Response to Comments
General Permit for Storm Water Discharges Associated with Small Municipal Separate Storm Sewer Systems (MS4s)
MPDES Permit MTR040000

On October 25, 2021, the Montana Department of Environmental Quality (DEQ) issued Public Notice MT-21-25, stating DEQ's intent to issue a Montana Pollutant Discharge Elimination System (MPDES) General Permit for Storm Water Discharges Associated with Small MS4s. The public notice was extended, and all substantive comments were required to be received or postmarked by December 6, 2021 to be considered in formulation of the final determination and issuance of the permit.

This Response to Comments document includes a summary of all significant comments on the draft permit and fact sheet received during the public comment period and DEQ's response to those comments. The Response to Comments supplements the permit record and supersedes the relevant portions of the Fact Sheet to the extent of the changes outlined below.

The table below identifies those individuals who submitted comments.

Persons Submitting Significant Comments on the Fact Sheet and Draft MPDES General Permit for Storm Water Discharges Associated with Small MS4s MTR040000	
Number	**Commenter**
1	Boris Krizek, Environmental Engineer, City of Billings Public Works Department
2	Ryan Leland, Public Works Director, City of Helena
3	Susie Turner, Director of Public Works, City of Kalispell
4	Todd Seib, Water Quality Specialist, Missoula Valley Water Quality District
5	Guy Alsentzer, Executive Director, Upper Missouri Waterkeeper
6	Alan Rollo, General Public
7	Logan McInnis, Deputy Public Works Director, City of Missoula

Response to Comments on the Fact Sheet and Draft Permit MTR040000:

Commenter 1 & 2; Boris Krizek, City of Billings Public Works Dept. and Ryan Leland, City of Helena

Comment 1 regarding page 6, section II.A.; "Implementation of required BMPs shall be documented in the permittee's SWMP, including updates and *rationale for decision making."*:

The reporting requirements for small MS4s is set forth in 40 CFR 122.34(d)(3), which requires the following items to be included in the report:

(i) The status of compliance with permit terms and conditions;

(ii) Results of information collected and analyzed, including monitoring data, if any, during the reporting period;
(iii) A summary of the storm water activities the permittee proposes to undertake to comply with the permit during the next reporting cycle;
(iv) Any changes made during the reporting period to the permittee's storm water management program; and
(v) Notice that the permittee is relying on another governmental entity to satisfy some of the permit obligations (if applicable), consistent with § 122.35(a).

The requirement in the General Permit to provide the rational for decision making is additive to the federal regulation and is therefore more burdensome than the comparable federal regulation. Under the federal rules, Permittees are required to report on the status of compliance, which will necessarily include a discussion of the implementation of the required BMPs. The requirement to include a discussion of the Permittees rational for decision making is therefore redundant and excessive. The Permittees therefore request the requirement to provide the rationale for decision making be removed from the General Permit.

Response: The federal regulation referenced, 40 CFR Part 122.34(d)(3), is specific to annual reporting requirements. This regulation has been adopted into state rules at ARM 17.30.1111(14); however, the permit requirement that requires a permittee to provide a rationale for decision making is not an annual reporting requirement. Furthermore, the fact EPA has not adopted a corresponding federal requirement does not mean a rule constitutes a more stringent standard under Mont. Code Ann. § 75-5-203. MCA 75-5-203 states that DEQ may not adopt a rule that is more stringent than the comparable federal water quality standards that address the same circumstances. Examples of water quality standards would be the toxic threshold of lead and copper. Permit terms and conditions are not water quality standards or an adopted rule, but translate the general provisions of the Montana Water Quality Act and applicable rules into specific provisions tailored to the operations of the discharger. In the case of MS4s, the Montana Supreme Court concluded in 2019 that the previous version of the MS4 General Permit was not a final iteration of implementation of applicable water quality requirements, but simply another step along the way in the right direction. The language cited in the General Permit reads "Implementation of required BMPs (best management practices) shall be documented in the permittee's SWMP (storm water management program), including updates and rationale for decision making". This language is more broadly applicable to SWMP documentation and is supported by 40 CFR Part 122.34(b), requiring that the permittee must document and describe in detail how the permittee intends to comply with the permit requirements for each minimum control measure.

In addition, documentation of decision making in the permittee's SWMP has been a requirement since the 2005 iteration of General Permit and removal of the condition could constitute antibacksliding. DEQ finds documenting rationale important for showing the maximum extent practicable standard is met in areas where permittees are required to choose from a menu of implementable BMPs to decide why one BMP is more practicable over another based on the specifics of the regulated MS4. No changes to the permit were made in response to this comment.

Comment 2 regarding page 6, section II.A.; "Include other conditions deemed necessary by the Department to comply with the *goals* and requirements of the Montana Water Quality Act.":

This provision, which authorizes the Department to require changes to the SWMP to comply with the "goals" of the Montana Water Quality Act, is too subjective to be included in the General Permit. This provision could also result in conditions that exceed the federal regulations in violation of Mont. Code Ann. § 75-5-203. Permittees therefore request the term "goals" be removed from this provision.

Response: DEQ disagrees this involves a stringency issue under Mont. Code Ann. § 75-5-203. The goals of the Montana Water Quality Act are set forth in statute and are not subjective. *See* Montana Code Ann. § 75-5-101. This is also not a new provision in this iteration of the General Permit, but one of the standard conditions in storm water permits simply reiterating that while the national marketplace of products and practices for storm water management is large, not all meet the requirements of the Montana Water Quality Act. No changes were made to the permit in response to this comment.

Comment 3 regarding page 10, section II.A.2.a.; "Identify categories of non-storm water discharges or flows that are significant contributors of pollutants to the MS4.":

40 CFR 122.34(b)(3)(ii) states: "The permit must also require the permittee to address the following categories of non-storm water discharges or flows (i.e., illicit discharges) only if the permittee identifies them as a significant contributor of pollutants to the small MS4. . ." Under the federal regulations, the listed categories are non-significant unless the permittee identify them as significant. Thus, the requirement is more stringent than the federal regulation, and is therefore in violation of Mont. Code Ann. § 75-5-203. Permittees request the provision be revised to reflect the language of the federal regulation.

Response: Montana Code Annotated 75-5-203 states that DEQ may not adopt a rule that is more stringent than the comparable federal regulations or guidelines that address the same circumstances. ARM 17.30.1111(6)(c)(iii) specifically addresses this scenario and is consistent with the corresponding federal regulation. Additionally**,** the language in the draft permit asks permittees to consider the non-storm water discharges or flows listed in ARM 17.30.1111(6)(c)(iii) and ultimately determine if non-storm water discharges or flows are significant. This is consistent with both state and federal regulations, by allowing the listed categories to be non-significant unless the permittee identifies them as significant contributors of pollutants. No changes were made to the permit in response to this comment.

Comment 4 regarding page 11, section II.A.2.a.ii.; "In the SWMP, document and update annually: A list of non-storm water discharges the permittee has identified as significant contributors of pollutants (i.e., illicit discharges). Include the pollutants associated with each illicit discharge, and any local controls or conditions placed on these discharges.":

It is unclear from the language of the section whether the list of non-stormwater discharges can be zero. Permittees request the section be revised to clarify that if no such non-stormwater discharges have been identified by the Permittee, the list may not have any entries.

Response: The intent of II.A.2.a is to identify *potential* non-storm water discharges or flows that *may* be contributing significant amounts of pollutants. The word "potential" has been added in 2.a.ii. to match the intent of 2.a.i. It is up to the permittee to determine and document if there are truly zero potential discharges or flows within the MS4 boundaries that may be contributing

significant amounts of pollutants. No changes were made to the permit in response to this comment.

Comment 5 regarding page 11, section II.A.2.b.ii.; "The permittee must identify a minimum number of high priority outfalls *not equaling zero*, based on the knowledge of potential illicit discharges in their MS4. High priority outfalls shall be reviewed and updated annually."

The cited provision appears to create a requirement that the Permittee identify a high priority outfall irrespective of whether the data supports the identification of an outfall as "high priority." In reality, the number of "high-priority" outfalls may be zero. Further, the federal regulations reference to "procedures for locating priority areas likely to have illicit discharges" does not contain a requirement to identify outfalls as "high priority." Permittees therefore request the statement "not equaling zero" be removed.

