

**ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM
GENERAL PERMIT FOR STORMWATER DISCHARGES
ASSOCIATED WITH CONSTRUCTION ACTIVITY
TO PROTECTED SURFACE WATERS**

Permit No. AZG2020-001

RESPONSE TO COMMENTS

(A.A.C. R18-9-A908(E)(3))

Administrative Record

The accompanying Fact Sheet sets forth the basis for the September 29, 2021 permit modification and the July 1, 2020 issuance of the Arizona National Pollutant Discharge Elimination System (AZPDES) Construction General Permit (CGP), No. AZG2020-001, by the Arizona Department of Environmental Quality (ADEQ). The September 29, 2021, permit modification included the addition of non-WOTUS protected surface waters in accordance with A.R.S Title 49 Chapter 2, Article 3.1.

The CGP authorizes stormwater pollutant discharges associated with construction activity under 40 CFR 122.26(b)(14)(x) and 40 CFR 122.26(b)(15) in Arizona to Protected Surface Waters, pursuant to federal conditions in 40 CFR 122.26 (WOTUS) and state conditions in A.R.S Title 49 Chapter 2, Article 3.1 et seq.(non-WOTUS). State requirements for discharges to non-WOTUS protected surface waters are adopted pursuant to A.R.S. § 49-255.04 and are enforceable solely by the Arizona Department of Environmental Quality (ADEQ). All discharges authorized by this general permit shall be consistent with the terms and conditions of this general permit. The CGP is applicable within the State of Arizona, except for Indian Country.

The public notice (PN) for the modified CGP was published in the Arizona Administrative Register on June 11, 2021 (Notice of Public Information No. M21-29). Public comments were accepted by the Department between June 15, 2021 through July 30, 2021. A list of commenters is included at the end of this document.

Summary of Changes from Draft Permit to Final Permit

ADEQ has revised the permit in response to comments received during the PN permit modification period, and in consideration of Federal and State regulatory requirements. The following is a summary of significant changes between the PN draft and final permit, with references to further information in this document or in the accompanying AZPDES Fact Sheet. Additional information and minor changes are addressed in the comments and responses which follow below.

- On August 30, 2021, a District Judge for the District of Arizona issued an order on vacating and remanding the Navigable Waters Protection Rule (NWPR). The order will have the effect of setting Clean Water Act (CWA) regulations in Arizona to those in place prior to the 2015 WOTUS rule revision.

Response to Comments

Permit Section - Cover Page

Comment CP1: received from the Arizona Mining Association via letter on July 30, 2021: Pursuant to 40 CFR § 122.26(b)(14)(x) and 40 CFR § 122.26(b)(15) (applicable only to discharges to WOTUS) and A.R.S Title 49 Chapter 2, Article 3.1 et seq. Conditions in this permit applicable to discharges to non-WOTUS protected surface waters are adopted solely pursuant to A.R.S. § 49-255.04 and are enforceable solely by the Arizona Department of Environmental Quality (ADEQ). All discharges authorized by this general permit shall be consistent with the applicable terms and conditions.

Response CP1: ADEQ agrees and has revised the cover page language as suggested by the commenter.

Comment CP2: received from the City of Glendale via letter on July 28, 2021: Cover Page - The sequence of the permit effective date, permit modification date, and the date the permit was signed is confusing. Also, is the original expiration date still valid or will the expiration date be changed to five years from the modification date? To better clarify the dates, the City requests the permit language be modified to read: This permit was originally issued on March 27, 2020, with an effective date of July 1, 2020. This permit was modified on, 2021.

The modified permit becomes effective on 2021.

This permit and the authorization to discharge expires on 2025.

Signed on 2021.

Also, the permit states "This general permit specifically authorizes stormwater discharges of pollutants..." Including "pollutant" is redundant since "discharge" is defined in the permit as "any addition of any pollutant..."

Response CP2: ADEQ agrees and has added modification effective date to permit title page. The permit expiration date will remain the same. The phrase "discharge of pollutants" is intended to be read as "discharge of ... pollutants associated with construction activities" and no change has been made to this phrase in permit.

Permit Section 1 - Permit Area

Comment 1A: received from the Gila River Indian Community via letter on July 30, 2021:

The Gila River Indian Community ("Community"), a Federally-recognized Indian Nation with Reservation lands encompassing approximately 372,000 acres, has been actively monitoring the Arizona Department of Environmental Quality's (ADEQ) Arizona Surface Water Protection Program (Program), and has reviewed ADEQ's proposed modifications to the Arizona Pollutant Discharge Elimination System (AZPDES) General Permits (dated June 15, 2021). The Community notes and appreciates that ADEQ has added language explicitly disclaiming authority to regulate discharges on Tribal lands in two of the six General Permits (the Multi Sector General Permit and the De Minimis General Permit). The remaining four General Permits, however, do not include similar language. Given that Arizona lacks authority to regulate any and all discharges on Tribal lands, and to avoid any confusion by the regulated community, ADEQ should include similar disclaimers in the four General Permits that currently lack them. Therefore, the Community respectfully requests that ADEQ amend the proposed General Permits so that they all include the appropriate disclaimers.

Response 1A: ADEQ agrees and has revised the permit part 1.1 as follows: *"This permit is not authorized for use by sites with stormwater discharges associated with industrial activities on any Indian Country lands in Arizona. Authorization for discharges in Indian Country must be obtained through US EPA Region IX or other appropriate authority."*

Comment 1B: received from Maricopa County Transportation (McDOT) via Konveio on June 23, 2021: Suggest to add: non-WOTUS protected surface waters in accordance with A.R.S. Title 49 Chapter 2, Article 2. (49-221).

Response 1B: ADEQ agrees and revised permit part 1.2 as follows: *"This general permit authorizes the discharge of stormwater from construction activity to all waters on the protected surface water list, including*

discharges to waters of the U.S. (WOTUS) and non-WOTUS protected surface waters. The requirements of discharges to non-WOTUS protected surface waters are state-only, and enforceable solely by ADEQ."

Comment 1C: received from Logan Simpson via Konveio on July 23, 2021: Please use myDEQ language on "conveyance". See also the language of the former draft of this permit: "Water if the first receiving water is classified as such. This includes discharges to the first receiving water by a man-made conveyance or system of conveyances (ditch, channel, municipal storm sewer system, etc.)." See Part 1.6.2.f. of this permit. Please define the terms "Disturbance" and "Earth Disturbance" vs. "Construction Activity". The 2013 CGP does not define "disturbance", nor does the EPA 2017 CGP. This definition differs from other environmental regulations (I.e. Maricopa County, Pima County, and Pinal County Air Quality Fugitive Dust Permits)? Is "disturbance intended to be the same definition as the EPA CGP? "Earth-Disturbing Activity"—actions taken to alter the existing vegetation and/or underlying soil of a site, such as clearing, grading, site preparation (e.g., excavating, cutting, and filling), soil compaction, and movement and stockpiling of top soils."

Subjective and interpretive terms. Consider different phraseology or eliminate the term "appropriate". The term "appropriate" is not defined. Perhaps use "Best Available Technology Economically Achievable" (BAT) and/or "Best Conventional Pollutant Control Technology" (BCT) which are used to reduce or eliminate pollutants in stormwater runoff.

