

Response to Comments
Produced Water General Permit
Montana Pollution Discharge Elimination System Permit Number MTG310000

On November 2, 2020 the Montana Department of Environmental Quality (DEQ) issued Public Notice MT-20-14, stating DEQ's intent to issue a Montana Pollution Discharge Elimination System (MPDES) general wastewater discharge permit for produced water (PWGP). This public notice stated that DEQ had prepared a draft permit, a Fact Sheet, and a draft environmental assessment.

The public notice stated that all comments received or postmarked by December 7, 2020 would be considered in the formulation of final determination and issuance of the permit. On December 4, 2020, DEQ received a request from EPA to extend the comment period an additional 46 days, until January 22, 2021. On January 19, 2021, DEQ received a second extension request from EPA to extend the comment period an additional 14 days, until February 5, 2021. EPA made these requests as provided in the Memorandum of Agreement (MOA) between the EPA and DEQ for implementation of the National Pollutant Discharge Elimination System. The MOA provides that EPA will be provided additional time for review upon request, so long as the total review period does not exceed 90 days.

On February 12, 2021, EPA objected to parts of the draft general permit. DEQ and EPA held several discussions which culminated in a meeting between all levels of Region 8 and DEQ management on August 9, 2021. On September 3, 2021, DEQ received an update on the objection which summarizes the agreements formed at the August 9 management meeting and clarifies changes for removal of EPA's objection.

This Response to Comments is an addendum to and supersedes relevant portions of the Fact Sheet. DEQ received and considered the following comments submitted by the US Environmental Protection Agency (EPA) and Somont Oil Co., Inc. Comments may be combined or paraphrased for ease of response.

Comment 1. Somont Oil requested that the permit provide latitude to existing permittees during the permit renewal process if they are not discharging when the Notice of Intent (NOI) is to be submitted because it is not possible to conduct a water quality analysis if the existing tank batteries are shut down. Somont Oil requested there be language allowing the water quality analysis to be submitted after re-commencing discharge.

Response 1: DEQ agrees to allow applicants to submit an anticipated water quality analysis from a nearby well or similar source if an existing permitted well has been shut down at the time of application renewal. Once discharge commences, permittees are required to submit the water quality analysis from Section II.E.2 within 3 months of re-commencing discharge. A compliance schedule has been added to PWGP Sections II.E.2 and II.E.3 requiring eligible permittees to submit semi-annual reports notifying DEQ whether their discharge status has changed. The compliance schedule (semi-annual status updates) will end once the permittee notifies DEQ that discharge has re-commenced and an eligible water quality analysis is submitted. Section I.D.2, I.D, II.E.2, and II.E.3 of the PWGP reflect these changes.

Comment 2.

On February 12, 2020 DEQ received a letter from EPA objecting to the Draft PWGP. In the objection, EPA identified one area within the permit that does not meet the substantive requirements of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA), and implementing regulations and stated: “[t]he draft permit lacks the necessary effluent limits to ensure the produced water is of ‘good enough quality’ as required under 40 CFR Part 435, Subpart E.” EPA then asked DEQ to “modify the draft permit to include numeric effluent limits for sulfate and EC that are at least as protective at the threshold criteria established by MDEQ in Table 3 of the draft permit.”

Response 2. On April 23, 2021 DEQ responded to EPA’s objection to the draft permit in disagreement, as the PWGP does not allow discharges to navigable waters as defined under 40 CFR § 120.2. The Produced Water General Permit regulates discharge to ephemeral drainages and/or impoundments constructed in ephemeral drainages, both of which are considered non-jurisdictional waters under 40 CFR § 120.2. In fact, 40 CFR § 435.50 reads “[t]he provisions of this subpart are applicable to those onshore facilities located in the continental United States and west of the 98th meridian for which the produced water has a use in agriculture or wildlife propagation when discharged into navigable waters.” Therefore, a prerequisite to apply the effluent limitations designed for the Agricultural and Wildlife Water Use Subcategory is a discharge to navigable waters.

Nonetheless, the PWGP does protect navigable (or jurisdictional) waters by prohibiting discharges and including requirements for dischargers to ensure that discharges are contained in ephemeral drainages or impoundments constructed in ephemeral drainages. Again, ephemeral features, including ephemeral streams, swales, gullies, rills, and pools, are defined as non-jurisdictional waters under 40 CFR § 120.2, are therefore not “navigable waters” or “waters of the United States” and are outside of Clean Water Act jurisdiction.

The general permit allows discharge to ephemeral streams or impoundments constructed in ephemeral streams but prohibits the discharge from reaching intermittent or perennial waters. Facilities proposing to discharge produced water directly or indirectly into waters of the US are not eligible coverage under the PWGP and must apply for an individual permit. This permit language will be clarified by including further language to prohibit discharges from reaching all navigable waters or waters of the United States as defined in 40 CFR 120.2 or list the other waters under definition.