Response: DEQ finds that it is reasonable for each MS4 to identify at a minimum *one* high priority outfall. The provided list of considerations in II.A.2.b.ii. are included as a minimum. If the MS4 cannot identify one high priority outfall based on the General Permit considerations, DEQ encourages the MS4 to expand the list of considerations. The permittee must identify high priority outfalls based on the knowledge of potential illicit discharges within their MS4. To say there are zero high priority outfalls insinuates there is zero potential for an illicit discharge. DEQ finds that conclusion is unsupported. No changes were made to the permit in response to this comment.

Comment 6 regarding page 13, section II.A.2.d.ii.; "Permittees with legal authority must adopt an ordinance or other regulatory mechanism to prohibit illicit discharges, *which shall include a provision prohibiting any occasional incidental non-storm water discharge event*.":

40 CFR 122.34(b)(3)(B) states: "To the extent allowable under State, Tribal or local law, effectively prohibit, through ordinance, or other regulatory mechanism, non-storm water discharges into the storm sewer system and implement appropriate enforcement procedures and actions." The inclusion of the provision "prohibiting any occasional incidental non-storm water discharge event" goes well beyond the federal regulation for a number of reasons. First, the term "occasional incidental non-storm water discharge event" is not defined within the General Permit, leaving the Permittees to guess what that term means. Second, there is no significance limitation on the "occasional incidental non-storm water discharge event," which extends the prohibition to discharges that contribute no pollutants to receiving waters. Permittees therefore request the provision be removed or revised to include a limitation that the "occasional incidental non-storm water discharge event" must be identified as a significant contributor of pollutants to the small MS4.

Response: Occasional incidental discharges are identified in II.A.2.a.ii. The exceptions to the general rule that illicit discharges must be effectively prohibited through ordinance or other regulatory mechanism are listed at ARM 17.30.1111(6)(c)(iii). There is no specific exception for other non-storm water discharges. The previous General Permit also required permittees to "include a provision prohibiting any occasional incidental non-storm water discharge" in appropriate ordinances, regulatory mechanisms, or memoranda of agreements. DEQ does not agree that this goes beyond the federal regulation requirements, but instead allows MS4s to best focus their resources on active problem areas versus events under control, such as a charity car wash. Occasional incidental non-storm water discharges are still non-storm water discharges, to

be identified by the permittee in requirement II.A.2.a.ii. and must be effectively addressed through ordinance or other regulatory mechanism as required by ARM 17.30.1111(6)(c)(ii)(B). *See also* 40 CFR 122.34(b)(3)(B). No changes were made to the permit in response to this comment.

Comment 7 regarding page 18, section II.A.3.c.iii.; "In addition, the ERP must also include non-monetary construction project-specific penalties such as stop work orders, *bonding requirements, and/or permit denials* for non-compliance.":

Both bonding and permits are issued before construction begins, so there is no ability to use those as enforcement mechanisms. Permittees suggest revising to remove reference to bonding and permit denials.

Response: The options listed are only suggestions or examples of non-monetary construction project-specific penalties. Permittees are free to implement, and include in their enforcement response plan, options that are a best fit for their MS4. No changes were made to the permit in response to this comment.

Comment 8 regarding page 19, section II.A.4.a.i.; "Update and implement a plan review checklist to ensure consistent review of submitted plans and to determine and *document compliance with state and local post-construction requirements*.":

This provision references state law post-construction requirements without providing a specific citation to the applicable state law. Permittees request the provision be revised to provide a citation to applicable post-construction state requirements.

Response: MS4s are responsible for documenting their compliance with post-construction requirements, including the requirements set forth in the General Permit and any other state requirements, as applicable. This is not a new requirement in this iteration of the General Permit and was designed to help permittees who find themselves in scenarios of overlapping regulatory frameworks. DEQ is able to assist permittees with questions regarding post-construction requirements on a case-by-case basis. No changes were made to the permit in response to this comment.

Comment 9 regarding page 22, section II.A.4.d.; "Incorporate recommendations and requirements into plans, policies, and ordinances which allow and support the utilization of LID (low impact development) concepts and green infrastructure on public and private property.":

The General Permit does not provide a definition of "low impact development." It is difficult for Permittees to implement this requirement without a complete definition of what constitutes "low impact development." Permittees request the provision be revised to include a definition of "low impact development."

Response: Low impact development is a term and concept that is readily used throughout the country and examples can be found online including U.S. EPA guidance. Please see https://www.epa.gov/nps/urban-runoff-low-impact-development. DEQ does not find it necessary to further define this common term. No changes were made to the permit in response to this comment.

Comment 10 regarding page 22, section II.A.4.d.ii.; "By the end of the third year of the permit cycle, develop and submit a plan outlining any needed modifications to relevant codes, ordinances, policies, and programs to implement LID/green infrastructure concepts.":

Permittees suggest revising the provision to allow for a justification for why implementation of LID/green infrastructure concepts is not feasible. There are situations where LID/green infrastructure concepts are not implementable due to specific site conditions (e.g., downtown re-development in an area with a high groundwater table).

Response: MS4 permitting requirements are iteratively built from the accomplishments in the last 5-year permit term. This is an iteration of the last General Permit which required MS4s to convene appropriate staff and conduct a discussion to evaluate existing barriers to implementing LID infrastructure. Permittees were also required to identify opportunities for change. At this point in an MS4 program, permittees should have identified at least some opportunities to implement LID/ green infrastructure concepts into their programs. If modifications to codes, ordinances, policies, or programs are not needed, DEQ added language to allow permittees to submit a plan/overview of any work scheduled or completed to implement LID/green infrastructure concepts. See General Permit Part II.A.4.d.ii. for language edits.

Comment 11 regarding page 23, section II.A.5.a.ii.; "An annual visual inspection of each applicable facility.":

The annual visual inspection is an additive and unnecessary inspection. If the standard operating procedure is established and followed for a specific facility and/or activity, and there are no changes to that facility and/or activity, there is no need to reinspect the facility and/or activity until there is a change in the facility and/or activity.

Response: It would be difficult to assess whether storm water controls at a given facility are in fact functioning as designed, and proper operating procedures are being followed, without at a minimum a visual inspection. Many EPA regulations require visual inspections of storm water controls, such as at Concentrated Animal Feeding Operations, on a daily or weekly basis, so DEQ finds annual visual inspections reasonable. No changes were made to the permit in response to this comment.

Comment 12 regarding page 24, section II.A.5.a.ii.; "Document facility inspections and communication with relevant department personnel regarding inadequate control measures.":

Throughout the General Permit, there are requirements for the documentation of communications between facility personnel. Documentation of facility inspections should be sufficient.

Response: DEQ has heard from MS4 permittees that many facilities owned by a permittee may not be within the same department as the person doing the inspection. Therefore, documentation of communication of inspection results to the appropriate personnel are just as important as doing the inspections. Documenting communication regarding inadequate control measures is an important mechanism to show the effort made to rectify the problem and ensure a proper operation and maintenance program is implemented to prevent or reduce runoff from permittee-owned/ operated facilities and field activities. Documentation of an inspection alone is not sufficient. No changes were made to the permit in response to this comment.

Comment 13 regarding page 25, section II.B.; Training

The required training program is burdensome and difficult to implement. Permittees suggest revising to streamline required training and to eliminate unnecessary repetitive training.

Response: DEQ worked extensively with the MS4 workgroup to revise and clarify the training requirements in this iteration of the General Permit to ensure time and resources spent on training were effective. DEQ finds the training requirements to be clear and concise and an improvement from the previous permit. No changes were made to the permit in response to this comment.

Comment 14 regarding page 26, section II.C.1.b.; "Sampling must be conducted at least semi-annually (two times per year) for each of the parameters listed in Table 1 during a storm event with a measurable amount of discharge."

In dry years, it is possible that some Permittees may not have a measurable discharge to state waters. Monitoring provision should be revised to acknowledge that there may be times that storm event monitoring may not be achievable in all years.

Response: Part II. C.1.b. outlines the steps a permittee should take if sampling frequency cannot be achieved. No changes were made to the permit in response to this comment.

Comment 15 regarding page 29-30, section II.E.2.; Program Effectiveness Assessment

The Program Effectiveness Assessment is redundant, burdensome, and exceeds the federal requirements. 40 CFR 122.34(d)(1) states: "The permit must require the permittee to evaluate compliance with the terms and conditions of the permit, including the effectiveness of the components of this storm water management program, and the status of achieving the measurable requirements in the permit." While the federal regulations unambiguously require an evaluation of the small MS4 stormwater program, the required elements of the Program Effectiveness Assessment far exceed a simple evaluation of compliance.

