any exclusive privilege.” However, MDEQ has often, through its CDGP, authorized the grant of the use of one entity’s private property rights for the use by another. This appears to be a governmental authorized taking of MCDC’s private easement right for the use by developers, in direct contravention to Section 2-10-103(1), MCA.

***Response to Comment 1:***

The issuance of the CDGP or any authorization thereunder neither regulates nor authorizes any infringement upon MCDC's property rights, including water rights and ditch easement rights. DEQ issues discharge permits under the authority provided in the Montana Water Quality Act (MWQA), Title 75, Chapter 5, MCA. Legislative enactments are presumed valid, and the MWQA, by its own terms, limits the "discharge [of] sewage, industrial waste, or other wastes into state waters."

General Permits are a type of MPDES permit, which are issued under a program designed to "implement one common system for issuing permits for point sources discharging pollutants into state waters" [Administrative Rules of Montana (ARM) 17.30.1301(1)]. General Permits, like the CDGP, are authorized under state law. See § 75-5-401(9), MCA, and ARM 17.30.1341. Provided owners or operators of point sources comply with necessary application requirements, DEQ individually authorizes CDGP discharges through an authorization process. See § 75-5-401(9), MCA, and ARM 17.30.1341(4). DEQ's permitting rules require it to issue permits to applicants if DEQ finds that "operation consistent with the limitations of the permit will not result in the pollution of any state waters." See § 75-5-401(2), MCA.

The CDGP regulates the discharge of pollutants from construction dewatering – primarily total suspended solids (TSS) through the implementation of turbidity effluent limits, monitoring, and reporting. The CDGP applies to discharge of construction dewatering pollutants to any state waters, which is defined as:

ARM 17.30.1304: "State waters" means any body of water, irrigation system, or drainage system, either surface or underground. This subchapter does not apply to irrigation waters where the waters are used up within the irrigation system and said waters are not returned to any other state waters."

This conveys the same information as Section 75-5-103(32), MCA:

- (a) "State waters" means a body of water, irrigation system, or drainage system, either surface or underground.
- (b) The term does not apply to:
  - (i) ponds or lagoons used solely for treating, transporting, or impounding pollutants; or
  - (ii) irrigation waters or land application disposal waters when the waters are used up within the irrigation or land application disposal system and the waters are not returned to state waters.

As long as the irrigation ditch water returns to another state water, the irrigation ditch is considered a state water.

The property rights statement included in the Standard Conditions on page 17 of the draft CDGP was derived from ARM 17.30.1312(2) and 17.30.1342(7), i.e., "This permit does not convey any property rights of any sort, or any exclusive privilege." The plain reading of this requirement is that DEQ is not conveying any property rights or authorizing any injury to the MCDC, its ditches, or any related surface water. In response to this comment, and to provide additional clarity, DEQ is adding to this standard condition "nor does it authorize any injury to persons or property or invasion of other private rights, or any infringement of state or local law or regulations." See ARM 17.30.1312(3). As set forth in the CDGP, DEQ regulates the narrow issue of the quality of water discharged -- not private property disputes or water rights.

Even as to the regulated entity, i.e., the permit applicants, there are no impacts upon real property and no property taking or damaging implications. See Section 2.11, *Final Environmental Assessment-CDGP*. The

aforementioned section of the EA has been modified to provide additional detail and clarity. Notably, for purposes of assessing private property impacts under the *Montana Environmental Policy Act (or MEPA)*, such assessment is limited to potential impacts upon private property that is *regulated*. See *Belk v. Mont. Dep't of Env't'l Quality*, 2022 MT 38, ¶ 21. Here, there is no governmental regulation or permit condition under consideration that would regulate the commenter or other adjacent property owners. Other environmental impacts are discussed throughout the EA; however, the permit does not regulate private property, does not create any property rights, and does not infringe upon existing property rights or the ability to enforce such rights.

**Comment 2:**

The discharge of untreated dewatering water is damaging to MCDC's ditches, filling them with silt, and contaminates its appropriated water, mingling fine soils from the turbid groundwater pumping. The extra silt fills the ditch, ultimately diminishing capacity, plugs culverts, pipelines, and headgates, damages pumps, and ultimately will require MCDC perform additional cleaning and maintenance to its ditches. Additionally, it diminishes the water quality of MCDC's water rights claims. There appears to be minimal water quality testing requirements for turbidity. And there does not appear to be any groundwater well construction or pumping standards.

