

Response to Comments Received During the 2009 Public Notice of Draft NPDES General Permits for Wastewater Lagoon Systems Located in Colorado, Montana, North Dakota, South Dakota, Utah and Wyoming

The public notice was published in the Federal Register on July 24, 2009. (74 Fed. Reg. 36705 (July 24, 2009)). Comments were received from the Colorado Department of Public Health and Environment and the U.S. Fish and Wildlife Service. A summary of the comments and the responses to the comments are given below:

Comment: The Colorado Department of Public Health and Environment (CDPHE) believes that it has authority to set water quality standards on fee lands within the Reservation boundaries and to regulate activities of non-tribal members on those fee lands. It cites to the 1974 Memorandum of Agreement signed as part of its National Pollutant Discharge Elimination System (NPDES) application and Public Law 98-290, 98 Stat. 201 (1984) to support its claim.

Response: The CDPHE has never specifically applied for or been specifically approved to administer any Clean Water Act (CWA) programs on the Southern Ute Reservation. EPA cannot implicitly grant states authority to administer programs in Indian country. Because neither the State nor the Southern Ute Tribe has been approved to administer any CWA programs on lands within the exterior boundaries of the Southern Ute Reservation, including the NPDES program, EPA remains the permitting authority for the NPDES program.

Comment: For those discharges where EPA has permitting authority, EPA must ensure that such discharges meet state water quality standards. How will EPA ensure that state water quality standards for downstream waters are met for discharges where EPA has jurisdiction?

Response: EPA Region 8 uses EPA CWA Section 304(a) recommended water quality criteria, tribally-adopted water quality standards and professional judgment to inform the setting of effluent limitations for NPDES permits issued in Indian country. Additionally, pursuant to 40 C.F.R. 122.4(d) no NPDES permit may be issued when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States. Where State water quality standards may be affected by a proposed NPDES permit, EPA considers those standards in preparing permit effluent limitations. Note: No comments were received from downstream states; New Mexico and Arizona.

Comment: Under Section 401 of the Clean Water Act, EPA is required to obtain certification from a state that a proposed federal permit includes conditions and effluent limits necessary to protect state water quality standards.

Response: As explained above, EPA administers all CWA programs within the exterior boundaries of the Southern Ute Reservation. Therefore, EPA is the certifying authority for the CWA Section 401 process.

Comment: The draft permit merely refers to additional requirements that will be set forth in a notice of authorization. The proposed general permit is devoid of any detail as to the method or timing for determining additional effluent limits, monitoring, and other requirements.

Response: For those facilities eligible for coverage under this permit, EPA expects that compliance with the effluent limitations will be protective of existing water uses and applicable state water quality standards. However, if EPA obtains information in a notice of intent (NOI), required reports, or from other sources of information, that a lagoon operator's discharges do not meet applicable water quality standards, EPA will do one of the following: (1) impose additional water quality-based effluent limitations on a site-specific basis; or, (2) require the lagoon operator to obtain coverage under an individual permit. This has been clarified in the fact sheet and the permit.

Comment: The U.S Fish and Wildlife Service (FWS) requested that when EPA Region 8 is consulting with the FWS concerning compliance with the Endangered Species Act for issuance of a general lagoon permit, please include the following procedures:

1. Obtain the most recent and complete Threatened and Endangered (TE) species list by county in the project area. These can be viewed at http://www.fws.gov/mountain-prairie/endspp/name_county_search.htm. All of the species should be included, not just listed fish.
2. If a TE species occurs in the county of your proposed project, contact the state USFWS Ecological Service Field Office.
3. If a proposed project may affect a listed species, consultation between EPA and USFWS is required.

Response: The EPA has modified the NOI requirements listed in the permit to require the applicant to identify all plant or animal species listed on the Federal or applicable state list of endangered or threatened species or a specific critical habitat of an endangered or threatened species in the county where the wastewater lagoon system is located. The URL for the FWS's web page for endangered and threatened species was included in the NOI requirements. Additionally, EPA has decided to limit coverage under the general permit to wastewater lagoon systems that meet the following criteria:

The wastewater lagoon system is:

- a. a facility listed in Appendix A of the fact sheet (facilities that EPA anticipates will seek coverage under the general permit); or
- b. a facility not listed in Appendix A of the fact sheet that meets the requirements specified in Part 5 of the general permit for complete retention wastewater lagoon systems.

EPA has evaluated potential impacts to threatened or endangered species and the designated critical habitat of such species by the discharges from lagoon systems currently covered under the existing general permit or an EPA-issued individual permit, and which EPA believes will likely seek coverage under this permit renewal action. With respect to these existing discharges, EPA either determined that this permit renewal would have “no effect” or “may affect, but is not likely to adversely affect” listed species or designated critical habitat. EPA informally consulted with the Colorado, Montana, North Dakota, South Dakota, Utah and Wyoming Fish and Wildlife Service offices, and all FWS offices have agreed with EPA’s determinations. EPA has also determined that because complete retention wastewater lagoon systems that obtain coverage under the general permit will not be authorized to discharge, such facilities will have “no effect” on threatened or endangered species. If facilities that do not meet the criteria above seek coverage under this general permit, EPA will notify the facility that it must apply for an individual permit.

Conclusion: EPA Region 8 has decided to issue the general permits with the changes noted in the response to the comments from the U.S. Fish and Wildlife Service.

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