Further, each individual MCM contains requirements for tracking and reporting the implementation and effectiveness of the MCM, which, collectively, evaluates the effectiveness of the SWMP as a whole. Further, the requirement to identify opportunities for change and to provide suggestions to the program is confusing and appears to go well beyond the federal requirements. The Permittees therefore request this unduly burdensome requirement for a written Program Effectiveness Assessment be removed from the General Permit.

Response: While DEQ does not agree that this requirement exceeds federal requirements (see 40 CFR Part 122.34(d)(1)), DEQ does agree to remove this requirement from this iteration of the General Permit. DEQ finds that each MS4 could benefit from more resources invested in storm water controls, any necessary updates to authority, and continued exploration of LID infrastructure. Part II.E.2 was removed from the General Permit. DEQ encourages each MS4 to take the resources that would have been invested in a Program Effectiveness Assessment and allocate those towards improved BMPs and storm water management plans.

Comment 16 regarding page 30-31, section III.D.; "Written notice must reference a "change of Storm Water Coordinator," identify the permit authorization number, identify the formal Small

MS4 Name as identified on the application, and be signed by a person meeting the signatory requirements of Part V.G, below."

The citation to "the signatory requirements of Part V.G." is incorrect. The correct citation is Part IV.M.

Response: DEQ has changed the reference to signatory requirements in section III.D. to "Part IV.M."

Comment 17 regarding page 37, section IV.V.; "'Outfall' means a physical location where conveyance structures discharge pollutants of storm water into surface water or where they leave the boundary of the designated MS4. The term does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances that connect segments of the same stream or other surface waters and that are used to convey surface waters.":

The definition of "Outfall" in the General Permit does not match the definition of "Outfall" in ARM 17.30.1103, which defines "Outfall" as: "a point source, as defined in this subchapter, at the point where a municipal separate storm sewer discharges to surface waters. The term does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances that connect segments of the same stream or other surface waters and that are used to convey surface waters." Permittees request the definition in the General Permit be revised to match the ARM definition.

Response: The provided definition for "Outfall" was carried over from previous iterations of this General Permit. During previous iterations of the permit, the definition of outfalls was agreed upon by the MS4 permittees and DEQ performed onsite compliance assistance to help evaluate the nature of structures where there were questions. Permittees found the provided definition in ARM 17.30.1103 was not specific enough to define outfalls for permitted MS4s, particularly where MS4 boundaries overlap or cross storm sewer systems. DEQ would be happy to assist MS4s with specific questions regarding the definition of an outfall for purposes of the MS4 General Permit. No changes were made to the permit in response to this comment.

Commenter 2; Ryan Leland, City of Helena

Comment 18: For the most part, the draft General Permit maintains the permitting framework from prior versions of the permit. There are, however, areas where the new permit significantly deviates from prior permits, and, in a number of instances, exceeds the stringency of the underlying federal regulations, and does not comport with the "clear, specific, and measurable terms" requirement of the federal Remand Rule. While many of the attached comments *[presented in comments 1-17, above]* expressly address those occasions where the draft General Permit is more stringent than the federal regulations, the City encourages the Department of Environmental Quality to take a hard look at the draft permit overall to ensure all provisions in the General Permit are not more stringent than the corresponding federal regulations, and that the terms of the permit meet the "clear, specific, and measurable" requirements of the federal Remand Rule.

Response: DEQ must follow applicable state laws when issuing permits, including those adopted to be consistent with federal requirements. ARM 17.30.1111 sets forth many of the basic

regulatory requirements for small MS4s. As set forth in the responses above, we do not find the permit to be more stringent than the corresponding federal regulations or guidelines. The Montana Supreme Court even concluded in 2019 that the previous version of the MS4 General Permit was not a final iteration, but simply another step along the way in the right direction. DEQ, in conjunction with the MS4 workgroup, spent considerable time over the last two years working with the draft permit to ensure the terms of the permit are clear, specific, and measurable. DEQ finds the terms of the permit are also consistent with the provisions of the federal Remand Rule. No changes were made to the permit in response to this comment.

Comment 19: The City's comments also address concerns the City has with the increased reporting burden added to the General Permit. The City understands the need to document and report compliance with the permit requirements, but the added reporting is largely redundant to preexisting reporting requirements, and creates an additional burden of compliance on the City. The City therefore respectfully requests the Department revise the draft General Permit to reduce the burden of compliance by eliminating duplicative reporting requirements.

Response: DEQ does not find that the General Permit has duplicative reporting requirements. This is an iteration of the last General Permit, along with over a decade's worth of permits before it. A significant portion of the reporting requirements in this iteration are a continuation of previous permit requirements. The reporting requirements are meant as a mechanism to document changes, updates, and growth in the permittee's storm water management programs, as well as compliance with the requirements of the General Permit. No changes were made to the permit in response to this comment.

Commenter 3; Susie Turner, City of Kalispell

Comment 20 regarding page 6, section II.A.; "The Department may require changes to the SWMP as needed to: Address impacts on receiving water quality caused, or contributed to, by discharges from the Small MS4; Include more stringent requirements necessary to comply with new federal statutory or regulatory requirements.; Include other conditions deemed necessary by the Department to comply with the goals and requirements of the Montana Water Quality Act.; Update BMPs to improve program effectiveness based on information and/or data submitted in permittees' annual reports.":

The permit conditions themselves should meet the intent of the MT Water Quality Act. Permittees are only required to meet the requirements of the Act, not goals. Permit compliance, i.e. additional conditions, should not be based on internal agency "goals", that are not already prescriptive within the permit. This statement provides DEQ with a very over-reaching, general, and subjective regulatory authority. Further, improving program effectiveness is subjective and open ended.

Response: See response to Comment 2. No changes were made to the permit in response to this comment.

Comment 21 regarding page 6, section II.A.; "…rationale for decision making…"

All decisions are made to sustain permit requirements and this paperwork exercise simply creates more work for the permittees and DEQ alike. Permit language is more stringent than federal code.

Response: See response to Comment 1. No changes were made to the permit in response to this comment.

Comment 22 regarding page 10-11, section I.A.2.a.i. and b.i.; "Ground Water"

Groundwater is one word. Only one of the many uses of "ground water" was fixed to groundwater.

Response: Both Montana and federal statute, as well as the US Supreme Court, use "ground water". All instances of the word in the final permit have been modified to "ground water".

Comment 23 regarding page 10, section I.A.2.a.; "Identify categories of non-storm water discharges or flows that are significant contributors of pollutants to the MS4."

Exceeds federal requirement. Montana Code Annotated 75-5-203: State Regulations No More Stringent Than Federal Regulations or Guidelines. Please review how other states format this section to reduce unnecessary paperwork and are just as effective at protecting water quality. This is a documentation exercise that creates more work for MS4's that does not result in water quality benefits. DEQ was provided with multiple comparable alternatives, during the stakeholder review phase. We are requesting DEQ consider recommendations provided during the technical committee review of other state permit's language be incorporated into the new permit.

Response: See response to Comment 3. No changes were made to the permit in response to this comment.

Comment 24 regarding page 11, section I.A.2.b.ii.; "The permittee must identify a minimum number of high priority outfalls not equaling zero, based on the knowledge of potential illicit discharges in their MS4.":

If an MS4 uses the parameters listed in the permit to determine high priority outfalls in a systematic way and no high priority outfalls are determined, then the proposed permit language is requiring that permittees manipulate the data to artificially create high priority outfalls.

Federal requirements do not require "a minimum number of high priority outfalls not equaling zero". DEQ requirements should be No More Stringent Than Federal Regulations or Guidelines.

Response: See response to Comment 5. MCA 75-5-203 states that DEQ may not adopt a rule that is more stringent than the comparable federal water quality standards that address the same circumstances. Examples of water quality standards would be the toxic threshold of lead and copper. Permit terms and conditions are not water quality standards or an adopted rule, but translate the general provisions of the Montana Water Quality Act and applicable rules into specific provisions tailored to the operations of the discharger. In the case of MS4s, the Montana Supreme Court concluded in 2019 that the previous version of the MS4 General Permit was not a final iteration of implementation of applicable water quality requirements, but simply another step along the way in the right direction. DEQ does not find the requirement is more stringent than comparable federal regulations or guidelines. ARM 17.30.1111(6)(c) addresses the

development of the illicit discharge detection and elimination minimum measure and the stated requirement is also consistent with the rule. No changes were made to the permit in response to this comment.