***Response to Comment 2:***

The CDGP only authorizes construction dewatering discharges that meet effluent limits and other conditions specified in the permit. If permittees operate consistent with the limitations of the CDGP, pollution of state waters will not occur. The CDGP is designed to restrict the amounts of solids that may enter a waterbody. Under both the 2020- and 2025-CDGP, dewatering discharges have turbidity limits, which function to regulate the amount of silt and other solids entrained in the wastewater. For irrigation ditches, the highest average monthly discharge turbidity limits are:

- 10 Nephelometric Turbidity Unit (NTU) to perennial waterbodies or intermittent waterbodies that have flow. Turbidity levels less than 10 NTU are considered low.
- 100 NTU to dry intermittent waterbodies. Waterbodies over 100 NTU may appear muddy; however, the relevant receiving waterbody is the discharge to a dry ditch.

These limits are the same as previous CDGPs. Any permittee discharging dewatering effluent is required to control their discharge to meet these limits.

Permittees are required to visually inspect the discharge daily, and sample and analyze at least twice per week plus anytime turbidity appears elevated. If a permittee is discharging at high turbidity levels or has not properly installed and operated best management practices (BMPs), they are out of compliance and are required to take corrective action. In such circumstances, a permittee may also be subject to an enforcement action, pursuant to Title 75, Chapter 5, Part 6, MCA.

DEQ does not provide design standards for wells or for control technology. It is up to the permittee to design and operate equipment to meet permit limits.

See also, Response to Comment 1.

**Comment 3:**

Discharge of an unregulated amount of water interferes with the regular operation of MCDC's ditch system. MCDC has no control over the amount or frequency of dewatering water contractors or developers pump into its ditches since it is never provided notice of the grant of a CDGP or given opportunity to plan for this additional water. If the ditch bank is overtopped, this could result in a catastrophic failure to MCDC's ditch and significant flooding or property damage to neighboring property. All of which MCDC would likely be responsible for.

***Response to Comment 3:***

The CDGP allows construction dewatering operations that meet effluent limits and other conditions specified in the permit to discharge pollutants to state surface waters to ensure that beneficial uses of the state surface water are maintained. Flow is not directly regulated by the CDGP. However, the dewatering control plan required by the CDGP includes the “evaluation, installation, and maintenance of BMPs” including erosion control. It also requires “measures taken to minimize erosion from the discharge through flow dissipation devices such as rip rap, baffles, or other methods, as necessary. The discharge shall not cause or result in erosion to the area of the discharge or the surrounding stream banks” (CDGP Part II.d.2). If a contractor is causing erosion, it is a permit compliance issue and DEQ should be notified.

In Montana, DNRC is the agency provided authority to regulate water use.

Private property or water rights disputes are also outside the scope of the CDGP. Members of the public have access to FACTS GIS viewer <https://gis.mtdeq.us/portal/apps/webappviewer/index.html?id=8fcbb1f7a6f84296b10fb0aab50aba99> where authorizations can be filtered by Permit Type (Construction Dewatering) and Permit Status (Effective or Administratively Extended). There is an additional layer to view terminated authorizations. Choosing a specific authorization will provide the permit number, owner/operator, and name of the project. The public may also request additional public records through a public records request on DEQ’s website.

See also, Responses to Comments 1 and 2.

**Comment 4:**

Discharge of dewatering water 365 days of the year also interferes with the regular operation and maintenance of MCDC’s ditches. Water is now flowing in its ditches year-round. The ditch bank often erodes due to the careless placement and directed flow of the water from the permittee. Or is damaged by the careless placement or removal of the pipes or pipeline used for the dewatering.

***Response to Comment 4:***

The CDGP authorizes the discharge of pollutants into state surface waters. The CDGP does not provide permission to cause property damage, trespass, or otherwise infringe upon private property rights. Similarly, DEQ does not have the legal authority to mandate the timing of construction projects.

See also, Responses to Comments 1, 2, and 3.

