

ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM

GENERAL PERMIT FOR DE MINIMIS DISCHARGES TO PROTECTED SURFACE WATERS

Permit No. AZG2021-001

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 June 1, 2021, issuance of the 2021 Arizona National Pollutant Discharge Elimination System (AZPDES) De Minimis General Permit (DMGP), No. AZG2021-001, 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 previous DMGP, AZG2016-001, expired on May 31, 2021, and was replaced by the June 1, 2021 DMGP, AZG2021-001.

The DMGP is intended to provide permit coverage for point source discharges to protected surface waters that meet the applicable surface water quality standards; that are low-flow and/or low-frequency, or otherwise determined by ADEQ to be appropriate for DMGP coverage; that are conducted with appropriate best management practices; and that do not last continuously for longer than thirty (30) days unless otherwise approved in advance by ADEQ. The DMGP is applicable within the State of Arizona, except for Indian Country.

The public notice (PN) for the modified DMGP was published in the Arizona Administrative Register on June 11, 2021 (Notice of Public Information No. M21-28). Public comments were accepted by the Department between June 15, 2021 through July 30, 2021. Representatives of two municipalities, one law firm, one mining association and one individual submitted comments during the PN period.

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

A. Comments received from Lavinia Wright using Konveio on July 29, 2021 and July 30, 2021

Comment A1

Part II.A.4. Adding the phrase "to a tributary" here seems to exclude direct discharges to both OAWs and impaired waters. That's fine for OAWs, since direct discharges to them are disallowed under Part I.C. But discharges that go directly into impaired waters don't seem to be addressed in this section now, even though they COULD be allowed if they meet water quality requirements. Suggestion: add at the end of this paragraph, "or directly to an impaired water". Do the same in other places where "to a tributary" has been added, involving impaired waters.

Response A1

Change made to remove the phrase "to a tributary" and to preserve the language in this section as issued June 1, 2021. Language was added to Part I.C.14 "Prohibited Discharges" to clarify that no new or expanded point source discharges to OAWs are permitted. ADEQ added the words "directly to an impaired water" in Table D for clarity.

Comment A2

Fact Sheet Appendix A. As per comments in the draft permit, the indicated changes in the titles still need to be made in the permit (or edited here).

Response A2

Change made to reflect the same titles.

Comment A3

Table A. This title is different from the one indicated in the Fact Sheet for this section. One or the other should be edited to make them the same.

Response A3

Change made to reflect the same titles.

Comment A4

Table C. Wording still needs to be added to the title as indicated in the Fact Sheet for this section; or modify FS to correspond to this title.

Response A4

Change made to reflect the same titles.

Comment A5

Table D. The title of the table still needs to be revised as indicated in the Fact Sheet for this section ("Tributaries to...").

Response A5

Change made to include an explanation in a footnote.

Comment A6

Table D. Is there a note corresponding to the asterisk after "Outstanding Arizona Waters"? I couldn't find one.

Response A6

Change made to include a description of an asterisk.

Comment A7

Part III.B.10.d. The wording seems to imply that this item applies only to discharges to TRIBUTARIES of the stated waters. It needs to somehow include DIRECT discharges to all types except OAWs.

Response A7

Change made to remove the phrase "to a tributary" and to preserve the language in this section as issued June 1, 2021.

Comment A8

Part IV.A.2. Should "protected surface water" be plural here? ("...waters")

Response A8

Change made.

Comment A9

Part B- Definitions. Change "waters of the U.S." to "protected surface waters".

Response A9

Change made.

Comment A10

Fact Sheet- Changes 1. The phrase "to tributaries" appears to be a new addition. Could an explanation of this be included? (Or a cross-reference if already there.)

Response A10

Change made to remove the phrase "to a tributary" and to preserve the language in this section as issued June 1, 2021. Language was added to Part I.C.14 "Prohibited Discharges" to clarify that no new or expanded point source discharges to OAWs are permitted.