Comment 25 regarding page 13, section I.A.2.d. and d.ii.; "Through ordinance or other regulatory mechanism to the extent allowable under state or local law, effectively prohibit discharge of non-storm water into the regulated storm sewer system and implement appropriate enforcement procedures and actions. Permittees with legal authority must adopt an ordinance or other regulatory mechanism to prohibit illicit discharges, which shall include a provision prohibiting any occasional incidental non-storm water discharge event.":

Exceeds federal requirement; prohibited by Montana Code Annotated 75-5-203

Current *(2017)* permit language: "To the extent allowable under State, or local law, effectively prohibit, through ordinance or other regulatory mechanism, non-storm water discharges (except those listed under Part II.A.3.a.) into the regulated storm sewer system and implement appropriate enforcement procedures and actions. If not done previously, adopt an ordinance or other regulatory mechanism to prohibit illicit discharges." The current *(2017)* permit language makes an exception for the non-storm water discharges or flows listed in draft permit section I.A.2.a.i. These non-storm water discharges could be outside MS4's jurisdiction/control or addressed elsewhere in permit with local controls and therefore should not be prohibited. Prohibiting the non-storm water discharges in draft permit section I.A.2.a.i. that are found to be non-significant contributors of pollutants not only exceeds the federal requirement but is impractical for the MS4's to effectively enforce. Essentially, because of the way this is written, DEQ is laying the groundwork for the MS4 permittees to have noncompliance violations.

Remove the requirement to prohibit any occasional incidental non-storm water discharge event. Refer to current permit language to see how the exception can be applied.

Response: See response to comment 6. No changes were made to the permit in response to this comment.

Comment 26 regarding page 23, section I.A.5.a.ii.; "An annual visual inspection of each applicable facility.":

It is unclear if MS4s are in compliance with this item without additional paperwork. Provide language in the permit that clarifies additional paperwork is not required.

Response: The permit states in section I.A.5.a.ii.; "Document facility inspections and communication with relevant department personnel regarding inadequate control measures." These are the recording requirements for inspections of permittee owned/operated facilities and their storm water management controls. No changes were made to the permit in response to this comment.

Comment 27 regarding page 30, section I.E.2.; "The plan shall assess BMP and program effectiveness for each minimum control measure in terms of the following outcomes:

- Participation of storm water program activities;
- Raising awareness;
- Changing behavior;
- Reducing pollutant loads;

- MS4 discharge quality; and
- Receiving water conditions.":

Exceeds federal requirement; prohibited by Montana Code Annotated 75-5-203. Tracking of MCMs is already required within the permit in each MCM section. The requirement to develop and implement an additional plan is an overly burdensome documentation exercise that is already captured within the tracking required by the other MCMs. Raising awareness, changing behavior, reducing pollutant loads, MS4 discharge quality, and receiving water conditions are either impossible to measure, impractical to evaluate accurately, or do not provide a comparable metric to BMP effectiveness due to the known extreme variability in stormwater quality. This item requires unnecessary reporting rather than focusing time and resources on permit conditions that will make an impact to protect water quality. The additional plan will take away from time implementing BMPs and not provide further water quality benefits.

Remove the program effectiveness plan from the permit requirements so that it does not exceed the federal requirement. Remove comparison of BMPs to the list of outcomes.

Response: See Response to Comment 15.

Comment 28 regarding page 30, section I.E.2.; "The assessment must identify opportunities for change and provide suggestions or proposals to the program to increase short and long-term effectiveness in protecting Montana's state waters from storm water pollution.":

Exceeds federal requirement; prohibited by Montana Code Annotated 75-5-203. If a permittee is in compliance with the permit, the permittee should not need to identify opportunities to change or suggestions or proposals to the program to increase short and long-term effectiveness in protecting Montana's state waters from storm water pollution.

Remove.

Response: See Response to Comment 15.

Comment 29 regarding page 38, section V.; "'Outfall' means the physical location where these conveyance structures discharge pollutants or storm water into surface water or where they leave the boundary of the designated MS4.The term does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances that connect segments of the same stream or other surface waters and that are used to convey surface waters.":

This definition does not match the definition in the state rules (ARM17.30.1102).

Change the definition to match the state rules or provide additional information on why DEQ is deviating from ARM 17.30.1102.

Response: See response to Comment 17. No changes were made to the permit in response to this comment.

Comment 30 regarding the Fact Sheet page 7, section IV.B.; "Through ordinance or other regulatory mechanism, permittees must effectively prohibit non-storm water discharges and implement appropriate enforcement procedures and actions."

Only non-storm water discharges that are illicit or considered significant contributors of pollutants should be prohibited. See comments above.

Modify to include the non-storm water discharge exceptions or retain the language in current fact sheet.

Response: 40 CFR 122.34 (b)(3)(B) states " To the extent allowable under State, Tribal or local law, effectively prohibit, through ordinance, or other regulatory mechanism, non-storm water discharges into the storm sewer system and implement appropriate enforcement procedures and actions." *See also* ARM 17.30.1111(6)(c)(ii)(B). This language does not specify discharges that are considered illicit or significant contributors of pollutants. No changes were made to the permit in response to this comment.

Comment 31 regarding the Fact Sheet page 9, section IV.B.; "Adopted from the EPA Water Quality Scorecard, this permit requires permittees to perform exercises targeted at incorporating recommendations and requirements which allow and support the utilization of low impact development (LID) and green infrastructure concepts on public and private property. The purpose of the exercise is to help the permittee identify barriers to comprehensive post-construction storm water management and green infrastructure implementation, and to identify ways to eliminate these barriers.":

This section is not adopted from the EPA Water Quality Scorecard. The language comes from 40 CFR 122.34. The fact sheet refers to identifying and eliminating barriers. The language barrier identification and elimination does not appear in the permit.

Remove the reference to the EPA Water Quality Scorecard. Modify language to accurately reflect permit contents.

Response: Thank you for providing clarification on the provided language. The fact sheet is for informational purposes to document the legal requirements and technical rationale that serve the decision-making process involved with draft permits. Direct modifications to the fact sheet are not made when a final permit issued. No changes were made to the permit in response to this comment.

Commenter 4; Todd Seib, Missoula Valley Water Quality District

Comment 32: The District is supportive of the intent of this General Permit as it seeks to clarify regulatory language and requirements to improve water quality resources in the state.

Stormwater discharges can be highly intermittent, are usually characterized by high flows occurring over relatively short time intervals, and can carry a variety of pollutants whose source, nature, and extent can vary within and between storm events. Because of this, it is critical to monitor stormwater discharges and implement BMPs to minimize these non-point source pollutant discharges. However, due to the variable nature of stormwater, it is equally challenging to assess the impacts of BMPs and accurately correlate intervening actions with measurable water quality results.

Therefore, we would like clarification on the expectations for assessing program effectiveness and the expected deliverables that would meet Section II. E. 2: "Program Effectiveness Assessment". The draft permit indicates that this assessment is a "holistic evaluation tool". What

will this tool look like? Will there be a guidance document, structured SWOT or other performance management tool built into the permit report? Otherwise, as currently proposed, the new requirement appears too broad to ensure compliance. While the District feels it is important to allow some flexibility for permittees to measure the success of their program efforts, this section would be improved by providing specific expectations and guidance for how programs can reliably demonstrate whether or not their stormwater management efforts lead to water quality improvements.

Response: See Response to Comment 15.

Commenter 5; Guy Alsentzer, Upper Missouri Waterkeeper

Comment 33: We recognize the Department's revisions to the GP to reflect the Remand Rule Order and appreciate its efforts to provide clarity in how the GP is offered and how and when mandated public participation opportunities occur. We appreciate revised MCM 1 requirements for a permittee to provide regulatory documents, including the GP and SWMP and Annual Reports, on its website for public review and input. We request that DEQ consider requiring permittees to post the last 5 (5x) Annual Reports on its website as the iterative nature of those reports should, theoretically, provide a complete picture of the progress – or lack thereof – that a permittee has made in fulfilling the MEP standard, in restoring impaired waters, and in implementing critical components of MCM 5 (LID code revisions). We also encourage DEQ to explicitly require permittees to perform outreach to an iterative stakeholder list concerning (a) availability of Annual Report, (b) revisions to the SWMP, and/or (c) opportunities for public comment. Put another way, the onus should lie on the permittee to use easily available electronic means to both inform and encourage stakeholder participation under the MS4 program.