Consider different phraseology. As written a contractor can discharge concrete/paint washout as long as controls were used. Perhaps reference Part 3.5 and indicate readers shall use listed and identified controls. Consider the reference in the Fact Sheet on page 29, Section III.3.5 for A.A.C. R18-9-B301(L) Type 1 General Permit, identifying the Concrete Washout Aquifer Protection General Permit on page 11 of the Fact Sheet as an example.

Response 1C: ADEQ appreciates the comments on the CGP, however, the permit was "opened" for modification to include the Surface Water Protection Program and the Protected Surface Waters List, which become effective on 9/29/2021. All other existing requirements remain the same and no other changes were made to the permit.

Comment 1D: received from the City of Glendale via letter on July 28, 2021:

1.5 -The term "tributary" is used here (and in other sections of the permit), but it is not defined in the permit. I was also unable to locate a definition for "tributary" in Arizona Revised Statutes. Is it ADEQ's intention to use the definition from 40 CFR 120.2(3)(xii) or a state-specific definition? Will ephemeral drainages be included in Arizona's definition of a tributary, or is "tributary" limited to perennial and intermittent waters?

Response 1D: Change made to remove "tributary" with respect to OAWs and to preserve the language in this section as issued July 1, 2020.

Permit Section 2 – Authorization

Comment 2A: received from the City of Glendale via letter on July 28, 2021: Please clarify if both types of operators (person with operational control over construction plans and specifications and the person with day-to-day operational control of those activities at the construction site) are required to submit an NOI. For example, as long as one operator is identified (such as the person with day-to-day operational control of those activities at the construction site) and submits the NOI, the construction project is covered under the CGP.

Response 2A: Please see permit part 2.1(1), which explains that all operators are required to get a NOI and coverage under the CGP. Permit part 2.1(2) explains that when there are multiple operators, all operators are required to get coverage for activities within their control on the construction site. ADEQ is happy to discuss this permit with the commenter. At this time, ADEQ modified the construction general permit for the addition of the Surface Water Protection Program and the Protected Surface Waters List. All other existing requirements remain the same and no other changes were made to the permit.

Comment 2B: received from the City of Phoenix via letter on July 30, 2021: In Section 2.2.3 of the permit, this language requires a new Notice of Intent (NOI) and fee to be submitted to reapply for coverage under the 2021 CGP. This appears to be a remnant from the 2020 permit reissuance. The City requests clarifying language in the permit that a new NOI will not be required for existing permittees under this modification unless the addition of a non-WOTUS PSW results in a change in discharge point or receiving PSW. In this case, the NOI should be considered a revised/modified NOI with no fee for existing permittees. Since ADEQ is continually updating the list of non-WOTUS PSWs and will likely be doing so for a long time, this seems the best way to approach the uncertain status of some water bodies and the sudden changes to that status as ADEQ continues to gather information on the status of water bodies as PSWs.

Response 2B: A new NOI will not be required for existing permittees under this permit modification that incorporates non-WOTUS protected surface waters into the July 1, 2020 CGP, unless the addition of a non-WOTUS protected surface water results in a change of a discharge point or change in protected surface water. In that case, the NOI should be modified, and there will be no modification fee for existing permittees to incorporate those changes to the NOI, unless a SWPPP is required to be submitted as part of the modification. No change was made to the permit.

Comment 2C: received from the City of Phoenix via letter on July 30, 2021: In Section 2.2.3.c of the Permit, ADEQ added the text "Note: this condition does not apply for discharges to non-WOTUS PSWs." ADEQ has not yet provided clarity on which PSWs are WOTUS and which are non-WOTUS. This is critical information for permittees to know which aspects of this permit apply and where. Please prioritize adding this critical information on WOTUS status to the PSW map and list. In addition, this permit should not become effective until the PSW map and list are final and accurately reflect the requirements in Arizona Revised Statutes (ARS) 49-221(G).

Response 2C: ADEQ anticipates issuing the modified CGP on or after September 29, 2021, when the Surface Water Protection Program becomes effective. The waters on the draft Protected Surface Waters List also become effective when publicly noticed within 30 days of the effective date of the program.

Comment 2D: received from the City of Glendale via letter on July 28, 2021: 2.3 - Please add spaces between the end of Section 2.2 and the beginning/heading of Section 2.3.

Response 2D: ADEQ appreciates the comment and edited the Permit to include proper spacing.

Comment 2E: received from the City of Glendale via letter on July 28, 2021: Section 2.3(3)(c), 3.8(1), and more -These sections of the permit refer to "applicable surface water quality standard (SWQS)" However, HB269 I includes new language at ARS 49-221(A)(2): "Adopt by rule, water quality standards for non-WOTUS protected surface waters, by December 31, 2022. .and as determined necessary in the rulemaking process." It is unclear to the City which standards would be applicable to the discharges under the CGP - existing SWQSs in Arizona Administrative Code, Title 18, Chapter 11, Article 1, or new SWQSs yet to be established? Existing SWQS for discharges to WOTUS and new SWQSs for discharges to non-WOTUS protected surface waters? Please clarify.

Response 2E: The current surface water quality standards in rule A.A.C. R18-11 are enforceable and apply to WOTUS and non-WOTUS protected surface waters. SWQS will be updated through the rulemaking process. Specifically, pursuant to Section 7 of HB2691, ADEQ will publish an initial PSWL within 30 days of the September 29th, effective date of the bill. Section 7 also requires that "[f]or non-WOTUS protected surface waters, the Director shall apply surface water quality standards established as of January 1, 2021" until specifically modified by that December 31, 2022 rulemaking. Permittees will be notified of any changes to the SWQS and will have any opportunity to review and comment through the public participation process.

Comment 2F: received from Logan Simpson via Konveio on July 23, 2021: Please add (either by foreclosure or denial of legal access to the site).

Response 2F: Permit part 2.7 is entitled Change of Operator Request due to Foreclosure or Bankruptcy and ADEQ is unsure what the commenter would like revised in this permit part. ADEQ is willing to discuss

future changes to the CGP with the commenter upon request. However, ADEQ "opened" the permit for the addition of the Surface Water Protection Program and the Protected Surface Waters List. All other existing requirements remain the same and no other changes were made to the permit.

Permit Section 3 - Effluent Limitations

Comment 3A: received from Maricopa County Transportation (McDOT) via Konveio on June 23, 2021: For consistency and clarity suggest to replace "non-WOTUS state waters" with non-WOTUS protected surface waters.

Response 3A: ADEQ agrees and has modified the permit as follows: "*An operator discharging to non-WOTUS protected surface waters shall choose to implement either non-numeric best management practices (BMP)...*"

Comment 3B: received from the Arizona Mining Association, via letter on July 30, 2021: Add sites that discharge to WOTUS, or BMPs that provide a similar degree of protection of applicable surface water quality standards in the receiving water for discharges to non-WOTUS protected surface waters.

Response 3B: ADEQ believes that Section 3.1 provides sufficient flexibility to allow operators to choose the appropriate BMPs for their site, yet provides enough specificity that compliance with Section 3.1 is clear. No change made to the permit.

