

Response to Public Comment
General Permit for
Storm Water Discharges Associated with Construction Activity
MPDES Permit Number MTR100000

On December 27, 2021, The Montana Department of Environmental Quality (DEQ) issued Public Notice MT-21-31. The Public Notice provided the tentative determination to issue a state-wide wastewater discharge permit renewal for the General Permit for Storm Water Discharges Associated with Construction Activity (SWC or General Permit), under the Montana Pollutant Discharge Elimination System (MPDES) permit MTR100000. The notice included the draft permit, fact sheet, and draft environmental assessment (EA).

The public notice required that all written comments be received or postmarked by January 31, 2022, in order to be considered in formulation of the final determination and issuance of the permit. DEQ held a public hearing on January 31, 2022, at the Metcalf Building in Helena, Montana.

The table below identifies the individuals who submitted comments.

Number	Commenter	Comment Type
1	United States Environmental Protection Agency, Region 8 (Stephanie DeJong, Wastewater Section Chief)	Written
2	City of Billings, MT (Boris Krizek, Environmental Engineer)	Written
3	City of Helena, MT (Edward L. Coleman, Deputy Director of Public Works)	Written
4	City of Missoula, MT (Ryan Sudbury, Deputy City Attorney)	Written
5	Holland & Hart, LLP (Victoria A. Marquis, Associate)	Written
6	Blueline Engineering LLC (Marshall Phil, Owner)	Written
7	Montana Building Industry Association (Abigail J. St. Lawrence, General Counsel)	Written and Verbal
8	Montana League of Cities and Towns (Kelly A. Lynch, Executive Director Designate)	Written
9	Lone Mountain Land Company (Richard Chandler, Director of Environmental Operations)	Verbal

This Response to Comment document includes a summary of all significant comments on the draft permit and fact sheet received during the public comment period and DEQ's responses to those comments. DEQ has considered these comments in preparation of the final permit and decision. A synopsis of the significant comments and DEQ's responses are included below. A copy of the unabridged comments is available from DEQ upon request. This Response to Comments is an addendum to and supersedes the fact sheet to the extent specific changes or clarifications are discussed herein.

Comment 1: Part 1.1.1 of the draft permit uses the term “Indian lands” and says it’s defined in Part 5, but Part 5 does not have a definition. EPA Region 8 uses the term “Indian country” as defined at 18 U.S.C. § 1151.

Response 1: DEQ replaced all references to “Indian lands” with “Indian country” in the General Permit and associated documents. Part 5 has been updated to include the definition of “Indian country” at 40 CFR § 122.2. 40 CFR § 122 pertains to NPDES programs and contains a substantively identical definition to 18 U.S.C. § 1151.

Comment 21: Part 1.1.1 of the draft permit states, “For construction activities that result in disturbance of less than five acres of total land area, determination of the acreage of disturbance does not include disturbance for routine maintenance activities on existing roads where the line and grade or hydrologic capacity of the road is not being altered, nor does it include the paving of existing roads.” It is unclear if the scope of this exclusion includes an exclusion where repaving includes clearing, grading, or excavating of underlying and/or surrounding soil as part of the repaving operation. Such clearing, grading, or excavating would meet EPA’s definition of construction activity and require permit coverage. It is recommended that routine maintenance exclusion be clarified such that permit coverage is clearly required for clearing, grading, or excavating of soil that meets the one-acre threshold.

Response 2: DEQ clarified the routine road maintenance exception in Part 1.1.1 of the General Permit to read “For construction activities that result in disturbance of less than five acres of total land area, determination of the acreage of disturbance does not include disturbance for routine maintenance activities on existing roads. The exclusion for routine road maintenance is not available if the maintenance or repaving operation will alter the line and grade or hydrologic capacity of the road or involves clearing, grading, or excavating of underlying and/or surrounding soil”.

Comment 3: Part 1.1.1.1 [1.1.1.1] of the draft permit – potential typo, add be? “Not *be* part of a larger commercial operation serving multiple unrelated construction activities;”

Response 3: DEQ corrected this typographical error in this sentence by adding the word “be” in the final version of the General Permit.

Comment 4: Part 2.3.4 of the draft permit – The red [italicized] language appears to be a typo. “Use one of the following methods to determine *the of* rainfall resulting from a storm event:”

Response 4: DEQ corrected this typographical error in this sentence by adding the word “amount” in the final version of the General Permit.