Comment A11

Fact Sheet- Changes Tables. The text above this point in this Fact Sheet item relates to the pre-public notice version of the June 2021 DMGP, and no longer reflects the language in Tables A-C. I suggest putting it in quotation marks and identifying it as an earlier version of the Fact Sheet. Then keep the "Note change..." sentences, which do reflect the current permit.

Response A11

Change made to clarify the timing of edits during re-issuance and permit modification.

B. Comments received from Copel and Law using Konveio on July 30, 2021

Comment B1

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 B1

No change made. 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.

C. Comments received from the City of Phoenix using Konveio on July 29, 2021 and by letter received July 30, 2021

Comment C1

Table of Contents Permit. Change "2010" to "2016".

Response C1

Change made.

Comment C2

Table of Content. Change "2010" to "2016".

Response C2

Change made.

Comment C3

Fact Sheet Part I.A. Typographical error, add "water" after "protected surface".

Response C3

Change made.

Comment C4

Fact Sheet Part I.A. Typographical error, add "water" after "protected surface".

Response C4

Change made.

Comment C5

Fact Sheet. On the first page and first paragraph of the Fact Sheet, please remove the word "protected" before "surface waters". The ADEQ definition of the term "protected surface waters" includes both Waters of the U.S. (WOTUS) and non-WOTUS but the point of this sentence seems to be that WOTUS does not include groundwater, which intent is captured by the use of the more general term "surface waters". Please also verify that the summary matches the permit so there are no discrepancies.

Response C5

Change made.

Comment C6

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 brief summary of the state legislation and explanation of use of the term PSW for both WOTUS and non-WOTUS waters.

Response C6

ADEQ added language to the Fact Sheet to include: ADEQ modified the June 1, 2021 DMGP to include non-WOTUS Protected Surface Waters in accordance with A.R.S Title 49 Chapter 2, Article 3.1, and for those permit modifications to be effective on September 29, 2021. This modification was necessary to authorize discharges to non-WOTUS Protected Surface Waters. Certain definitions have been updated or introduced to reflect the change. Notably, the terms Protected Surface Water, WOTUS, and non-WOTUS Protected Surface Waters are used throughout the permit. Protected Surface Waters means waters of the State listed on the protected surface water list under Section A.R.S. §49-221, Subsection G and includes all WOTUS. Waters of the United States (WOTUS) means a protected surface waters that are also navigable waters as defined by Section 502(7) of the Clean Water Act and are federally regulated. Non-WOTUS protected surface water means a protected surface water that is not a WOTUS but included on the Protected Surface Water List under A.R.S. §49-221, Subsection G and is regulated by the State.

Comment C7

Fact Sheet. On pages 6-7 of the Fact Sheet (I.B.4 Hydrostatic Testing), the acronyms "non-DWS" and "TRC" are introduced. The first use of these acronyms should be spelled out.

Response C7

Change made to explain the acronyms when first used in the Fact Sheet.

Comment C8

General WOTUS. In the permit it is clear that some requirements apply only to non-WOTUS PSW. 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 C8

ADEQ is in the process of determining the jurisdictional status of Arizona surface waters since the remand of the federal Navigable Waters Protection Rule (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.

ADEQ is required to issue the AZPDES general permits to incorporate State protected surface waters within 90 days from when HB 2691 is signed. The date the AZPDES general permits have to be issued is on September 29, 2021, therefore ADEQ cannot defer the effective date of the permits in order to finalize the GIS map or lists. Pursuant to Section 7 of HB2691, ADEQ will publish an initial Protected Surface Water List (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. A draft version of the PSWL was shared with stakeholders and legislators during the legislative process. The PSWL can be found on ADEQ's website at: <http://www.azdeq.gov/surface-water-protection-permitting>.

Comment C9

Textual throughout. "At multiple locations throughout the Fact Sheet and Permit, the City observed inconsistent use of the term "protected surface waters". These include terms such as "waterbody," "receiving channel", "receiving water", "state waters" and "waters". In many instances, it appears that these terms should change to either PSW, WOTUS PSW, or Non-WOTUS PSW. In addition, some places that need WOTUS or Non-WOTUS added in front of PSW do not have those distinctions. Please do a thorough check for consistency in the use of the new terminology throughout these documents.