Comment 3C: received from the Arizona Mining Association (AMA). via letter on July 30, 2021: Add corrective action only applicable to discharges to WOTUS [permit part 3.2]

Response 3C: The current language for corrective action in the permit for WOTUS and non-WOTUS protected surface water is an adequate measure to ensure that discharges are sufficiently controlled in order to protect surface water quality. Corrective actions are an integral component of permit compliance, such that issues of non-compliance will be resolved in a timely manner (i.e. changes to existing BMPs, modification to a site's SWPPP, etc.) and that the discharge of pollutants through stormwater will be minimized or eliminated. No change was made to the permit.

Comment 3D: received from the City of Glendale via letter on July 28, 2021: 3.3(6)(b)(i) - Due to the exclusion of ephemeral drainages from the definition of WOTUS and protected surface waters, suggest changing this to read: "Place stockpiles outside of ~~washes or other~~ protected surface waters, stormwater conveyances (such as curb and gutter systems), or streets..."

Response 3D: Based on the August 30, 2021 Federal District Judge's order vacating and remanding the Navigable Waters Protection Rule (NWPR), ephemeral waters such as washes may be regulated as protected surface waters. No change was made to the permit.

Comment 3E: received from the City of Glendale via letter on July 28, 2021: 3.3(7)(c)(iii) - Correct the second sentence to read: "The operator shall document the rationale for why it is infeasible..."

Response 3E: ADEQ appreciates the comment and has made the correction.

Comment 3F: received from Logan Simpson via Konveio on July 23, 2021: 3.3.7 Just perennial waters, or all WOTUS including protected washes?

Response 3F: The intent of permit part 3.3(7) is that natural buffers adjacent to *perennial* surface waters should be maintained. In modifying this permit for the Surface Water Protection Program, ADEQ added "to perennial protected surface waters," which may be WOTUS or non-WOTUS protected surface waters. No change was made to the permit.

Comment 3G: received from the City of Phoenix via letter on July 30, 2021: In the permit Section 3.4.1, temporary stabilization, the last paragraph states "The operator is not expected to apply temporary or permanent stabilization measures to areas that are intended to remain unvegetated or unstabilized..." For clarity for MS4 entities, the City suggests that this section be amended to require the permittee to include a written statement in the SWPPP regarding their intent that the area remain unstabilized.

Response 3G: ADEQ modified the construction general permit for the addition of the Surface Water Protection Program and the Protected Surface Waters List. All other existing requirements remain the same and no other changes were made to the permit.

Comment 3H: received from the City of Glendale via letter on July 28, 2021: 3.4(2)(c) - Should this be applicable to "protected surface waters" rather than "water of the U.S.?"

Response 3H: ADEQ agrees and has replaced waters of the U.S. with protected surface waters as follows: *"Areas disturbed that were not previously used for agricultural activities, such as buffer strips immediately adjacent to protected surface waters, and areas that are not being returned to their preconstruction agricultural use shall meet the final stabilization criteria above."*

Comment 3I: received from Logan Simpson via Konveio on July 23, 2021: 3.4.3 Please define in Appendix A. (E.g. retaining all stormwater held without discharge and without an outlet). This is not the same as a detention basin and should not be considered "equivalent".

Response 3I: ADEQ modified the construction general permit for the addition of the Surface Water Protection Program and the Protected Surface Waters List. All other existing requirements remain the same and no other changes were made to the permit.

Comment 3J: received from the City of Glendale via letter on July 28, 2021: 3.5(4)(c)(vi) Due to the exclusion of ephemeral drainages from the definition of WOTUS and protected surface waters, suggest changing this to read: "For sanitary waste: Position portable toilets outside of ~~washes or other~~ protected surface waters, or stormwater conveyances, such as curb and gutter systems, or streets..."

Response 3J: See response 3D.

Permit Section 4 – Inspections

Comment 4A: received from the City of Glendale via letter on July 28, 2021: 4.4(10) - Is this the correct citation, for 4.4(10) to reference 4.4(10)?

Response 4A: ADEQ agrees and has modified 4.4(10) to appropriately reference 4.4(9).

Permit Section 6 – SWPPP

Comment 6A: received from the City of Phoenix via letter on July 30, 2021: Similarly, the language in permit Section 6.1.1 implies the need for a new/updated stormwater pollution prevention plan (SWPPP) under the modified permit. The City requests clarifying language in the permit that an updated/new SWPPP is not required for existing permittees under this modification unless the addition of a non-WOTUS PSW results in a change in discharge point or receiving PSW. As the case with the NOI, this seems appropriate given the incomplete and in progress status of ADEQ's review of water bodies in the state as PSWs.

Response 6A: ADEQ modified the construction general permit for the addition of the Surface Water Protection Program and the Protected Surface Waters List. All other existing requirements remain the same and no other changes were made to the permit. On the ground implementation may require changes to the SWPPP to address newly regulated waters on the PSW.

ADEQ is in the process of determining the jurisdictional status of Arizona surface waters since the vacatur of the federal Navigable Waters Protection Rule. Evaluations are ongoing through the application of a Screening Toolkit. More information is available at azdeq.gov/screeningtoolkit.

Comment 6B: received from Logan Simpson via Konveio on July 23, 2021: 6.3.6 Please eliminate the terms “nearest” and “near” for this clause as they are interpretive. Perhaps use the similar language of Parts 3.8.2. and 6.3.6.i. “within ¼ mile upstream of a receiving water or wetland.

Response 6B: ADEQ would be happy to discuss future changes to the CGP with the commenter however, ADEQ “opened” the construction general permit for the addition of the Surface Water Protection Program and the Protected Surface Waters List. All other existing requirements remain the same and no other changes were made to the permit.

Permit Section 7 - Stormwater Monitoring

Comment 7A: received from the City of Glendale via letter on July 28, 2021: 7.3(5) - Please add spaces between the end of 7.3(4) and the beginning/ heading of 7.3(5).

Response 7A: ADEQ appreciates the comment and has made the correction.

Permit Section Appendix A – Definitions

Comment A1: received from the Arizona Mining Association, via letter on July 30, 2021: Please use these definitions:

Discharge – any addition of any pollutant to protected surface waters from any point source but does not include the addition of dredged or fill material to non-WOTUS protected surface waters.

Ephemeral water – means a surface water or portion of surface water that flows or pools only in direct response to precipitation.

Intermittent waters – means a surface water or portion of surface water that flows continuously during certain times of the year and more than in direct response to precipitation, such as when it receives water from a spring, elevated groundwater table or another surface source such as melting snowpack.

Response A1: The commenters definition of discharge listed in the comment above is consistent with the definition in A.R.S. 49-255(2) therefore no change was made to that definition in the CGP. However, ADEQ agrees and has modified the definitions of ephemeral and intermittent waters e using the language provided by the commenter, which is consistent with the definitions in A.R.S. 49-255(2).

Comment A2: received from the City of Phoenix via letter on July 30, 2021: In Appendix A, many of the definitions need to be reviewed for consistency between all of the stormwater general permits, the Arizona Administrative Code (AAC), and the ARS. These definitions should all be consistent, such as “ephemeral water”, “intermittent water”, “perennial water”, “not- attaining water”, and “Total Maximum Daily Load (TMDL)”. For example, ADEQ has revised the definition of perennial water so that it is no longer consistent with the definition in the AAC, and there are several varying definitions of perennial water, intermittent water, etc. across the draft stormwater general permits.