Response: Please see Response to Comment 36.

Comment 34: We are concerned that removal of the deadline/implementation schedule, without addition of some corollary tracking and assessment mechanism, is a disservice to permittees and the public and therefore strongly encourage DEQ to include dates by which activities and plans are to be completed. To the extent that DEQ believes a combination of monitoring, Annual Report, and Assessment Evaluations fulfill this purpose, we encourage DEQ to ensure that such plans and reports are available to the public through easily identified electronic means (i.e., websites) and that permittees have a regulatory duty to affirmatively solicit stakeholder review and input consistently across permit terms.

Response: The previous permit contained a deadline/implementation schedule because permittees were developing large documents and strategies to support their programs. In this iteration, permittees should already be well on their way to implementing these requirements on a regular, annual, or permit cycle basis. These "deadlines" are written throughout the permit in their correlating sections. The focus of this permit is to continue implementing permit requirements, evaluating them on a regular basis, and making appropriate, informed changes to their programs to further protect Montana state waters. Permittees are required to provide their annual reports, sampling plans, and updated written storm water management programs (SWMP) on their website. Additionally, permittees are required to solicit feedback from the public on their SWMP, which should contain information on how the MS4 is implementing the permit terms, at

a minimum of one opportunity annually. No changes were made to the permit in response to this comment.

Comment 35: We use this space to specifically encourage DEQ to be more pedantic in incentivizing the use of LID/GI strategies as means for permittees to best satisfy the MEP standard and to make progress restoring impaired water quality. As DEQ is aware, despite decades of efforts attempting to control municipal stormwater under the Clean Water Act, stormwater continues to negatively impact our local waterways. The current regulatory approach has proven to be generally ineffective at preventing excessive stormwater volumes and pollutants from degrading local waterways in urbanized and developed areas.

The National Research Council (NRC) conducted a comprehensive and authoritative examination of EPA's stormwater permitting and regulatory program, which it documented in a 2009 report, "Urban Stormwater Management in the United States." The NRC report identified two significant shortcomings:

- First, the stormwater permit program's over-reliance on general permits, most of which contain vague, subjective, and unenforceable permit terms and,
- Second, the relative lack of permits that require stormwater management practices that will actually reduce runoff volume rather than simply convey or detain it.

On the first point, Phase II permits in particular tend to rely on "narrative" requirements that permittees adopt programs or control measures to reduce stormwater discharges to the "maximum extent practicable." Montana is taking action to translate this flexible legal standard into numerical or objective permit limits, yet we note that permittees retain tremendous discretion to self-identify and self-police their own stormwater control practices, including the level of control applied to new development and redevelopment projects within their jurisdictions. In our initial review of MS4 jurisdictions within Montana, this level of control is expressed in mostly superficial terms.

Open-ended, generalized approach to expressing permit requirements has given rise to the second shortcoming identified by the NRC panel: a long-standing preference for stormwater management practices that are designed to control the rate of water delivered by storm sewers to local waterways. This preference for detention of stormwater volumes often does little to address the impacts of the large amounts of concentrated runoff that are created and discharged from our built environments. Equally troubling from a water quality perspective, even though on-site or regional detention basins have evolved to reduce peak flows rates following rain events, they provide only some measure of water quality treatment, doing little to significantly reduce the amount of pollutants carried by runoff from developed areas.

In response, the NRC panel affirmed the stormwater community's emerging shift towards runoff control measures that "harvest, infiltrate, and evapotranspire stormwater," and which allow a site to be developed while maintaining as much of the natural hydrology as possible. Achieved through practices that are commonly referred to as Low Impact Development (or LID) or "green infrastructure," these approaches reduce pollutants and excessive volume by using natural processes or similar approaches that capture, infiltrate, and reuse precipitation, better approximating the natural hydrologic cycle. Green infrastructure prevents stormwater from accumulating and running off developed properties by reducing impervious areas, allowing rain to infiltrate into the soil, to be taken up by plants, or captured for later use in cisterns or rain barrels. In addition to water quantity and quality gains, many of these practices provide

additional benefits such as improved groundwater recharge, increased energy efficiency, and improved air quality.

As a result, green infrastructure practices are increasingly recognized as one of the most effective solutions to the water quantity and quality problems associated with polluted stormwater runoff. While these curbs, gutters, tunnels and culverts served the flood control and public health needs of the past, they are now significantly challenged by the sheer volume of runoff that has been produced by the dramatic conversion of open space into paved surfaces and rooftops that dominate modern communities. Indeed, the increased volumes, discharge rates and pollutant concentrations common to these systems are now among the leading stressors of water quality in the United States.

In contrast, the green infrastructure approaches recommended by the NRC and supported by Waterkeeper, reduce volumes, flow rates, and pollutants by managing precipitation on-site, before it has a chance to flow into storm sewers and surface waters. In doing so, these green infrastructure approaches represent a significant advance in water quality protection and an increasingly feasible solution in stormwater management technology.

As DEQ is aware, in the wake of the NRC research and report, EPA has emphasized the need for stormwater permits that require dischargers to take steps that reduce the volume, duration, and velocity of runoff by integrating flow or volume based restrictions into permit terms.

Recognizing that the state of knowledge and expertise surrounding green infrastructure is continually progressing, EPA guidance stresses that "CWA NPDES permits and enforcement agreements that incorporate green or gray infrastructure solutions require enforceable performance criteria, implementation schedules, monitoring plans and protocols, progress tracking and reporting, and operation and maintenance requirements." Focusing on just one of these criteria, EPA notes that NPDES permits can foster green infrastructure implementation in a number of ways, including:

- Establishing performance standards for post-construction stormwater volume control for sites undergoing development/redevelopment. Performance standards to control the volume of discharges and to mimic the pre-construction hydrology of a site will lead to implementation of BMPs and green infrastructure to infiltrate, evapotranspire, and/or harvest and beneficially use stormwater.
- Requiring that green infrastructure/low impact development measures be considered/ implemented as part of local building and site development approval processes.
- Establishing ceilings on effective impervious area.

While simply requiring, as the Draft Permit does, that green infrastructure measures be considered by permittees is a significant step forward, as a permit term this approach retains some of the weakness of a discretionary, narrative standard. Far preferable is the incorporation of an objective, readily identifiable and enforceable performance standard that can be most effectively met through green infrastructure practices. As EPA notes in its broadly phrased list, even objective standards can reflect a range of preferred approaches, expressing limits on effective impervious area, requirements to manage designated runoff or precipitation volumes on-site, or mandates to evaluate and match pre- development hydrology characteristics.

In the 2010 MS4 Permit Improvement Guide, EPA echoed its list of preferred permitting approaches with specific recommendations for state permit writers. The Guide details the Agency's own selection of model performance standards that would add objectivity to post-

construction stormwater management permit requirements by pulling language from permits, related documents, or EPA guidance that reflected then current best thinking about prescriptions for on-site management.

We note that DEQ has chosen the percentile precipitation event and retention standard, which constitute a first step towards clarity in post-construction stormwater BMPs. We strongly encourage DEQ to add upon this first step by adding specified green infrastructure practices and hydromodification protections. Doing so would utilize the precipitation volume tied to the objective, onsite management standard, and supplement this basis with additionally stringent retention or treatment requirements designed to prevent hydromodification of streams or provide additional pollutant removal. Complementary to this work could be, as discussed below, a "credit" system for smart growth projects, allowing certain permittees to meet more relaxed performance criteria, and extending the full performance standard requirements to road construction (one of the traditional leading sources of harmful stormwater discharges across all MS4 permittees).