Example locations include:

- Fact Sheet page 4, CHANGES in 2021 DMGP from 2016 DMGP, first bullet point "Representative Sample Location
- Permit Part I. Coverage Under This General Permit,
- C.11 Limitations on Coverage
- Permit Part V.P.1.e Standard Permit Conditions
- Permit Part VII.B. Definition of De Minimis Discharge

Response C9

Changes made to incorporate protected surface waters were appropriate.

Comment C10

Textual throughout. At multiple locations in Appendix C, please add "that are PSW" after "non-DWS Use Canals".

Response C10

Change made.

Comment C11

Potable Water. The permit requirements for potable water discharges (i.e., line flushing, repair, drinking water wells, etc.) are inconsistent with other AZPDES stormwater permits (i.e., MS4, Construction General Permit (CGP), Multi-Sector General Permit (MSGP)). In the MS4, CGP, and MSGP, the discharge of potable water is allowable if it does not discharge pollutants to PSW. But this permit dictates much more extensive requirements for these same discharges. Water discharged from potable water lines is generally not a pollutant concern if the water is de-chlorinated either through direct action or natural attenuation prior to reaching a PSW and if erosion control measures are instituted, if needed. This de-chlorination or other pollutant controls are clearly a requirement of the allowable non-stormwater discharge of potable water in the other AZPDES permits. In these other permits, if these control measures are not sufficient to prevent the discharge of pollutants from the potable water discharge, it is not then an allowable non-stormwater discharge. Given that many of the potable water activities currently completed under the DMGP are identical or very similar to those allowed under the other AZPDES permits, a similar approach to the DMGP seems

appropriate and practicable while still addressing the removal of pollutants. Therefore, the City requests the DMGP be updated in line with the CGP to reflect that potable water discharge is an allowable non-stormwater discharge provided appropriate control measures to reduce or eliminate pollutants in the discharge are installed. We recommend using the language from the CGP: "Discharges related to installation and maintenance of potable water supply systems, including disinfection and flushing activities, discharges resulting from pressure releases or overflows, discharges due to potable water pipeline breaks and discharges from wells approved by ADEQ for drinking water use." Please also clarify in the Fact Sheet the circumstances in which the DMGP should be used for potable water discharges rather than getting coverage under one of the other stormwater permits.

Response C11

No change made. The potable water discharge section was not changed as part of the September 2021 permit modification. If a site is covered by another general permit such as a CGP and or MSGP and meets all the applicable permit requirements, separate coverage is not required if it is an allowable non-stormwater discharge, barring any limitations identified in the DMGP (discharge to an impaired water). The statutory requirement for such discharges to have permit coverage (A.R.S. §49-255.01(A)) is met by the CGP or MSGP coverage. The CGP or the MSGP permittee's Stormwater Pollution Prevention Plan (SWPPP) must identify: all outfalls having the potential to contain allowable non-stormwater discharges; the type(s) of such discharges; and the control measures implemented for the allowable non-stormwater discharges.

Comment C12

"Impaired, Outstanding Arizona Waters, Perennial, and Intermittent: 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) (and in some cases perennial and intermittent PSW). However, the addition of the word "tributary" in this context effectively excludes discharge within 1/4 mile upstream of noted 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.
- Example locations include: Fact Sheet page 3, Changes in the 2021 DMGP; Fact Sheet page 10 Part II.A (multiple); Fact Sheet page 11 "About the NOI Process", Fact Sheet page 13 Part III.B.10.D "Contents of NOI"; Fact Sheet page 17 Appendix A, Tables A-D; Part II. Authorization Under This General Permit, A.4 Application for Coverage and Timing of Authorizations
- 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.
- In the Permit, Part II. Authorization Under this General Permit, A.3.a Application for Coverage and Timing of Authorizations, the city recommends adding "upstream" with the ¼ mile reference to be consistent with the remainder of the permit."

