

RESPONSE TO PUBLIC COMMENT
Sand and Gravel General Permit (SGGP)
MPDES Permit No. MTG490000

The Montana Department of Environmental Quality (DEQ) issued Public Notice MT-24-15 on November 25, 2024. The Public Notice provided the tentative determination to issue a statewide wastewater discharge permit renewal for the General Permit for Sand and Gravel Operations (SGGP) under the Montana Pollutant Discharge Elimination System (MPDES) permit MTG490000. The notice included the draft Permit, Fact Sheet, and draft Environmental Assessment (EA).

The notice required that all written comments be received or postmarked by December 27, 2024, to be considered in formulation of the final determination and issuance of the permit. A public hearing was also held on December 19, 2024, to accept public comments. DEQ did not receive comments during the public hearing. DEQ received written comments from the parties in the table below.

Persons/Entities Submitting Substantive Comments on Public Notice Package of MPDES Permit MTG490000	
No.	Commenter
1	Erik Makus, U.S. EPA Region 8, Montana Office
2	Anne Hedges, Montana Environmental Information Center (MEIC)

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

Comments 1 – 6 are from Erik Makus, EPA Region 8

Comment 1:

Permit pages 3-5: There are four references to the “2019-General Permit” which should be the “2024-General Permit...”

Response to Comment 1:

The noted typographical errors are corrected in the final permit.

Comment 2:

Permit page 4: One bullet contains reference to the regional administrator. Since “regional administrator” is not defined or used anywhere else in the document, the EPA suggests altering this statement to make it clear who it is referring to (e.g., replacing “regional administrator” with “EPA”, adding some clarifying language such as “...the regional administrator **of the EPA...**,” adding a definition of “Regional Administrator” to the permit, etc.).

Response to Comment 2:

The final permit is changed to read “...regional administrator of the EPA...”

Comment 3:

Permit page 8 (and FS page 6): The hyperlink to the National Asphalt Association website does not work. Suggest removing it or correcting it.

Response to Comment 3:

The hyperlink is removed and replaced with the web address for the National Asphalt Association’s homepage.

Comment 4:

- Permit page 9 (Table 2): Footnote 5 is not applicable to pH *monitoring*; it is an exemption from technology-based pH limits derived from the Effluent Limitation Guidelines found in 40 CFR Part 436. As written, the wording creates a situation where MDEQ is exempting a permittee from pH monitoring, but the permittee still has a pH limit. This situation would not comply with 40 CFR 122.44(i)(1)(i). If the pH limits in Table 1 were based solely on TBELs, then this footnote could be moved from Table 2 to Table 1. But in this case, the fact sheet *appears* to consider water quality-based pH concerns (and the permit includes a pH stipulation directly from Montana’s water quality standards). The exemption from 40 CFR Part 436 would not apply to water quality-based effluent limits.

The EPA suggests removing the footnote. Note that it also appears in the Fact Sheet, Table 3.

Response to Comment 4:

The footnote is removed in the final permit.

Comment 5:

Permit page 9 (Table 2): The permit has both a “Daily Maximum” TSS limit and an “Average Monthly” TSS limit (see Table 1). Thus, permittees should be required to report both parameters in Table 2. However, Table 2 only requires “Monthly Average” reporting for TSS. The “Reporting Requirement” for TSS in Table 2 should be changed to “Monthly Average and Daily Maximum.”

Response to Comment 5:

Daily Maximum is added to the reporting requirement for TSS in the final permit.

Comment 6:

Permit page 11 (Section 5. Standard Conditions): NPDES permits covering mining dischargers must contain the additional conditions found in 40 CFR 122.42(a) (which are also found in ARM 17.30.1343(1)(a)).

Response to Comment 6:

The referenced language is added to the Standard Conditions section in the final permit.

Comments 7 – 14 are from Anne Hedges, MEIC**Comment 7:**

The Montana Department of Environmental Quality’s (DEQ) proposed general discharge permit for sand and gravel operations is not only misguided but it fails to fulfill DEQ’s legal obligation to allow public participation, enable Montanans’ right to know, and to protect a clean and healthful environment for present and future generations. The result is that DEQ will fail to consider important, legally required information that will better inform its decisions and verify that an application complies with water quality laws and Montanans’ constitutional rights. In addition, water rights are protected by the Montana Constitution and are recognized as a constitutional private property right (MT Constitution, Article 9, §3). Yet DEQ fails to consider any of these constitutional rights under this general permit scheme for sand and gravel operations.