We encourage DEQ to consider revising MCM 5 to include an overview of more explicit terms and strategies to protect water quality. [*The commenter provided several pages of suggested language for consideration].*

Response: The permit requires regulated construction projects to implement post-construction storm water management controls that are designed to infiltrate, evapotranspire, or capture for reuse the first 0.5 inches of rainfall from a 24-hour storm event on-site (runoff reduction requirement). Offsite treatment is only allowed under certain circumstances when on site treatment is not technically or logistically feasible and that determination may not be based solely on difficulty or cost. DEQ finds the runoff reduction requirement contained in the General Permit is a core performance standard necessary to maintain or restore stable hydrology in receiving waters and is adequate considering what is technologically and financially feasible for Montana's MS4 permittees. Additionally, the General Permit requires implementation of a combination of both structural and non-structural BMPs with adequate long-term operation and maintenance. Throughout the permit, when necessary, DEQ provided a menu or list of BMPs for permittees to choose from. This allows permittees with enough flexibility to tailor their storm water programs to their specific MS4 needs while remaining prescriptive and enforceable. DEQ finds that a level of flexibility in regulating MS4s is necessary to optimize reductions in storm water pollutants on a location-by-location basis. EPA's final remand rule is clear that requirements for the MS4 General Permit may be expressed in either narrative or numeric form. Due to the variability in storm water discharges, DEQ finds narrative effluent limitations to be the most appropriate to protect water quality in many situations. Nothing in EPA's final remand rule prevents a permitting authority from developing permit requirements that are flexible, as long as the requirements are articulated in clear, specific, and measurable terms. The permitting authority retains discretion in determining how much specificity is needed for different permit requirements.

DEQ acknowledges the immense time and resources it will take for most MS4s to fully incorporate and implement LID/green infrastructure concepts into local policies/procedures and to effectively regulate these concepts on all regulated construction projects. Therefore, DEQ feels it is necessary to provide time for MS4s to thoroughly assess options at a local level. This iteration of the General Permit has gone a step further to require permittees to plan for future

implementation, while also taking credit for what permittees may already be doing within their storm water management programs. As we move forward with future iterations of this General Permit and have a better understanding of how MS4s are already implementing these concepts, it is likely that additional LID/green infrastructure requirements will need to be assessed. However, no changes were made to this iteration of the permit in response to this comment.

Comment 36: The Draft Permit contemplates a Program Effectiveness Assessment in the 4th year of the Permit term. We strongly encourage the DEQ to make this an annual requirement. Permittees have now been part of the MS4 program for two decades and received more than fair notice of their obligations and responsibilities. As development pressures continue to increase there is a distinct need for permittees to document and reflect on successes and shortcomings of their programs, and to do so transparently with the public.

In addition, we strongly encourage DEQ to include the requirement that annual assessments (including plans, programs, maps, and reports required by the Permit) are made available to the public on each permittee's website. Doing so would significantly advance the public participation goals of MCMs 1-2, as well as do much to practicably increase public awareness and engagement/support of municipal stormwater projects. We also strongly encourage the Dept. as the State lead overseeing the MS4 Permit program to make each permittee's NOI and all reports available on its website for public review as doing so puts rubber to the road in terms of making good on the promises of transparency and accountability in stormwater pollution control efforts.

Response: Regarding the Program Effectiveness Assessment; please see response to Comment 15.

DEQ agrees to modify MCMs 1 and 2 titled Public Education, Outreach, Involvement, and Participation 1.a to include a requirement that all MS4 post on their storm water website a copy of Notice of Intent application form including all supplemental information supporting the application package. DEQ also agrees to modify MCM 1 and 2 1.a to require each MS4 to post a minimum of five years of annual reports submitted to DEQ. These website updates must be completed with 90 days of effective date of this General Permit.

Comment 37: Pollution reduction targets should be based on a clear standard that is linked to the long-term goal of attaining water quality standards statewide within a reasonable timeframe. Each phase of the permit, including the present 5th iteration, should require incremental reductions in permitted pollution. Pollution reduction targets should not be reduced from one permit term to the next unless a consistent and lasting improvement in water quality has been observed.

Our perspective on this issue is guided by our interest in long-term sustainability of the waters of the State of Montana. It is also informed by our understanding that municipalities and counties face significant challenges in planning for and financing stormwater improvements, and that to effectively incorporate stormwater needs into the capital improvement budget takes years of planning, outreach, grants research, partnership building, and more. Expecting municipalities to proactively invest in clean water projects without a clear understanding of what permit expectations will be in the 10-20 year timeframe seems unrealistic. Furthermore, uncertainty about long-term permit expectations is a disincentive to the kind of up-front investment required for innovation, collaboration, and creative planning at the local level.

Response: Reducing pollutants to the Maximum Extent Practicable (MEP) is the statutory standard that directs DEQ to establish a level of pollutant reduction that must be achieved through management practices, control techniques, and system design/engineering methods. This is achieved through the implementation of best management practices that are selected, designed, installed, implemented, inspected, and maintained in accordance with good engineering, hydrologic, and pollutant control practices. DEQ finds this iteration to be clear, specific, and measurable leading to a more prescriptive and enforceable permit overall. It is difficult to make assumptions about the future of the state's storm water program without the knowledge of available technology, storm weather conditions, or future investment opportunities in 10-20 years. Stakeholder involvement is encouraged throughout the permit development process to consider the variability and current status of the permittees covered under this General Permit. That involvement will continue to be encouraged to grow and seek out opportunities for the program to develop in the future. No changes were made to the permit in response to this comment.

Comment 38: Many permittees are in the process of making progress toward pollution reduction goals established for the prior General Permit term. Others have repeatedly submitted deficient plans and have been effectively rewarded by deferring the timeframe to begin compliance. This inconsistency needs to be addressed without halting progress towards the long-term goal of restoring Montana's impaired waters. At the same time, we recognize that enforcement actions are time-consuming and take up valuable staff time. Therefore, we suggest that DEQ consider additional options to incentivize compliance, such as:

- Scheduled, cumulative increases in the pollution reduction targets over time (see above), such that targets not implemented during each five-year permit period are added to the targets associated with the next permit term.
- Selection criteria for state-sponsored grant programs that prioritize municipalities/counties that have implemented pollution reduction activities and documented pollution control improvement within the assigned timeframe.
- Establishment of a formal pollution reduction plan credit system that assigns bonuses for early implementation, and penalties for delays.

Response: DEQ appreciates your suggestions and will take these into consideration as we move forward with future iterations of this General Permit and further develop the state's MS4 program. No changes were made to this iteration of the General Permit in response to this comment.

Comment 39: As discussed above, green and natural infrastructure – essentially, systems that use trees, plants, and the processes of evapotranspiration and infiltration – can benefit communities far beyond improvements in water quality. In particular, these practices can improve climate resilience by capturing carbon, by reducing runoff volumes, and by increasing local groundwater recharge. The Department has a great deal of influence on the design of pollution-reducing practices through both formal and informal rules and guidance.

We see the following as opportunities to create a nuanced credit policy for MS4s, with the goal of promoting and incentivizing the increased and prioritized use of green infrastructure for satisfying both Post-Construction duties and restoration mandates for impaired waterways:

- Perform an inventory of studies and EPA guidance to inform a credit policy supplementing the MS4 GP.
- Credit incentives for volume-reducing, vegetated BMPs, including temporal element giving increasing credits for BMPs that mature over time.
- Credit disincentives for tree/natural flora removal in both development/redevelopment projects, especially within a riparian zone (100' or less from a surface water).
- Increase Dept. resources to assist permittee programs regarding waterway assessments in high-growth watersheds
- Strengthen MCM 4 and MCM 5, and impaired waterways, requirements to ensure documentation of ongoing performance of BMPs.

Response: This iteration of the General Permit utilizes EPA guidance and promotes the use of LID and green infrastructure concepts by requiring permittees to plan for future implementation, while also taking credit for what permittees may already be doing within their storm water management programs. As we move forward with future iterations of this General Permit and have a better understanding of how MS4s are already implementing these concepts, it is likely that additional LID/green infrastructure requirements will need to be assessed. DEQ does not have the resources to develop a nuanced credit system at this time. However, DEQ will take your suggestion into consideration as we move forward with future iterations of this General Permit and further develop the state's MS4 program. No changes were made to the permit in response to this comment.

Comment 40: We believe that collaborative implementation of permit requirements can improve environmental outcomes while reducing costs and administrative effort for the municipality and for the Department. While some communities may have launched collaborative efforts, many others have struggled to take the first step. We suggest the following policy changes to enhance permit incentives for regional collaboration, especially given the reasonably foreseeable likelihood that many counties in high-growth river valleys will become non-traditional MS4 permittees in the near future:

- Communicate long-term program goals and performance requirements. As noted above, a clear understanding of the long-term investment required to meet water quality targets would be helpful to municipalities that are evaluating the costs and benefits of any kind of up-front investment of effort (such as establishing a collaborative).
- Increase permit coverage. Patchwork permit coverage is a disincentive to regional collaboration. The Department should make it a priority project to, on its initiative, assess what other regions and/or entities must become MS4 permittees under this Permit. We also suggest developing a tiered permit that establishes coverage for non-urbanized areas that have significant water quality impairment. This could also establish a means for allowing municipalities more flexibility in terms of where pollution reducing projects are located.
- Consider other regulatory and nonregulatory incentives. There may be additional opportunities to create policy incentives for collaboration, from expedited review, to enhanced technical assistance, to priority grant awards, to longer-term crediting strategies.