Comment 5: Part 2.3.4 of the draft permit states that for 24-hour inspections, there are methods for determining a whether a rainfall event of 0.25” occurred but not for snowmelt that results in a discharge. To make the snowmelt requirement more enforceable, it is recommended a method be included for how to determine if any snowmelt resulted in a discharge. Below is an example of how EPA implemented a similar provision our 2022 CGP (<https://www.epa.gov/npdes/2022-construction-general-permit-cgp> [epa.gov]):

- An inspection is required within 24 hours of:

4.2.2.b – “A discharge caused by snowmelt from a storm event that produces 3.25 inches or more of snow within a 24-hour period. You are required to conduct one inspection once the discharge of snowmelt from a 3.25-inch or more snow accumulation occurs. Additional snowmelt inspections are only required if following the discharge from the first snowmelt, there is a discharge from a separate storm event that produces 3.25 inches or more of snow.”

- 4.2.3 – “To determine whether a storm event meets either of the thresholds in Parts 4.2.2a or 4.2.2b:”

4.2.3.b – “For snow, you must either take measurements of snowfall at your site, or rely on similar information from a local weather forecasting provider that is representative of your location.”

Response 5: Given the variable number and timing of snow events and the melt periods in a given year in Montana, DEQ finds the proposed provision regarding the snowmelt will be challenging to enforce. For example, if there is a snow event that yields snow accumulation of 4” followed by a snow event that yields accumulation of 3”, the permittee will not be able to accurately determine when snow from the 3” event has fully melted, thereby requiring an inspection for runoff from the 4” event. DEQ will retain the original language in the permit under Part 2.3.4 which reads the permittee must “Conduct a post-storm event inspection within 24-hours of the end of a rainfall event of 0.25 inches or greater and within 24 hours of runoff from snowmelt (i.e., any snowmelt event that may result in a discharge).” DEQ notes that this provision was updated from the 2018 General Permit to clarify that any snowmelt event resulting in discharge constitutes a snowmelt event.

Comment 6: Will a SWPPP be required for the separated parcels as part of the modification package for projects part of a larger common plan of development or sale? How will MS4s be notified?

Response 6: Section D of the Notice of Intent (NOI) application form requires applicants with projects located in MS4s to contact the MS4. If an authorization for a larger common plan of development or sale is modified because there is a new authorization indicating a new owner/operator for specific parcels, the new owner/operator will be required to submit an NOI and SWPPP to DEQ for the separate parcels and contact the MS4. As part of the permit modification process, the original owner/operator is required to modify the NOI and update the SWPPP.

Comment 7: A notice of termination (NOT) has historically been submitted to DEQ. Will MS4s be notified of these terminated authorizations, especially for separated parcels/lots prior to DEQ approval?

Response 7Comment : The General Permit for Construction Activities associated with Storm Water Discharges (General Permit) does not regulate the communication between permittees and MS4s. However, DEQ expanded Section E of the NOT form requiring permittees to affirm the following statement: “I understand if this project is located within a MS4, I must follow local MS4 regulations regarding termination of an authorization under the General Permit.”

The termination process for the General Permit is based on permittees self-certifying that the project has achieved final stabilization and met other permit requirements making the site eligible for termination. DEQ reviews Notice of Terminations forms (SWC-NOTs) but does not approve or disapprove termination requests. DEQ corrected Part 1.4 of the General Permit to clarify that DEQ does not approve NOT-SWCs.

Comment 8: It is unclear what legal document constitutes a “larger common plan of development or sale” and what date on the legal document is applicable. Is it retroactive or is it to be considered the effective date of the new General Permit for Storm Water Discharges Associated with Construction Activity?

Response 8: The term “larger common plan of development or sale” is included in the definition of “storm water discharge associated with construction activity” at ARM 17.30.1102(28) (effective 2003).

See Parts 1.1.5 and 5 of the General Permit for further guidance on the “larger common plan of development or sale” definition.

Comment 9: It is unclear how or if a General Permit for construction disturbance of a “larger common plan of development or sale” can be terminated if a site is stabilized, no construction activities are occurring, but the subdivision or other development has not been completely built out.

Response 9: Authorization under the General Permit may be terminated if the entire site has reached final stabilization, as defined in the General Permit, or if each parcel on the site has either reached final stabilization or has new authorization obtained by a new owner/operator. If areas of the site have not reached final stabilization, but no active construction work is occurring, then the project may be eligible for a reduction in inspection frequency under Part 2.3.5 of the General Permit. The permittee may modify the authorization to reduce the area covered as the construction project progresses and the area of disturbance decreases.

Comment 10: How will DEQ implement SWC permit coverage requirements for lots/parcels that are less than one acre, but are part of a larger common plan of development or sale?

Response 10: Lots occupying less one acre that are part of a larger common plan of development or sale totaling greater than or equal to one acre require coverage under the General Permit. DEQ recommends that the entire larger common plan of development or sale obtain coverage under one permit authorization rather than individual home buyers obtaining authorization under the General Permit. The permittee may retain coverage and request authorization modifications to reduce the coverage area by removing areas that have achieved final stabilization as the development progresses or transfer permit coverage to a new owner/operator. See Parts 1.2.4.1 and 1.3 of the General Permit.