Response to Comment 7:

Montana Code Annotated (MCA) 75-5-401(9) grants DEQ the authority to adopt rules authorizing general permits for categories of point source discharges. The Administrative Rules

of Montana (ARM) contain specific rule for the issuance of MPDES general permits, including the issuance of general permits for “sand and gravel mining and processing applications.” ARM 17.30.1341(1)(i). The development of the Montana Pollutant Discharge Elimination System (MPDES) General Permit for Sand and Gravel Operations (a.k.a. Sand and Gravel General Permit or SGGP) followed the requirements of the Montana Water Quality Act and the Administrative Rules of Montana for the issuance of discharge permits. DEQ’s permit development process is compliant with Montana statutes and rules. Montana statutes, which authorize the adoption of administrative rules for general permits, are presumed to be valid and constitutional.

No change is made to the draft permit in response to this comment.

Comment 8:

In 2021 the Montana legislature passed House Bill 599. HB 599 drastically curtailed public participation and consideration of water resources, among other things, in the permitting of open cut mines (sand and gravel operations). DEQ assured legislators that the water resources staff at DEQ would still consider water issues related to proposed projects before sand and gravel operations could move forward. At the time, DEQ failed to disclose that the water resource program relies on a general permit to govern water issues at open cut mines. A general permit fails to provide neighbors of proposed sand and gravel operations as well as the general public with an opportunity to know what impacts may occur to water resources in the permit area and fails to provide them an opportunity to comment on water related issues in the permitting scheme.

Response to Comment 8:

Currently, as well as historically, the MPDES program has developed discharge permits and considered water issues for only a small subset of the sites permitted by the opencut program. For example, there are currently 1,600 to 1,700 sites permitted by the opencut program. Of those, fewer than 20 have discharges requiring coverage under the SGGP. Approximately 60 sites have coverage under the MPDES storm water general permit for the control of storm water potentially discharging off the sites and into state water. The MPDES program has consistently considered water within the pit of an active opencut site to be process water [ARM 17.30.1304(56)] and not subject to MPDES permitting provided the pit water is not discharged to state surface water. See also the response to comment 7.

No change is made to the draft permit in response to this comment.

Comment 9:

Article II, Section 8 of Montana’s Constitution provides Montanans with the right to participate. Article II, Section 9 of the Montana Constitution provides Montanans with the right to know what decisions their government is making. This general permitting scheme denies the public of both rights. Once a general permit is in place there is no opportunity for public comment nor is there the ability of the public to provide site-specific information to the permitting agency regarding water resource impacts from a proposed or ongoing operation. Instead, the only public participation opportunity is during the general permitting process, which occurs prior to a sand or gravel operation being proposed in their area. During subsequent permit renewal there appears to be no notice and opportunity for site specific public comment during permit renewal. This leaves the public without the ability to provide information and influence the outcome of a permitting decision by DEQ that could have a profound impact on their well- being, livelihood, property or natural resources.

Response to Comment 9:

See the response to comment 7. General permits are publicly noticed each time they are reissued, and the public is invited to submit comments. The public may also file complaints with DEQ anytime they believe that activities are taking place that are illegal or unpermitted. As required by ARM 17.30.1341(11), DEQ maintains a database of all MPDES general permit authorizations and NOIs. Lists of all such sources are available to the public upon request.

There is additional public participation associated with DEQ's issuance of an Opencut permit. The Opencut Program issues a public notice and EA for every opencut permit and for every amendment adding 50% or more acreage.

No change is made to the draft permit in response to this comment.

Comment 10:

DEQ's environmental assessment makes clear, "The [sand and gravel general permit] reissuance (proposed action) does not approve, regulate, or permit the underlying sand and gravel activities or the scope of the sand and gravel operation." (Draft EA, p. 1) This is one of the fundamental flaws with the current permitting scheme. Sand and gravel operations can have significant impacts to water resources. Existing neighbors and water rights holders are frequently concerned that the operation may impact their existing uses and water resource needs. Under the general permit scheme, they are right to be concerned as there is no site-specific analysis or oversight by the DEQ to verify the data provided by the developer, to investigate the concerns raised by neighbors, or to enforce the laws on behalf of the existing community of water users. The public is left with no protection under the current scheme. Their comments are allowed to be ignored in the open cut permitting process and there is no avenue for them to comment on errors contained in the operators' general permit submittal that are specific to the site. The public is left with nowhere to turn regarding water resources that may be illegally or unwittingly impacted by an open cut operation. This disregard for public participation, the public right to know, and the public's right to a clean and healthful environment, and water rights, is in direct contradiction to the state's legal obligations under the Montana Constitution.