Response A2: ADEQ has made the definitions consistent across all the six (6) general permits. The revised definitions published in A.R.S. 49-201 and 49-231 are binding; the definitions in the A.A.C. will be updated through a future rule-making process.

Comment A3: received from the City of Phoenix via letter on July 30, 2021: Municipal Separate Storm Sewer System (MS4): The city questions why the definition of MS4 would only apply to non-WOTUS PSWs in small MS4s. The draft language in the city's Phase I MS4 permit implies that it applies to all PSWs, not just WOTUS PSWs. Either this definition needs to be updated or the language in the draft MS4 permit needs to be changed to make it clear it only applies to WOTUS PSWs. Also, the definition reference to 40 CFR 122.32 is also incorrect.

Response A3: The definition of MS4 has been standardized across the general permits and authorizes discharges from MS4s to WOTUS and non-WOTUS PSWs.

Comment A4: received from the City of Phoenix via letter on July 30, 2021: Non-WOTUS PSW: Please add a definition for "Non-WOTUS PSW - means a PSW that is not a WOTUS" as added to the De Minimis General Permit and the Multi-Sector General Permit.

Response A4: ADEQ agrees and has revised the definition as suggested.

Comment A5: received from the City of Phoenix via letter on July 30, 2021: Not-Attaining Water: The double negative in the last section of this definition "or the impairment of the surface water is due to pollution but not a pollutant, for which a TMDL load allocation cannot be developed" is confusing and the comma after "pollutant" is unnecessary and could contribute to misinterpretation. The City recommends that ADEQ consider a re-write for clarity. Is the point that the impairment is the result of a pollutant for which a TMDL can be established, but simply has not yet?

Response A5: ADEQ agrees and has revised the definition of a Not-Attaining Protected Surface Water as follows: subset c: "the impairment of the protected surface water is due to pollution, for which a TMDL load allocation cannot be developed."

Comment A6: received from the City of Phoenix via letter on July 30, 2021: Outstanding Arizona Water (OAW): Change "PSW" to "WOTUS PSW". Per ARS 49-221, ADEQ cannot include any OAW designation for a non-WOTUS PSW.

Response A6: ADEQ agrees and has revised the definition of OAW as follows: " OAW is a WOTUS protected surface water designated under A.A.C. R18-11-112."

Comment A7: received from the City of Phoenix via letter on July 30, 2021: Perennial Water: Remove "protected" before "surface water". A channel can be perennial irrespective of its protected status. Being perennial may confer protected status, but being protected does not confer perennial status and therefore should be part of the definition of a "perennial water".

Response A7: ADEQ agrees and has changed the permit.

Comment A8: received from the City of Phoenix via letter on July 30, 2021: Point Source: In this definition, the term "WOTUS" should be removed so it just reads "PSW". By ADEQ's own definition, PSW includes both WOTUS and non-WOTUS.

Response A8: ADEQ agrees and has removed waters of the U.S. from this definition. The revised definition is as follows: "*Point Source means any discernible, confined, and discrete conveyance, including any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged to protected surface waters. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff.*"

Comment A9: received from the City of Phoenix via letter on July 30, 2021: Surface Water Quality Standards (SWQS): The City suggests this definition be revised as follows: “Standards adopted for a “non-WOTUS” PSW pursuant to A.R.S. § 49-221 and, in the case of waters of the U.S. “WOTUS PSW”, pursuant to A.R.S. § 49-222.”

Response A9: ADEQ agrees and has revised the definition of SWQS as follows: Standards adopted for a non-WOTUS protected surface water pursuant to A.R.S. § 49-221 and, in the case of WOTUS, pursuant to A.R.S. § 49-222.

Comment A10: received from the City of Phoenix via letter on July 30, 2021: Total Maximum Daily Load: Please add the text “protected surface” in the first and second sentence before “water”. The City also suggests that the text in the first sentence for non-WOTUS protected state waters “non-WOTUS PSWs cannot be added to the 303(d) list, but a state equivalent will be established by ADEQ. In addition, the third sentence from the TMDL definition in the De Minimis General Permit, Multi-Sector General Permit and A.A.C. R18-11-601(24) should be added to this definition, with the following correction: “Total Maximum Daily Loads for waters of the U.S. “WOTUS PSWs” shall meet the requirements of section 303(d) of the Clean Water Act (33 USC 1313(d) and regulations implementing that statute, or [the requirements] that the department otherwise determines are required to restore an impaired water.”

Response A10: ADEQ has standardized the definition of TMDL across the general permits to match A.R.S. 49-231: TMDL “means an estimation of the total amount of a pollutant from all sources that may be added to a protected surface water, while still allowing the protected surface water to achieve and maintain applicable surface water quality standards. Each total maximum daily load shall include allocations for sources that contribute the pollutant to the water. Total Maximum Daily Loads for Waters of the U.S. shall meet the requirements of section 303(d) of the Clean Water Act (33 USC 1313(d) and regulations implementing that statute to achieve applicable surface water quality standards.”

ADEQ intends to engage stakeholders prior to rulemaking regarding the program for non-WOTUS PSWs Surface Water Quality Standards.

Comment A11: received from the City of Phoenix via letter on July 30, 2021: Waters of the U.S.: The term “waters of the state” should be changed to “PSWs”.

Response A11: The current definition of PSW is “waters of the state listed on the Protected Surface Waters list under Section 49-221.” No change was made in this permit.

Comment A12: received from the City of Phoenix via letter on July 30, 2021: WOTUS PSW: For consistency between general permits, a definition should be added for “WOTUS PSW” as included in the De Minimis General Permit and Multi-Sector General Permit.

Response A12: The current definition in the CGP for WOTUS protected surface waters includes “WOTUS protected surface water”- means a protected surface water that is a WOTUS.” No change was made to the permit.

Comment A13: received from the City of Glendale via letter on July 28, 2021: Appendix A - The third line states “not used in permit language - okay to remove?” It is unclear what this is referring to and why it is needed here.

Response A13: ADEQ appreciates the comment and has removed this unnecessary phrase.

Comment A14: received from the City of Glendale via letter on July 28, 2021: Recommend adding “WOTUS” to the list of acronyms.

Response A14: ADEQ agrees and has added WOTUS to the Acronyms page.

Permit Section - Fact Sheet

Comment FS1: received from the City of Phoenix via letter on July 30, 2021: At several locations throughout the Fact Sheet and permit, the 303(d) list is referenced. The Fact Sheet and Permit should reference "WOTUS PSWs" in each case when the 303(d) list is referenced because the 303(d) list is specific to the Clean Water Act.

Response FS1: The current 303(d) list includes non-WOTUS PSWs under A.R.S. 49-232(K) as modified by Section 11 of HB2691 (2021), a gap-filling measure in the legislation. Pursuant to that section of HB2691, ADEQ will apply existing identification rules adopted in accordance with subsection D to impaired non-WOTUS protected surface waters until the SWPP rulemaking is completed. During the SWPP rulemaking, ADEQ will modify the rules for identifying impaired waters. As part of the SWPP rulemaking, ADEQ will prepare a new list of impaired waters using the modified identification rules and any modified water quality standards. ADEQ will follow the publication requirements in the new 49-232(B) for the new impaired non-WOTUS protected surface water list.