Comment 11: It is unclear what MS4s in Montana will be required to do to implement new provisions of the General Permit and how responsibilities will be shared with DEQ since DEQ issues and terminates authorizations under the General Permit.

Response 11: The 2022-issued Montana Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Small Municipal Separate Storm Sewer System (MS4 General Permit MTR040000) contains the applicable requirements for regulated MS4s. Specifically Minimum Control Measure (MCM) 4 titled Construction Site Storm Water Management outlines the MS4 General Permit requirements related to construction activity within a regulated MS4. Each MS4 should review the site inspection form or checklist to see if updates are needed in addition to the Enforcement Response Plan or other procedures and processes implemented to comply with the MS4 requirements. MTR100000, Part 3.3 requires the SWPPP submitted with an NOI application

form identify the location of the MS4 outlet where the storm water will discharge to state surface water. Additionally, the SWPPP must include a site map identifying the MS4 and location of each outlet.

Comment 12: DEQ gave insufficient notice to interested parties of the General Permit Renewal, and there should be an extension to the public notice period. Since MS4s responsible for implementing the permit, they should have been included earlier in the process. Stakeholders on relevant DEQ mailings lists were not notified.

Response 12: DEQ followed the requirements outlined in ARM 17.30.1372 to notify the public of DEQ's tentative determination to reissue the Montana Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction Activity. The public comment period opened on December 27, 2021 and closed on January 31, 2022. In addition, DEQ held a public hearing about the draft General Permit on January 31, 2022. DEQ published notification regarding the draft General Permit on DEQ's webpage and in all major newspapers across the state.

All permittees currently authorized under the 2018 General Permit and those individuals on the interested parties list were notified by mail of DEQ's tentative determination, public comment period and the date of the public hearing. In addition to the formal public participation, DEQ held a stakeholder meeting on November 29, 2021 to discuss changes and solicit feedback from stakeholders. Contacts from all MS4s were notified by e-mail of this stakeholder meeting.

Water Protection Bureau maintains a list of interested parties that are notified of either all public comment periods for draft MPDES permits or of all public comment periods for draft MPDES permits in specific watersheds. Please contact the Water Protection Bureau at 444-5583 to be added to an interested parties list.

Comment 13: The language in the draft General Permit concerning the larger common plan of development or sale language contrary to BER 2015-01 WQ and BER 2015-02 WQ rulings which held that a developer cannot be held liable for stormwater violations on individual lots that have been purchased. The Board also affirmed in this ruling that the "owner or operator of the construction activity," specifically "the person who owns, operates, or supervises the project at the time that the offending storm water discharges take place" is the person liable for permit coverage. The provisions in the draft General Permit are illegal because they seek to impose liability through permit changes that should be sought through rulemaking pursuant to the Montana Administrative Procedure Act (MAPA).

Response 13: See Response to Comment 12. The administrative rules at ARM Title 17, Chapter 30, Subchapter 11 pertain to permit authorizations under MTR100000 and are applied together with ARM Title 17, Chapter 30, subchapters 12 and 13 to establish a system for regulating discharges of potential pollutants from point source discharges of storm water to state surface water. See ARM 17.30.1101(1). When a permittee submits a Notice of Intent (NOI) they acknowledge they are eligible to obtain coverage under MTR100000 and agree to comply with effluent limits and conditions of the Permit. The NOI remains in effect from the date of receipt by DEQ until the NOI is transferred or terminated. See Part 1.2 of the General Permit. The BER rulings in Case Nos. 2015-01 WQ and 2015-02 WQ determined the subdivision developers in those cases were not owners or operators of construction activity at the time of the alleged violations, but the BER did not weaken

the obligations of a permittee under MTR100000 while the General Permit is in effect. The owner or operator of a point source that discharges or proposes to discharge to state water must obtain and maintain MPDES permit coverage and comply with the Montana Water Quality Act (WQA). See ARM 17.30.1105. If an entity has obtained authorization to discharge under the General Permit, that entity maintains responsibility under the General Permit until the project reaches final stabilization and the authorization is terminated, the authorization is transferred, or multiple entities assume responsibility for a larger common plan of development or sale.

Comment 14: According to the draft General Permit, the only way a developer can end permit coverage or reduce their liability to pay for modify their authorization every time a lot is purchased. This is problematic as some developers buy 50 lots at once while other buy two or three lots at a time with the intent of buying 20 lots throughout the course of a year. This is infeasible and prohibitively costly.