Response to Comment 10:

The purpose of the SGGP is to regulate point source discharges of wastewater to state surface waters. The MPDES program does not have regulatory authority to regulate water issues outside those caused or potentially caused by a discharge of pollutants to surface waters. The primary pollutant of concern with sand and gravel discharges is turbidity, which is represented by total suspended solids (TSS). TSS is characterized by the permittee on the NOI, is subject to effluent limitations in the general permit, and is monitored by the permittee to comply with the permit requirements. If the public believes that there are other pollutants being discharged at a site, they may submit a complaint and DEQ will investigate and take appropriate action. The public may also submit data or additional information as part of the public comment period during general permit renewal.

See also the response to comments 7, 8, and 9.

No change is made to the draft permit in response to this comment.

Comment 11:

If a developer analyzes water resources during an abnormally dry or wet period, as periodically occurs in various regions of the state, the developers' submission will be flawed and misleading. The local community may be aware of well depth changes, seasonal fluctuations, intermittent or perennial streams, annual deviations from the norm, impacts to wildlife, areas of natural or cultural significance, and more. Leaving DEQ permitting staff without access to site-specific knowledge, data, and information is misguided and counter to responsible resource use and Montanans' fundamental rights.

Response to Comment 11:

See the response to comments 7, 9, and 10.

No change is made to the draft permit in response to this comment.

Comment 12:

Section 1.2.2 "Continuing Authorizations under the 2019-General Permit, (General Permit draft, p. 6) refers to permittees that "require continued authorization." This term is undefined. It is unclear whether all operations that continue past that date need to be reauthorized or if only a select group must do so. This should be clarified. It is also unclear if the developer or DEQ are required to notify neighbors, and if so, how that notification must occur and be verified. It appears that there is no such obligation, which raises significant concerns.

Response to Comment 12:

Permittees with existing authorizations who wish to continue coverage under the 2024 permit require continued authorization and must submit an updated NOI. Permittees who are continuing to operate in a manner that causes a discharge to state surface waters require continued authorization.

See the response to comments 7, 8, 9, 10, and 11.

No change is made to the draft permit in response to this comment.

Comment 13:

The general permit appears to be missing two critical components. First, there is no opportunity for public notice and comment. Exclusion of notice and the ability of the public to comment on the issuance or reissuance of the permit violates Montanan's right to know and participate. The only mention of notice in the general permit occurs when notice must be given to the DEQ. The unsuspecting public may be upset about water related issues at a proposed or existing operation yet has no opportunity to know a permit is being issued or reissued and therefore no ability to submit comments or review the proposal. This public oversight is critical, as DEQ knows little to nothing about what is happening on the ground at a site outside of what is provided by the permittee. The public could have information that is essential to protecting resources in the area, yet DEQ never provides the public the opportunity to provide that information.

Second, DEQ makes no mention of the quantity of water that is being consumed by the permittee. Often, the issue of most concern for neighbors is the dewatering of sand and gravel pits impacting their wells or water resources. Many areas of the state already face water shortfalls. There are times and places in which the addition of a sand and gravel operation will fundamentally impair water rights and water resources, yet DEQ requires no consideration of water quantity, nor does it acknowledge the connection between water quality and water quantity. The draft EA simply

states that the general permit “will not negatively impact water quantity.” DEQ provides no rationale for this statement and fails to consider the hydrologic connection between ground and surface waters. The withdrawal of water for a sand and gravel operation could have significant impacts on surface and ground water resources that serve water rights holders. DEQ must consider these issues on a case-by-case basis. Furthermore, its failure to allow the public to comment on hydrologic connectivity is not only misguided but violates the constitution and water resource statutes. Finally, the failure of DEQ to coordinate with DNRC in a manner that is transparent and available to the public could have profound impacts on existing water rights holders. DEQ needs to coordinate with DNRC and allow the public to raise these concerns during the permitting or permit renewal processes so that these issues are considered before a permit is issued or reissued.

Response to Comment 13:

See previous responses. DEQ drafted and public noticed the permit in accordance with the applicable regulations.

MPDES permits do not regulate water rights or convey any property rights. DEQ also does not regulate disputes regarding water rights. The draft permit included additional flow monitoring to account for nondegradation requirements around potential discharge flow impacts on the receiving water.

See response to comment 10.

No change is made to the draft permit in response to this comment.

Comment 14:

The proposed general permit should be rejected until the above-mentioned flaws are corrected, the public has an opportunity to review and comment on a proposed project, and DEQ has the ability to deny a permit for failure to comply with the law and the constitutional obligations of the state and the permittee.

Response to Comment 14:

DEQ followed the statutes, rules and regulations regarding the issuance of general permits for discharges from point sources of pollutants to state surface waters. See the response to comments 7, 9, and 10.

No change is made to the draft permit in response to this comment.