Comment FS2: received from the City of Phoenix via letter on July 30, 2021: In the Fact Sheet, Section II.1.5 Limitations of Coverage, #3 Discharges to Impaired or Not-Attaining waters, paragraph three, the sentence should be revised to clarify that antidegradation only applies to WOTUS PSWs.

Response FS2: ADEQ agrees and has modified the Fact Sheet language to clarify that anti-degradation requirements apply to WOTUS PSWs only.

Comment FS3: received from Maricopa County Transportation (McDOT) via Konveio on June 23, 2021: Suggest to add 2020; Suggest to clarify that the operators of construction sites are required to obtain an AZPDES permit when "construction activities (as defined in the CGP)" result in land disturbance of one....", for consistency with the permit language.

Response FS3: In the Background section of the 2021 Small MS4 Fact Sheet "Operators of construction sites disturbing one or more acres of land or smaller sites that are part of a common plan of development or sale are required to obtain Arizona Pollutant Discharge Elimination System (AZPDES) permit coverage for stormwater discharges" which is consistent with the requirements in the permit part 1.2, Eligibility." ADEQ is happy to discuss this permit with the commenter. At this time, ADEQ modified the construction general permit for the addition of the Surface Water Protection Program and the Protected Surface Waters List. All other existing requirements remain the same and no other changes were made to the permit.

Comment FS4: received from the City of Phoenix via letter on July 30, 2021: In the Fact Sheet, Section III.3.8 Surface Water Quality Standards, ADEQ has revised "water quality standards" to "PSW quality standards". It is our understanding that the term "surface water quality standards" should be unchanged because this term is referred to in the Arizona Revised Statutes (ARS) and throughout the remainder of the permit and currently applies to all PSWs. Please retain the original phrase "surface water quality standards" and verify that this phrase is being used consistently throughout the permit and fact sheet.

Response FS4: In the 2021 CGP Fact Sheet, part 3.8, ADEQ has modified the language to removed PSW in this instance, as follows: "If the discharge is to an impaired water, ADEQ will inform the operator if any additional limits or controls are necessary for the discharge to be controlled as necessary to meet surface water quality standards, including for it to be consistent with the assumptions of any available wasteload allocation in any applicable TMDL..."

Comment FS5: received from Maricopa County Transportation (McDOT) via Konveio on June 23, 2021: Suggest to revise the requirements for routine maintenance on the Fact Sheet II.1.2 in accordance with the AZG2020-001 CGP Section 1.2 Eligibility and the 2020 Fact Sheet Erratum.

Response FS5: ADEQ is happy to discuss routine maintenance in this permit with the commenter. At this time, ADEQ modified the construction general permit for the addition of the Surface Water Protection

Program and the Protected Surface Waters List. All other existing requirements remain the same and no other changes were made to the permit.

Comment FS6: received from the City of Phoenix via letter on July 30, 2021: The Fact Sheet Introduction section includes brief remarks providing the background for the permit modification. Given the unique nature of this modification, the City recommends that this section be updated to include a summary of the state legislation and explanation of use of the term PSW for both WOTUS and non-WOTUS waters.

Response FS6: ADEQ agrees and has added information as requested to the Fact Sheet regarding the permit modification to include the incorporation of SWPP and PSWL requirements.

Comment FS7: received from the City of Phoenix via letter on July 30, 2021: The City agrees with use of the word "upstream" throughout the permit related to discharges within ¼ mile of impaired, not-attaining, and Outstanding Arizona Waters (OAW). However, the addition of the word "tributary" in this context effectively excludes discharge within 1/4 mile upstream of the impaired, non-attaining, OAW, etc. reach within the same river/water body. The City is not certain this was ADEQ's intent. In addition, tributary is not defined. If needed to meet ADEQ's intent, please clarify this language throughout the fact sheet and permit to clearly indicate that the various requirements apply to discharges within ¼ mile upstream of the noted reach whether the discharge is within the same water body or a tributary. Please add a definition for "tributary" to clarify if this includes unregulated tributaries, tributaries that are a PSW or both. In addition, please clarify that "tributary" only applies to surface channels and not to the storm drain system.

Response FS7: Change made to remove "tributary" with respect to OAWs and to preserve the language in this section.

Permit Section Appendix B - Standard Permit Conditions

Comment B1: received from the Arizona Mining Association via letter on July 30, 2021: Condition 1: Duty to Comply - add for a discharge to WOTUS after permit non-compliance.

Response B1: ADEQ agrees and has added language to clarify that for discharges to a WOTUS, any permit noncompliance constitutes a violation of the Clean Water Act

Comment B2: received from the Arizona Mining Association via letter on July 30, 2021: Condition 12: The alteration or addition to a permitted site may meet one of the criteria for determining whether a site is a new source in 40 CFR 122.29(b) (incorporated by reference at A.A.C. R18-9-A905(A)(1)(e)) [Applicable only to discharges to WOTUS]; added.

Response B2: ADEQ agrees and has added "Applicable only to discharges to WOTUS" in the AZPDES General Permit Conditions.

Comment B3: received from the Arizona Mining Association via letter on July 30, 2021: Condition 17: This section [Standard Condition 17(a)] needs to be revised as it applies to discharges to non-WOTUS protected surface waters in order to reflect A.R.S. § 49-255.04(C).

Response B3: ADEQ agrees and has modified Standard Condition 17(a) as follows: "For discharges to a WOTUS: The Director may require an operator authorized by this permit to apply for and/or obtain either an individual AZPDES permit or an alternative AZPDES general permit. For discharges to a non-WOTUS: Discharges to non-WOTUS protected surface waters, ADEQ may require an operator to obtain authorization under an Individual AZPDES Permit if the requirements in A.R.S. 49-255.04(C) are met."

General Comments

Comment GC1: received from the City of Glendale via letter on July 28, 2021: The City of Glendale supports the idea of state-specific protected surface waters. However, ADEQ's proposed modifications to

the CGP are based on language in House Bill 2691 (to become Arizona Revised Statute 49-221). not requirements approved through a rule-making process. Early implementation and pre-emptive changes to the CGP creates confusion as to the parties' rights and obligations. For example: • House Bill 2691 (HB2691) was signed by the Governor on May 5, 2021, and becomes effective on September 28, 2021. Is it ADEQ's intention that the modified CGP becomes effective after September 28, 2021? • The scope of the draft modified CGP is specific to discharges to protected surface waters. While ADEQ has posted a Draft Protected Surface Waters List, HB2691 states the Protected Surface Waters List must be adopted by rule by December 31, 2022. Why is the permit being modified now, when there is uncertainty on which surface waters will be regulated? How can those waters be regulated for the next year and a half if they ultimately are not included in the final List in December 2022? • Due to the current uncertainty regarding which surface waters are "protected surface waters," the City cannot assess the true impact of the modified CGP on the City's current and future construction projects. Therefore, the comments herein are based on available information to date which indicates the City does not discharge to a protected surface water.

Response GC1: Pursuant to Section 7 of HB2691, ADEQ will publish an initial PSWL within 30 days of the September 29th, effective date of the bill. In order to facilitate this list of Protected Surface Waters, ADEQ has "opened" this permit to modify language to incorporate the e State Protected Surface Waters by the effective date of the new law, September 29, 2021, to ensure any discharges to Protected Surface Waters can be permitted and are in compliance with the law.