Response 14: The General Permit language in Part 1.2.4 regarding modifications to authorizations under the General Permit provides clarification and options for the permittee. The permittee of a larger common plan of development or sale may choose to keep permit coverage until the entire permitted area has reached final stabilization or reduce the area covered under the authorization through the modification process under Part 1.2.4.1. The modification process in which a new owner/operator of a parcel would obtain permit coverage is optional. The original owner/operator may choose when to modify their authorization, to reduce both fees and paperwork. There is no requirement that each time a lot is purchased, the initial permit authorization be modified or transferred.

Comment 15: New larger common plan language would increase liability and monetary costs for builders and home buyers because it would require homeowners to obtain permit coverage for individual lots and the original permit holder to pay to modify their permit with every sale.

Response 15: See Response to Comment 14. The original owner/operator who obtains authorization under the General Permit has the option to maintain permit coverage until the entire project area has reached final stabilization, modify to reduce the disturbed area as the project progresses, or transfer the permit to new lot owners. None of these options are mandatory. The only requirement is that areas disturbed by construction maintain permit coverage until final stabilization.

Comment 16: Part 1.1.5 defines a "larger common plan of development or sale" as "a construction project consisting of parcel or parcels of land in an area where multiple separate and distinct but remain related by a shared development plan, builder or contractor," specifically calls out "residential communities," and specifies that it may have "development implemented by different "owner/operators." Draft Permit, pp. 6-7. This definition conflicts with the storm water permitting rules and the recent Board of Environmental Review ("Board") decision in the Department's failed enforcement action against Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC.

As noted during that litigation, a "larger common plan of development" involves only one property owner. *Friends of Maha 'Ulepu Inc. v. Hawai 'i Dairy Farms*, 224 F.Supp.3d 1094. EPA guidance for the analogous federal permit also limits liability for permit coverage to the "owner" of the project

(i.e.: owner of the home being built) or the party with "operational control over construction plans and specifications." EPA 2022 General Permit, p. 4. EPA notes that "where there are multiple operators associated with the same project, all operators must obtain permit coverage." *Id.* Thus the legal definition of "larger common plan of development" and the EPA approach are both contrary to the provisions in this Draft Permit.

Response 16: The court in *Friends of Maha 'Ulepu Inc. v. Hawai 'i Dairy Farms*, 224 F.Supp.3d 1094, 1104 defined a "larger common plan of development or sale" as a contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one plan. The *Friends of Maha 'Ulepu* court further provided: "Common plan" is broadly defined as any announcement or piece of documentation (including a sign, public notice or hearing, or sales pitch, advertisement, drawing, permit application, zoning request, computer design, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating construction activities may occur on a specific plot." The *Friends of Maha 'Ulepu* court did not limit a "larger common plan of development or sale" to one property owner. Under the WQA an "owner or operator" is "a person who leases, operates, controls, or supervises a point source." § 75-5-103(26) MCA. The initial owner/operator of a larger common plan of development or sale is an owner/operator under the WQA. The initial owner/operator/permittee may modify their authorization and remove areas that are stabilized or have a new owner/operator who has obtained separate permit coverage. Part 1.1.5 of MTR100000 is consistent with the BER's recent decisions, federal case law, the WQA, and the CWA.

Comment 17: Projects within a larger common plan should be able to obtain one authorization and adjust the acreage of the permit until they are done building. Fees should be reduced to a one-time fee.

Response 17: Projects within a larger common plan may obtain a single authorization under the General Permit. The modification option for projects part of a larger common plan of development or sale pertains when part of a permitted project has achieved final stabilization or a new owner/operator obtains parcels within the larger common plan and obtains separate authorization for the parcels under their ownership or control. There is no modification requirement. Permit fees are outlined in ARM 17.30 Subchapter 2.

Comment 18: Section IV(A)(1)(d) of the fact sheet states: "To improve accountability, and recordkeeping, permittees with projects with a larger common plan of development or sale who request termination of permit coverage must include the authorization number for the parcel(s) with a new owner/operator in the NOT-SWC form." If someone had authorization under the General Permit for a subdivision, and portions of that subdivision were sold off or transferred under different permit coverage, it would be the owner or current permit holder's responsibility to track down the MTR numbers of the parcels. I request that DEQ provide easily accessible geographic reference to the neighboring parcels also under coverage. Without that query established, it might be somewhat difficult for an individual that is trying to file an NOT, to discover all the adjoining MTR numbers.

Response 18: The termination requirement for projects part of a larger common plan of development or sale requires that the permittee requesting termination only provide permit numbers for parcels part of the current authorized area which have coverage under a new authorization. To help with the tracking of these new authorization, DEQ added the following question to Section I of the NOI:

“6. Is this project part of a larger common plan that currently has authorization under the General Permit?

Yes Provide permit number: MTR1____ No”

DEQ will explore the idea of creating a map or online system to help make permitted locations more accessible to permittees.