Response: Stakeholder and permittee involvement is always encouraged to assist in communication of program goals and performance requirements. This General Permit covers areas that are served by, or contribute to, municipal separate storm sewer systems that discharge to state waters as designated by ARM 17.30.1102 or subsequently designated by DEQ. The boundaries for permit coverage are not determined by the permitting process. The General Permit applies to areas already determined to be MS4s, but cannot establish those areas. DEQ will take into consideration the suggestion to consider other regulatory or non-regulatory incentives in future development of the state's MS4 program. No changes were made to the permit in response to this comment.

Comment 41: It is indisputable that MS4 Permittees have an important and strategic role to play in cleaning up Montana's urban and suburban waterways. The time is right to establish, through the MS4 GP, a public-facing program to assess and share progress, both toward permitting requirements and toward ultimate attainment of water quality standards. The Department is in a unique position to evaluate what works and what doesn't in the aggregate across permittees, and to share this information with permittees consistently to reduce costs and ensure that the desired outcomes are achieved. We see three areas of focus as regards monitoring and evaluation:

- MCM 5: As one proverbial lynchpin of the MS4 GP's pollution control mandate, including the means by which permittees can and should be advancing necessary green infrastructure policies at the local level, we strongly encourage DEQ to require as a permit term that practices and actions taken pursuant to MCM 5 be inventoried, assessed, and certified annually by the permittee. We recognize that limited capacity or permittee appetite for inspections and enforcement at the local level means there is little accountability for ensuring that chosen MCM 5 actions and plans adequately reflect GP priorities (i.e., increasing use of LID/GI practices and strategies), and making progress in this arena will be critical to the long-term success of MCM 5 actions. We suggest the Department increase annual MS4 permittee inspections with a focus on new and redevelopment projects over the most recent permit term to assess if chosen BMPs on the ground reflect adequate priorities and whether such BMPs have been constructed and maintained consistent with their original design. Establishing this iterative baseline for MCM 5 achieves the regulatory goals of transparency, accountability, and enforceability while properly daylighting successes and failures of permittee MS4 programs.
- Monitoring & Assessment of Projects Addressing Impaired Waterways: Increasingly permittees will need to develop portfolios of projects aimed at eliminating harmful pollution discharges causing or contributing to the impairment of local receiving waters. It is critical that projects addressing impaired waterway contributions are adequately inventoried and monitored, both for ongoing maintenance and to ensure performance is consistent with design. For some types of installations, such as stream restoration, monitoring approaches may be new or unfamiliar to permittee staff. While we recognize that there is a significant body of technical guidance available, we also recognize the challenges permittees face in funding inspection and maintenance activities, and see the permit as the proper means providing a strong incentive for ensuring that financial commitments are made. Therefore, we encourage DEQ to include more specific requirements for inspections and reporting on impaired waters projects beyond the annual reporting and evaluation requirements. For instance, there exists a critical opportunity for permittees to use the existing requirement to evaluate and improve local code to support

LID/GI practices, and the implementation of such new code revisions and projects thereunder should be qualified and quantified.

- Monitoring, Generally: In addition to monitoring that BMPs have been constructed and maintained, water quality monitoring is essential to ensuring that they are working towards the ultimate goal of attaining water quality standards. Owing to the complexity of watershed systems and the challenges of drawing conclusions from monitoring data, we encourage the Department to increase monitoring required under the Permit. Presently, semi-annual (twice yearly) monitoring of four (4x) locations, two of which could potentially be the same, raises serious questions about the adequacy or representative nature of such a plans' results, particularly given the sprawling and diverse land uses most permittees encompass. We encourage DEQ to consider improving Permit monitoring elements in terms of scope, frequency, and intensity as follows:
    - Are MS4 permittee monitoring locations helpful to characterizing known existing or near-term pollution reduction projects? Arguably each project should require at least an upstream and downstream monitoring location and monitoring frequency of pre-project and post-project discharges during wet weather events over time.
    - Are chosen monitoring frequency or locations sufficient to document any water quality improvements in Urbanized Areas? If as we believe existing requirements cannot provide such clarity, at minimum increased monitoring should be required across jurisdictions and watersheds sufficient to provide such data.
    - Are monitoring requirements sufficient to qualify a measurable improvement in the water quality of wet weather flows from MS4 outfalls from pre- to post- impaired waterway restoration project(s) implementation? (if any baseline data has been collected since TMDLs or impairment designation) Here again, project specific monitoring of a more intense and frequent nature is required for a short-term, and then periodic monitoring to assess project pollution reductions as compared to technical design criteria.
    - Is monitoring for an MS4 permittee sufficient to establish new baseline data for comparison of future permitting requirements? E.g., the Permit should require permittees to establish baseline – or renewed baselines – for areas that will experience development and the proliferation of impervious surfaces in the reasonably foreseeably future. At present no such requirement or consideration exists in the permit, which is solely focused on existing conditions.

Response: DEQ finds the current local-level inspection and enforcement requirements in the General Permit to be adequate. These requirements are backed by what is currently feasible for the majority of permittees. Not all permittees have been able to obtain the necessary regulatory authority at a local level to justify increasing inspection/enforcement requirements.

DEQ is unsure as to which "impaired water projects" you are referring to. Permittees are required to comply with all MS4-related requirements associated with Total Maximum Daily Loads (TMDLs), as well as all monitoring and reporting requirements in the General Permit. Permittees were required to evaluate existing barriers to implementing LID infrastructure and identify opportunities for change during the last permit term. At this point in an MS4 program, permittees should have identified opportunities to implement LID/ green infrastructure concepts into their programs and this iteration promotes the use of those concepts by requiring a plan for implementation.

The Montana Supreme Court found that pollutant monitoring is not required by either federal or state law for MS4 permits. DEQ finds the current monitoring requirements adequate and is backed by what is currently feasible for the majority of permittees at this time. It is shown through monitoring in previous permit terms that it is difficult to derive trends and make program decisions based on monitoring data alone. Additional monitoring is extremely time consuming and cost prohibitive. Requiring permittees to monitor upstream and downstream of every construction project (or project with potential to discharge) is not achievable. Construction projects with potential to discharge storm water are required to obtain their own Montana Pollutant Discharge Elimination System permit coverage and meet the associated requirements. If a Program Effectiveness Assessment leads to the conclusion that additional monitoring would in fact help further protect Montana state waters, DEQ may take that into consideration during the next permit cycle. At this time, we find it to be more beneficial to direct resources to other areas of the program to help reduce or eliminate the discharge of storm water pollutants to the maximum extent practicable. No changes were made to the permit in response to this comment.

Comment 42: We take a moment here to specifically urge DEQ to invest the necessary resources into proactively inventorying high-growth areas across the State and cross-referencing those areas with maps of existing MS4 permittees. In short, the Department should be taking the bull by the horns in recognizing growth trends and making the necessary outreach and permit designations affirmatively to bring appropriate new entities into the permitting program. Waiting, or hesitancy, to do so will inevitably further stymie regulatory clarity and result in serious lost opportunities to ensure science-based practices are on the books and actually being implemented in urbanizing areas across Montana. Put another way, with water quality data demonstrating that most receiving waterways in urbanized or developing regions of Montana are already experiencing pollution issues, the onus is on DEQ to be anticipatory, to bring developing regions into the permit program, and to set clear expectations for land use development that protect and improve local water quality.

Response: See response to comment 40. No changes were made to the permit in response to this comment.

Commenter 6; Alan Rollo, General Public

Comment 43 regarding section V.A. Storm Event Monitoring: Requiring the permittees to perform only "semi-annual sampling" and only "at least four locations" is VERY inadequate to really know what is entering the affected waterbody. I realize to increase this requirement puts an extra cost on the applicant but the fact is there can be many rain events or discharge locations NOT being monitored that can easily be causing significant impairments into the affected waterbody. Frequency and number of sites needs to be increased to at least 50% of average storm events and discharge sites.