**Comment 5:**

The CDGP does not have any DEQ oversight, and is not a comprehensive review of any adverse effects to the water source or water rights of nearby users. There is no water quality compliance mechanism other than self-reported infrequent observation reports. The Form NOI-07 just requires the applicant name the “Receiving Surface Water” but does not delineate between a man-made irrigation ditch or a natural surface water source.

***Response to Comment 5:***

The CDGP limits the discharge of pollutants into state waters, and many irrigation ditches are considered state waters. See Response to Comment 1 for a discussion on state waters.

The Fact Sheet for the CDGP renewal included an evaluation of relevant regulatory requirements, including turbidity standards for Montana waterbodies in ARM 17.30 Subchapter 6. As part of the renewal, DEQ reviewed turbidity levels for the period of record (March 2020-July 2024), as reported

by the permittees within the national Discharge Monitoring Report (NetDMR) program. The CDGP is designed to avoid any adverse effects from pollutants in dewatering discharges by developing turbidity limits that will comply with the turbidity standards.

In addition to taking two or three turbidity samples per week, permittees are required to maintain a daily log, and to take preventative measures, including additional sampling if excessive turbidity is noted in their discharge. They are also required to report the daily maximum and monthly average turbidity levels for every month they are in operation on the monthly NetDMRs. Elevated turbidity will result in the issuance of a violation letter requiring a written response; it may also prompt a DEQ compliance inspection.

As part of the NOI-07, applicants must include the outfall location and the initial and the first-named waterbodies for the proposed discharge(s). DEQ compares this information with the submitted map and GIS aerial photos to confirm the discharge location. It does not matter for permitting purposes whether the receiving water is man-made or natural; the CDGP authorizes discharges of pollutants into state waters, which include both natural and man-made waters. If a receiving waterbody does not meet the definition of a state surface water, a permittee is not authorized to discharge under the CDGP.

See also Responses to Comments 1 through 4.

**Comment 6:**

MCDC requests the MDEQ to take a “No Action Alternative.” Based on its own Draft Environmental Assessment, taking such action would require permittees “the legal options for discharging would be limited to land-application, loading tanker trucks, or (if allowed) discharging into the municipal sanitary sewer system.” Alternatively, MCDC requests the MDEQ modify the CDGP to limit the discharge to state surface water, to exclude discharges into irrigation canals.

***Response to Comment 6:***

Taking no renewal action would result in either an administrative extension or an expiration of the 2020-issued CDGP. The legal options for disposing of dewatering wastewater without an effective CDGP are not practical and would lead to illegal (unpermitted) dewatering discharges.

As stated in the draft EA Section 7. Conclusions and Findings, DEQ’s preferred proposed action is to issue the MPDES permit. This action is preferred because the permit program provides the regulatory mechanism for protecting water quality by enforcing the terms of the MPDES permit.

Furthermore, DEQ does not have the authority to exclude state waters from permit coverage based on private property disputes, and the CDGP does not authorize any infringement upon private property, including water rights. See also, Responses to Comments 1 through 5.

**Comment 7: from the Gallatin Watershed Council**

**Comment 7:**

When updating the General Permit for Construction Dewatering, we encourage the Division to uphold MCA 70-17-112, which prohibits interfering with canals or ditch easements without written consent. More consistent messaging across regulations that encourage coordination and clearly guide people to follow the law would benefit all involved, and we hope the Division will take this opportunity.

***Response to Comment 7:***

Section 70-17-112, MCA, states “(2) A person may not encroach upon or otherwise impair any easement for a canal or ditch used for irrigation or any other lawful domestic or commercial purpose, including carrying return water.” DEQ is not encroaching upon or otherwise impairing any easement.

The renewed CDGP provides discharge limits to protect the beneficial use of any of the state waters, including turbidity limits and BMP requirements. See the response to Comment #1, including that DEQ is adding to the standard condition “nor does it authorize any injury to persons or property or invasion of other private rights, or any infringement of state or local law or regulations” based on ARM 17.30.1312(3). See also, Responses to Comments 2 through 6.

**Comment 8:**

As part of this response to comments, DEQ corrected an omission in order to consistently include the entire Large River stretch as shown in the Draft Permit Attachment #3. DEQ will ensure that the names of the Large Rivers include the specific stretches or reference the attachment.