DEQ agrees to make the following changes to the Produced Water General Permit in response to this comment:

1. DEQ clarified that sources eligible for coverage are only those that will not reach a WOTUS in Section I.B.2. DEQ included an exclusion that prohibits discharge from reaching a WOTUS in Section I.C.3. DEQ included language in Section F in the NOI requiring the permittee certify that all discharges from the facility will not reach a WOTUS, and to contact DEQ regarding permit coverage if it does.

2. Parts I.B.2, I.C.3.b of the final permit are modified to prohibit discharges from reaching a WOTUS as defined in 40 CFR 120.2. This includes tributaries; lakes and ponds, and impoundments of jurisdictional waters; and adjacent wetlands. It does not include ephemeral features, including ephemeral streams, swales, gullies, rills, and pools.

DEQ clarified that sources eligible for coverage are only those that will not reach a WOTUS in Section I.B.2 of the final permit. DEQ included an exclusion that prohibits discharge from reaching a WOTUS in Section I.C.3. DEQ included language in the NOI requiring the permittee certify that all discharges from the facility will not reach a WOTUS, and to directing them to contact DEQ regarding permit coverage if it does.

3. Part I.D.4 and II.C of the final permit require applicants to disclose chemicals and additives used at all leases and facilities that discharge produced wastewater. The PWGP requires all product names, recommended uses, manufacturer, and Safety Data Sheet (SDS) be submitted. An SDS is acceptable for submission if it contains the required information. Additionally, the Part I.D of the PWGP includes language that discloses that DEQ may include monitoring for additional pollutants on a case-by-case basis in the authorization letter depending on the information provided by the Owner/Operator.
4. DEQ expanded the pollutants included in the routine effluent monitoring. See Table 2 of the final permit. The additional parameters are pH, arsenic, cadmium, chromium, cobalt, copper, fluoride, lead, nitrate as N, nitrite as N, selenium, and zinc. DEQ also includes a requirement for electrical conductivity of the discharge to be at or below 8000 microSiemens/cm in Table 2 Part II.E.2 of the PWGP.

Comment 3. DEQ and EPA held several discussions which culminated in a meeting of all levels of Region 8 and DEQ management on August 9, 2021. On September 3, 2021, DEQ received a letter from EPA stating that based on the August 9 meeting, EPA understands the following:

The final general permit will only provide state permit coverage for facilities with a discharge that does not reach a water of the U.S. (WOTUS). The final PWGP will therefore not provide coverage for the purposes of the Clean Water Act (CWA). Any discharge permitted under DEQ's general permit that reaches a WOTUS will be considered a violation of the final general permit and will be considered an unpermitted discharge by DEQ and EPA under the CWA.

Notices of Intent (NOIs) for the final general permit will require submission of information that will allow DEQ, in conjunction with other information available to DEQ, to determine general permit eligibility including confirmation that discharges do not reach a WOTUS.

In the event a discharge reaches a WOTUS, or a NOI is received for a discharge that will reach a WOTUS, DEQ agrees to request a permit application and subsequently issue an individual

permit to the facility which will include all required federal permit requirements, including technology based effluent limits found in 40 CFR Part 435, Subpart E – Agricultural and Wildlife Water Use Subcategory.

Response 3. Thank you for working with DEQ on this issue. See response to comment 2.

Comment 4. EPA’s September 3, 2021 correspondence described above said that during the August 9 management meeting, DEQ stated that the draft general permit and previous versions of the general permit were not intended to cover discharges to a WOTUS. EPA concluded the current draft general permit is unclear and leaves room for it to cover a discharge to a WOTUS, and that the following changes to the general permit will clarify DEQ’s intent and meet the agreement:

Section I.B.2, Sources Eligible for Coverage – Clarify that eligible sources are only those with a discharge that will not reach a WOTUS.

Section I.C, Sources Prohibited from Coverage under this General Permit – Add an exclusion that prohibits that discharge reaches a WOTUS.

Response 4. The NOI requires submission of information that will allow DEQ to determine eligibility that discharges do not reach a WOTUS. If a discharge does reach a WOTUS, DEQ agrees to request a permit application and subsequently issue an individual permit. See response to Comment 2.

Comment 5. EPA’s September 3, 2021 correspondence requested that the Fact Sheet explain the PWGP does not cover discharges that reach a WOTUS. Additionally, EPA requested the Fact Sheet explain that there is a potential for the definition of WOTUS to change, and that the covered facilities must meet the updated definition.

Response 2: As described above, this Response to Comments is an addendum to and supersedes relevant portions of the Fact Sheet. DEQ cannot delay permit issuance for pending rule development. Any new applicable rules will be implemented during subsequent permit renewals in accordance with 75-5-703, MCA.

Typographical Errors and Formatting Corrections made to the Final PWGP:

In addition to changes made in response to comments, the following typographical errors and formatting corrections have been made:

- Made acronym for the Notice of Intent consistent throughout permit package
- Updated dates
- Corrected references to “Form PW-1” to “NOI-31”
- Removed references to 40 CFR Part 135 Subpart E
- Some sections have been renumbered to account for added changes in the final permit.