Response: DEQ finds that storm event monitoring is highly variable and often hard to associate trends and make informed decisions for the storm water management program based on monitoring alone. No changes were made to the permit in response to this comment.

Comment 44 regarding section V.B. Impaired Waterbody Monitoring - for approved TMDL: Even though the requirements for additional monitoring AND sharing responsibilities under

Section VI. are admirable, the fact is without requiring the applicants to work together with other applicants AND with other entities involved with the TMDL, improving water quality in impaired waterbodies CANNOT succeed. Change wording in Section V and VI to "required" to work with other permittees and other entities working on that waterbody TMDL.

With today's advanced technologies in communication and the proven evidence that teamwork is far more effective than working in a vacuum the MS4 program MUST be accomplished with all parties involved with trying to improve water quality in the specific waterbody being addressed. Please do not let the voices of too busy and not enough money control the best way to deal with the MS4 program.

Response: DEQ can provide resources and encouragement for collaboration but cannot require it. The majority of MS4 permittees actively participate in the statewide MS4 work group, where regular communication is encouraged to discuss difficulties or successes in storm water management programs, meeting the permit requirements, and protecting Montana's state waters. Although shared responsibility is encouraged, DEQ does not have the authority to require MS4 permittees to work together. DEQ uses the recommendations in TMDL documents for successful pollution control on impaired waters. No changes were made to the permit in response to this comment.

Commenter 7; Logan McInnis, City of Missoula

Comment 45: The City is concerned about the new requirement for a Program Effectiveness Assessment and Improvement Plan. This appears to be a very open-ended requirement that could consume significant resources to produce, without a clear goal or direction. The requirement to display data collected and compare monitoring stations over time is easily understood and makes sense. However, the open-ended requirement to assess program effectiveness across all MCMs and develop an improvement plan for each seems over-broad, and in some cases, largely seems like a paperwork exercise that will not necessarily result in improved water quality. It may be prudent to develop an improvement plan for MCMs where there have been documented shortfalls in compliance, or where data shows localized degradation in water quality over time. However, as written, this requirement is overbroad and will consume staff time and resources that should be focusing on enforcing the current SWMP and ensuring compliance with the MCMs. The City requests that DEQ revise this section to more narrowly tailor it to address existing shortfalls or problem areas–and reduce the administrative burden associated with trying to "improve" storm water management approaches that may already be working well. DEQ should additionally provide clear direction on what this plan looks like and how it will help to improve stormwater management.

Response: See Response to Comment 15.

Comment 46: The City is concerned that the new MS4 Permit definition of 'outfall' is different from the definition used in the state rules. The definition in the permit makes it such that an outfall could be inside a pipe, e.g., when a pipe leaves the City limits and crosses into MDT's jurisdiction. It is not practicable to consider this an outfall for inventorying or sampling. The City urges DEQ to use the term in a manner consistent with the existing definition in state rules. If DEQ is steadfast in its desire to use a different definition, please explain the rationale and clarify that this is DEQ's express intent. Additionally, it is critical that DEQ provide clear direction for

how the MS4s can be compliant based on this new definition, given the difficulties associated with this approach.

Response: See response to Comment 17. This is not a new definition for this iteration. Permittees have not been required to monitor inside of a pipe or closed structure. The General Permit allows permittees to choose monitoring outfall locations, as long as they fit the requirements in section II.C. of the General Permit. No changes were made to the permit in response to this comment.

Comment 47: The repeated requirement to provide "rationale" for decision making seems subjective, while the permit must have clear and measurable conditions. This seems like a paperwork exercise, as all decisions are based on meeting permit requirements and/or maintaining or improving water quality. Because this seems like an open-ended and subjective exercise, can you please clarify DEQ's expectations and how the MS4s will be expected to comply with these conditions?

Response: Documentation of rationale for decision making is not a new requirement in this iteration of the General Permit. Where MPDES permits provide some flexibility, such as for MS4s to use Best Professional Judgement or sound engineering practices, permittees must document rationale that their decision was not arbitrary, and in the case of MS4s, meets the MEP requirement. Permittees are required to document rationale in their written Storm Water Management Program to comply with these conditions. No changes were made to the permit in response to this comment.

Comment 48: Why are permittees addressed as if they are all municipalities, while MDT, universities, and counties are not municipalities?

Response: The General Permit addresses and applies to all designated MS4 in Montana both traditional and non-traditional permittees throughout. When not explicitly addressed as a requirement for traditional or non-traditional permittees, the requirement must be met by both. No changes were made to the permit in response to this comment.

Comment 49: Please update the permit language to concur with the referenced Center for Watershed Protection's outfall screening protocol and include the protocol in an appendix.

Response: The Center for Watershed Protection screening protocol can be obtained by contacting DEQ or by navigating to the link provided in the Information Sources section of the fact sheet (section VII). DEQ does not find it necessary to directly quote the language in the document for General Permit purposes. No changes were made to the permit in response to this comment.

Comment 50: Please clearly define LID as it is understood by DEQ. It is difficult to implement and comply with this requirement without understanding MDEQ's definition. The City understands that this term means different things to different people, and that jurisdictions around the country use this term differently. The permit should clearly outline DEQ's definition and expectations as far as low impact development is concerned.

Response: See response to comment 9. No changes were made to the permit in response to this comment.

Comment 51: The City is concerned about being required to enforce the terms of DEQ's General Permits, notably, the Construction General Permit. If this practice is going to proceed, DEQ must provide the MS4s with clear direction regarding their expectations in this regard.

Response: The Montana Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction Activity (Storm Water Construction GP) can be found by visiting DEQ's website or by contacting DEQ. MS4 permittees are required and have been required to since 2005 implement a program that reduces pollutants in storm water from construction activities. Instead of copying in the entire language of the Storm Water Construction GP into the MS General Permit, DEQ incorporated it by reference. In 2019, the Montana Supreme Court upheld the practice of incorporating the Storm Water Construction GP into the MS4 General Permit as means of regulatory consistency. MS4s develop and implement procedures for site inspections and enforcement control measures that meet the minimum requirements in section II.A.3. of the General Permit for regulated projects within their MS4 boundaries. Some of these requirements reference specific parts of the state's Storm Water Construction GP to ensure that the MS4's construction site management is consistent with state requirements, such as technology-based effluent limits. DEQ finds that providing the direct reference to the SWC GP provides clear, specific, and measurable expectations. Please feel free to contact DEQ with specific questions or concerns regarding permit implementation for your specific MS4, as we are always happy to help. No changes were made to the permit in response to this comment.

In formulating the final permit, DEQ made the following changes:

- Language was added to section II.A.1.a.i. to include requirements for posting a copy of the Notice of Intent application form, including all supplemental information, and a minimum of five years of most recent annual reports on permittees' storm water websites.
- The word "potential" has been added in section II.A.2.a.ii. to read as follows:

    i. In the SWMP, document and update annually:

    - *A list of potential non-storm water discharges the permittee has identified as significant contributors of pollutants (i.e., illicit discharges). Include the pollutants associated with each illicit discharge, and any local controls or conditions placed on these discharges.*
    - *A list of potential non-storm water discharges the permittee has determined as non-significant contributors of pollutants (i.e., occasional incidental discharges) and will not be addressed as illicit discharges, based on the information available to the permittee. Include the pollutants associated with each type of discharge and any local controls or conditions placed on these discharges.*

- Language has been added to section II.A.4.d.ii. to allow permittees that have already implemented LID/green infrastructure concepts into their storm water management programs to submit a plan/overview of work already scheduled/completed to satisfy the requirement. It reads as follows:

By the end of the third year of the permit cycle, develop and submit a plan outlining any needed modifications to relevant codes, ordinances, policies, and programs to implement LID/green infrastructure concepts. The plan shall include, but is not limited to, the preventative actions identified above that have not yet been implemented and proposed timelines for any needed code, ordinance, policy or programmatic updates. If modifications to codes, ordinances, policies, or programs are not needed, submit a plan/overview of any work scheduled or completed to implement LID/green infrastructure concepts, such as those listed above.

- The reference to signatory requirements in section III.D. has been corrected to "Part IV.M.":

  If the Storm Water Coordinator person/position, mailing address, email address, or telephone number identified on the application form change, the permittee shall notify the Department in writing within 15 calendar days of the change. Written notice must reference a "change of Storm Water Coordinator", identify the permit authorization number, identify the formal Small MS4 Name as identified on the application, and be signed by a person meeting the signatory requirements of Part IV.M., below.