Comment GC2: received from the Arizona Mining Association via redline on July 30, 2021: Add "applicable only to discharges to WOTUS" in multiple locations throughout the permit and fact sheet.

Response GC2: ADEQ has added "applicable only to discharges to WOTUS" or similar language throughout the permit and fact sheet where appropriate.

List of Commenters:

Arizona Mining Association

City of Glendale

City of Phoenix

Gila River Indian Community

Logan Simpson

Maricopa County Department of Transportation

ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM

GENERAL PERMIT MODIFICATIONS AND RE-ISSUANCE FOR STORMWATER AND OTHER AZPDES DISCHARGES TO PROTECTED SURFACE WATERS

Six General Permits

RESPONSE TO GENERAL COMMENTS

(A.A.C. R18-9-A908(E)(3))

Administrative Record

On September 29, 2021, four permit modifications and two general permit reissuances included the addition of non-WOTUS protected surface waters in accordance with A.R.S Title 49 Chapter 2, Article 3.1.

Permits that were modified include:

- Construction General Permit (CGP)
- Industrial Multi-Sector General Permit (MSGP)
- Mining Multi-Sector General Permit (Mining MSGP)
- De Minimis General permit (DMGP)

Permit that were re-issued include:

- Phase II MS4 General Permit (MS4)
- Pesticides General Permit (PGP)

The public notice (PN) for the modified and re-issued general permits was published in the Arizona Administrative Register on June 11, 2021 (Notice of Public Information No. M21-28 through M21-32). Public comments were accepted by the Department between June 15, 2021 and July 30, 2021. Representatives of one law firm, the Nature Conservancy, Gila River Indian Community, one mining association and two municipalities submitted general comments during the PN period. General comments pertained to all six general permits or were submitted as a cover letter not related to a specific general permit.

Response to Comments

A. Comments received from Copeland Law using Konveio on July 30, 2021

Comment A1

Part 1.B. and Fact Sheet Changes 1. Suggest adding the following clarification sentence under this eligibility section: Sites excluded pursuant to A.R.S. 49-221(G)(2) need not secure a permit under this Section.

Response A1

No change made. The permit explains who must be covered and does not detail every situation where permit coverage is not required. Only if eligibility requirements in the permit are met, is coverage required.

B. Comments received by Nature Conservancy by Email on July 29, 2021

Comment B1

Without explanation, the draft general permits include the addition of the phrase “of pollutants” after “discharge.” This proposal adds a redundancy because “discharge,” by definition, is the addition of pollutants. A.R.S. § 49-255(2). Despite the redundancy, if the phrase is added on the cover page, it should be added to every “discharge” reference in the general permit to avoid ambiguity.

Response B1

The word "pollutant" was removed after the word "discharge" on the cover page. Discharge, by definition means any addition of any pollutant to protected surface waters from any point source.

Comment B2

We suggest ADEQ consider changing "in A.R.S Title 49 Chapter 2, Article 3.1 et seq." to "pursuant to A.R.S Title 49 Chapter 2, Article 3.1 et seq." to reflect the new implementing rules that will be in effect during the general permit term.

Response B2

Change made.

Comment B3

Again, adding the phrase "of pollutants" after "discharge" adds a redundancy because "discharge," by definition, is the addition of pollutants. A.R.S. § 49-255(2). If the phrase is added early in the Coverage and Eligibility sections, it should be added to every "discharge" reference in the general permit to avoid ambiguity.

Response B3

See Response B1.

Comment B4

The most challenging aspect of the new Surface Water Protection Program may be the ability to know if the discharge is to a WOTUS versus a non-WOTUS protected surface water in order to know whether federal or the state-only requirements apply to a discharge. ADEQ, stakeholders, and the public are required to implement and track the implementation of two distinct AZPDES permit programs. How will this aspect be implemented by ADEQ in the general permit program? Will ADEQ publish a map or list of non-WOTUS protected surface waters? If so, what will be the criteria that governs that map or list and what will be the process for involving stakeholders and the public?

Response B4

No change made to the permits. ADEQ concurs that there is uncertainty after EPA's promulgation of the Navigable Waters Protection Rule (NWPR), and the subsequent vacatur of the NWPR. ADEQ is in the process of developing a map of flow regimes and which program regulates the waters to give clarity on whether a water is a protected surface water and a WOTUS. Evaluations are ongoing through the application of ADEQ's Screening Toolkit. More information is available at [azdeq.gov/screeningtoolkit](https://www.azdeq.gov/screeningtoolkit).

Where it still is not clear if a discharge would reach a protected surface water, the facility should evaluate its risk and determine if permit coverage is prudent. Whenever a facility requests permit coverage ADEQ will grant coverage, unless it is factually impossible for that facility to discharge to a protected surface water. ADEQ is willing to work with any organization or applicant to help determine if a water is a protected surface water and to determine which standards apply to those water bodies.

The approach in the AZPDES general permits is to identify those areas of the permit that only apply to WOTUS. Currently, the Protected Surface Water List (PSWL) is located on ADEQ's Surface Water Protection Program (SWPP) website at: <https://www.azdeq.gov/SWPP>. Pursuant to Section 7 of HB2691, ADEQ will publish an initial PSWL by October 29, 2021.

Comment B5

Will ADEQ make an affirmative decision for a particular NOI that the discharge is to a WOTUS or non-WOTUS protected surface water? If so, what will that process be and how will the permit applicant, interested stakeholders, and the public know about these NOI-related decisions?

Response B5

When the applicant applies for an NOI, the myDEQ system will provide a list of nearby protected surface waters (including WOTUS and non-WOTUS). The applicant will choose the protected surface water that is applicable for a particular outfall. It is the responsibility of the applicant to choose the correct protected surface water, and the applicant always has the ability to modify the NOI. If ADEQ suspects an error in the selection of the protected surface, ADEQ staff will reach out to correct the deficiency. Customers can access public records, such as NOIs, by using ADEQ Record Center at: <http://azdeq.gov/records-center>. Customers can use AZMapper to identify water body IDs selected on general permit NOIs.

Comment B6

Will ADEQ make these decisions only in the context of the inspection and enforcement program? How will the permit applicant, interested stakeholders, and the public know about these inspection and enforcement-related decisions?

Response B6

During a routine or complaint-based inspection, ADEQ will first look at permit eligibility and requirements. If there is an absence of evidence to support a discharge, the inspector will suggest that the customer contact Permit's Unit to revisit their permit eligibility. ADEQ is willing to work with any organization or applicant to help determine if a water is a protected surface water, and will make determinations regarding discharges if needed, during compliance and enforcement. The PSWL is the list of waters that ADEQ will use to determine if a discharge is to a protected surface water. Customers can access public records, such as inspection reports and enforcement decisions, by using ADEQ Record Center at: <http://azdeq.gov/records-center>.

Comment B7

Without explanation, the draft general permits include a new approach to discharges to Outstanding Arizona Waters. The proposed approach may be ADEQ's proposal for the implementation of A.R.S. § 49-221(A)(1), the provision in the new Surface Water Protection Program that provides ADEQ may not apply or adopt rules regarding OAWs "as water quality standards for non-WOTUS protected surface waters." However, that provision does not require or authorize ADEQ to do what it proposes in the draft general permits. Please explain the purpose and rationale for the following proposed revisions to the general permits related to OAWs.

Response B7

The modified or re-issued general permits intend to clarify requirements for discharges directly to or upstream of Outstanding Arizona Waters (OAWs) under A.A.C. R18-11.107.01.C.3, including provisions that exclude OAW requirements from discharges to non-WOTUS PSW. Rules for OAW cannot be adopted or applied as water quality standards for non-WOTUS protected surface waters in accordance with A.R.S. § 49-221(A)(1)(c). As an OAW must be a WOTUS, discharge requirements for OAWs cannot apply to non-WOTUS PSW.

The general permits did not change or remove provisions for OAWs that are WOTUS. Some of the general permits (DMGP and CGP) *clarified* that new or expanded point source discharges to OAWs are prohibited, and discharges to upstream segments of an OAW, require further ADEQ review and approval, as that information was lacking from those permits. ADEQ added clarification to be consistent with A.A.C. R18-11.107.01.C.3 that a person seeking authorization for a regulated discharge to a tributary to, or upstream of, an OAW shall demonstrate in a permit application or in other documentation submitted to the Department that the regulated discharge will not degrade existing water quality in the downstream OAW.

Comment B8

The proposed general permits contain the addition of reference to discharges to "tributaries" of OAWs, but not directly to streams that may contain a downstream segment on the same stream that is an OAW (a

discharge to a tributary is different than a discharge to a different stream segment). As proposed, these general permits incorrectly distinguish discharges to tributaries of OAWs and discharges upstream of OAWs. Current examples of OAWs where this distinction is relevant are Cienega Creek, Aravaipa Creek, and Davidson Canyon. We suggest that ADEQ strike the addition of the “tributary to” an OAW and replace it with “upstream of ” an OAW, consistent with past and current general permit provisions.

Response B8

The word “tributary” was not added to the MSGP’s during the permit modifications. The language regarding tributaries in the MSGP has been present in both MSGP’s since permit issuance on January 1, 2020, and is not part of the September 2021 permit proposed modification(s). For clarification, a discharge within 2.5 miles upstream, could be within the same protected surface water or a tributary to that protected surface water.

This comment appears to be related to the DMGP permit modification where the word tributary was added to within 1/4 mile upstream of an impaired water or OAW. Changes were made to remove the phrase “to a tributary” from the DMGP and to preserve the language in this section as issued June 1, 2021 DMGP. Language was added to the DMGP, Part I.C.14 “Prohibited Discharges” to clarify that no new or expanded point source discharges to OAWs are permitted.

Comment B9

The proposed general permits appear to take an overly broad approach to implementing A.R.S. § 49-221(A)(1). That provision only limits ADEQ’s ability to establish OAW status to a non-WOTUS protected surface water, meaning ADEQ would be constrained to adopting OAW status only for WOTUS waters. However, the proposed general permits include several provisions that eliminate certain activities and requirements in relation to OAWs—including those that are WOTUS—and that has nothing to do with the application or adoption of water quality standards per the new statute.

Response B9

The general permits did not exclude or remove provisions for OAWs that are WOTUS. Some of the general permits clarified that new or expanded point source discharges to OAWs are prohibited, and discharges to upstream segments of an OAW, require further ADEQ review and approval, as that information was lacking from those permits. ADEQ added clarification to be consistent with A.A.C. R18-11.107.01.C.3 that a person seeking authorization for a regulated discharge to a tributary, or upstream of, an OAW shall demonstrate in a permit application or in other documentation submitted to the Department that the regulated discharge will not degrade existing water quality in the downstream OAW.

Comment B10

For example, section 5.5 of the proposed MSGP indicates a Stormwater Pollution Prevention Plan (SWPPP) submittal is not required for discharges to an OAW. Similarly, section 6.2.4 of the MSGP eliminates OAW monitoring for discharges to non-WOTUS protected surface waters. These proposed exemptions are unrelated to the statutory limitation on adoption of an OAW water quality standard. Rather, they indiscriminately reduce or eliminate water quality protections for OAWs, whether they are WOTUS or not. Each of the proposed general permits contain similar provisions that inappropriately eliminate monitoring and other requirements for discharges that may impact OAWs. We believe ADEQ should ensure that the general permits maintain the protections that apply to OAWs, especially those that are WOTUS.

Response B10

Rules for OAW cannot be adopted or applied as water quality standards for non-WOTUS protected surface waters in accordance with A.R.S. § 49-221(A)(1)(c). All OAWs must be a WOTUS, therefore there are no non-WOTUS OAWs.

Section 5.5 of the MSGP includes a statement that "a SWPPP does not need to be submitted for discharges to a non-WOTUS impaired, not-attaining and or OAW. “That statement is prefaced by non-WOTUS. Since there are no non-WOTUS OAWs, that portion of the sentence pertaining to non-WOTUS OAWs was

removed. Since all OAWs are WOTUS, the SWPPP submittal and OAW monitoring will apply for new or expanded discharges to upstream segments of an OAW. The MSGP includes a number of generic statements, in certain OAW permit sections, to identify that sections of the permit would not apply for those discharges solely to non-WOTUS protected surface waters. Any applicant discharging to an upstream segment of an OAW would be subject to the Federal WOTUS rule and would be subject to SWPPP and monitoring provisions defined in the permit.

Comment B11

The draft De Minimis General Permit includes a provision to implement A.A.C. R18-11-107.01(C)(2). Please explain the purpose and rationale for including such a provision only in the DMGP.

Response B11

All AZPDES general permits are subject to the antidegradation requirements in A.A.C. R18-11-107.01(C)(2) which states "A new or expanded point-source discharge directly to an OAW is prohibited." Language was added to all general permits to clarify this prohibition (except the MSGP's which explicitly included that statement). The DMGP included this rule reference in the revised Fact Sheet since the previous language was unclear.

Comment B12

Suggest adding the following clarification sentence under this eligibility section: Sites excluded pursuant to A.R.S. 49-221(G)(2) need not secure a permit under this Section.

Response B12

No change made to the permits. The permit explains who must be covered and does not detail every situation where permit coverage is not required. Only if coverage eligibility requirements in the permit are met, is coverage required.

Comment B13

Without explanation, the proposed general permits indicate that stormwater pollution prevention plans (SWPPPs) submittals are not required for discharges to non-WOTUS impaired or non-attaining waters. SWPPPs are important tools to ensure best management practices are employed to protect water quality to the "maximum extent practicable" as required by the AZPDES program rules. Please explain the rationale and purpose for the proposed changes in the general permits to the SWPPP submittal requirements for discharges to non-WOTUS impaired or non-attaining waters.

Response B13

A.R.S. § 49-255.04(B)(1) requires that the director shall not adopt or apply rules or requirements specific to new sources or new dischargers under the federal Clean Water Act for dischargers to non-WOTUS Protected Surface Water (PSW). 40 CFR 122.4(i) prohibits permit coverage of a "new source or a new discharger, if the discharge from its construction or industrial operation will cause or contribute to the violation of water quality standards." This is the federal CWA authority AZPDES permits rely on when requiring SWPPP and SAP review prior to permit coverage, but such requirements are prohibited for permits for discharges to non-WOTUS PSW. Consequently, the SWPPP submittal requirement was removed for those dischargers to non-WOTUS PSW. However, all CGP, Mining MSGP, and MSGP permittees must have SWPPPs, which are reviewed during ADEQ inspections. No change made.

C. Gila River Indian Community (GRIC) by Letter on July 30, 2021

Comment C1

The Community notes and appreciates that ADEQ has added language explicitly disclaiming authority to regulate discharges on Tribal lands in two of the six General Permits (the Multi-Sector General Permit and the De Minimis General Permit). The remaining four General Permits, however, do not include similar

language. Given that Arizona lacks authority to regulate any and all discharges on Tribal lands, and to avoid any confusion by the regulated community, ADEQ should include similar disclaimers in the four General Permits that currently lack them. Therefore, the Community respectfully requests that ADEQ amend the proposed General Permits so that they all include the appropriate disclaimers.

Response C1

Change made. ADEQ will add this language to the other applicable permits.

D. City of Phoenix by Letter on July 30, 2021

Comment D1

The City of Phoenix (City) is pleased to provide comments on the Arizona Department of Environmental Quality (ADEQ) Arizona Pollutant Discharge Elimination System (AZPDES) De Minimis General Permit (permit) modification. We understand ADEQ's primary intent for this permit modification is to incorporate Protected Surface Waters (PSW) in the permit with the existing surface water quality standards. Although ADEQ requested commenters use their on-line platform, the City was not able to add all the comments to the on-line platform due to difficulties encountered, including:

- The on-line platform stopped responding multiple times and only worked after restarting the system. This occurred on multiple networks, indicating it was likely an issue with the on-line platform, not the system using it.
- At times, the comments did not save and had to be re-entered.
- At times, comments spontaneously shifted from the document location they were placed.
- The on-line platform doesn't allow for formatting such as bold text, underline text, or strikeouts. Due to these issues, we stopped using the online platform. This letter provides the City's official and complete comments on the draft modified Fact Sheet and the Permit.

Response D1

ADEQ recognizes there were some technical issues while using the new public comment forum called Konveio. ADEQ appreciates the feedback, and acknowledges comments were also submitted by the City of Phoenix in a July 30, 2021 Letter.

E. Arizona Mining Association (AMA) by Letter on July 30, 2021

Comment E1

Preference for adoption of separate permits for discharges to non-WOTUS protected surface waters: In a May 24 email to ADEQ Water Quality Division Director Trevor Baggione, AMA encouraged ADEQ to consider adopting separate permits for discharges to non-WOTUS protected surface waters, rather than modifying the existing permits to cover discharges to both WOTUS and non-WOTUS protected surface waters. AMA continues to believe that separate permits make more sense, for two primary reasons.

First, numerous provisions of the existing permits cannot be applied to discharges to non-WOTUS protected surface waters, based on provisions in the implementing legislation for the new state program (chiefly A.R.S. §§ 49-221(A)(1) & 49-255.04(B)). In its proposed redlines, ADEQ addressed some but not all of the provisions that need to be modified. AMA's redlines of two of the proposed general permits (the Mining MSGP and the construction general permit), enclosed with this letter, identify numerous additional provisions that need to be modified in order to ensure that the permits do not impose unlawful restrictions on discharges to non-WOTUS protected surface waters. We are concerned that these additional necessary revisions, on top of those initially proposed by ADEQ, make the permits cumbersome and confusing for users.

Response E1

ADEQ considered two separate permits, but ultimately decided that one permit was simpler for our customers and ADEQ. Particularly, if a site with multiple outfalls discharged to both a WOTUS and non-

WOTUS protected surface water, coverage under one permit was deemed more straightforward. ADEQ believes it has adequately identified those sections of the permit(s) that apply to WOTUS only, and or do not apply to non-WOTUS protected surface waters.

Comment E2

Second, using a single permit creates the potential for confusion about how the permits will be enforced (i.e., which provisions can be enforced by the state alone and which are also enforceable by EPA or via citizen suit under the CWA). ADEQ attempted to clarify this issue in the draft permits, but numerous additional provisions require modification in order to provide the necessary certainty about how the permits are to be enforced. For example, in the Mining MSGP, ADEQ did not propose to change the language stating that “any” noncompliance with “any” terms of the permit constitutes a violation of the CWA (Part 1.2 and Standard Condition 1 in Appendix B). That language, if retained, could potentially transform violations of permit provisions adopted solely under state law into matters that could be enforced under the CWA, including via citizen suit.

This concern is not theoretical. A recent decision from federal court in the state of Washington involved a state-issued NPDES permit that was combined with a permit issued under the state’s waste discharge permit program (adopted solely under state law). Because the provisions adopted pursuant to state law were included in a document styled as a NPDES permit, and because that combined permit included provisions stating that “any” violation of the permit constituted a violation of the CWA (language similar to that retained in the permits proposed by ADEQ, as noted above), the court allowed the CWA citizen suit to proceed on all claims. See *Okanogan Highlands Alliance v. Crown Resources Corp.*, 2021 WL 2481878 (E.D. Wash. June 17, 2021). Although the case involved an individual permit, the same risk applies in a general permit context. We believe that the Okanogan Highlands Alliance case is poorly reasoned and wrongly decided, but it highlights the risk of integrating requirements applicable only under state law into CWA discharge permits. We have attempted to ameliorate that risk by suggesting numerous revisions to ADEQ’s proposed permits, but the only way to completely eliminate the risk is to adopt entirely separate permits for discharges to non-WOTUS protected surface waters.

Response E2

ADEQ has made changes to the permits to more clearly identify the permits' enforceability under state and/or federal law. ADEQ notes that the Washington State case involves a combined state and federal permit with no distinction between the federal Clean Water Act requirements and the State's own authorities for water quality protection under the Revised Code of Washington 90.48. ADEQ believes a single combined state and federal permit, with appropriate conditions demarcating federal authority, is the simplest solution.

Comment E3

In light of this enforcement concern and given the fact that the permits are cumbersome and confusing when modified to address discharge to non-WOTUS protected surface waters as well as discharges to WOTUS, AMA continues to believe that the best approach is to adopt separate permits for discharges to non-WOTUS protected surface waters. This approach would have the potential added benefit of avoiding the need for EPA to review modifications to general permits for discharges to WOTUS that it has previously reviewed and approved.

Response E3

See Response E2.

F. Marie Light, Pima County, by Konveio on July 27, 2021

Comment F1

Each general permit refers to tributaries in relation to OAWs and 303(d) waters. The following recommendations are provided for clarification:

1. Add the citation of Arizona Administrative Code R18-11-107(C) requiring the extra protection for these waters.
2. Use consistent language throughout the general permits. For example, "... for a discharge to a protected surface water or a tributary within a ¼ mile upstream of an OAW or impaired waters...".
3. This clarification is recommended for the following general permits and their fact sheets. (CGP, MSGP, Mining MSGP, DMGP, MS4 and PGP).

Response F1

Language edited in all permits and fact sheets to provide clarity, where appropriate, that no new or expanded point source discharges to OAWs are permitted in accordance with A.A.C. R18-11-107(C). Change made from the public noticed version to remove the phrase "to a tributary" in the DMGP.