Response C12

Change made to remove the phrase "to a tributary" and to preserve the language in this section as issued June 1, 2021. Language was added to Part I.C.14 "Prohibited Discharges" to clarify that no new or expanded point source discharges to OAWs are permitted.

Change made to include upstream in Part A.3.a.

Comment C13

Notice of Intent and Stormwater Pollution Prevention Plans: On Page 11 of the Fact Sheet (Part II.A Application for Coverage and Timing of Authorizations, Timing of Authorizations) the text could be interpreted to indicate that ADEQ plans to charge a fee to review the Best Management Practices Plan (BMPP) every time there is an Notice of Intent (NOI) modification to include a discharge request within ¼ mile upstream of an OAW or impaired water. Please add language to the Fact Sheet and permit to clarify that a new BMPP review and fee is not needed in these circumstances. Please update myDEQ so that it

only requires submission of the BMPP when the discharge is within ¼ mile upstream and may discharge into the waterbody, and not just “within” ¼ mile.

Response C13

No change was made to the permit. In general, there will not be a BMPP review every time a NOI is modified. If an outfall is added to an Areawide NOI that is a similar discharging type to the same protected surface water, a BMPP review would not be needed. However, if there is a new discharge to a non-WOTUS protected surface water that previously was not covered by the existing NOI, and a BMPP is required, then a BMPP upload and review would be required. If a new outfall is added to an impaired water that previously was not authorized, or a new type of discharging activity is added to an impaired water, a BMPP review may be warranted. If a BMPP is requested by the myDEQ system in error, we can work with the applicant to process a refund for the BMPP review fee.

Currently there is not a way for myDEQ to calculate upstream distances, rather myDEQ can calculate distance (as the crow flies) and will identify those outfalls *within* 1/4 mile. ADEQ can work with the applicant to determine the location of the outfall relative to the protected surface water and determine if a BMPP is needed. Future myDEQ enhancements will include an additional question, once a protected surface water is selected, to include "will the discharge reach the protected surface water?", to further omit the unnecessary submittals of BMPPs.

Comment C14

Fact Sheet-NOI Process. Also in the Fact Sheet in the section “About the NOI Process (Parts II.A.3-II.A.11)”, in the first paragraph, the language indicates that a printed authorization will be sent to the permittee. Please update this language to indicate that the authorization will be sent electronically or provided electronically via myDEQ. Please check for consistency throughout the Fact Sheet and permit.

Response C14

Change made. ADEQ has added to the Fact Sheet that the authorization will be electronically sent.

Comment C15

Authorization. In the Fact Sheet and Permit (Part II Authorization Under This General Permit, A.1 Application for Coverage and Timing of Authorizations and Part III.A. Notice of Intent Requirements - Deadlines for Notification), the language requires a new Notice of Intent (NOI) and fee to be submitted by July 30, 2021 to apply for coverage under the 2021 De Minimis General Permit (DMGP). This appears to be a remnant from the recently finalized permit reissuance. The City requests clarifying language in the permit and Fact Sheet 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, this seems a fair 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 C15

Changes made to include information about the September 2021 permit modification and to insert language into permit and fact sheet to clarify existing permittee’s do not have to resubmit a NOI under this permit modification (unless there is a change to an outfall or protected surface water is added).

Comment C16

Ephemerals general. In the Permit, Part III.B.10.I Notice of Intent Requirements, Contents of Notice of Intent, ADEQ added the term “ephemeral drainage”. However, some ephemeral drainages are PSWs (i.e., ephemeral reaches of the eight major rivers). The city believes the intent of this statement would be clarified if rephrased as, “if the surface water receiving the discharge is not a protected surface water, but there is a risk of the discharge reaching a protected surface water...” The city recommends making this wording change. In addition, the text “protected surface water” is missing after “closest downstream” and “discharge point to the...”.

Response C16

Change made. In addition, based on the August 30, 2021 District Judge's District of Arizona order vacating and remanding the NWPR, ephemerals will be regulated as protected surface waters, because ephemerals are WOTUS. This was necessary because 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.

Comment C17

Maps. The City requests that ADEQ add the new required mapping features as detailed in the permit, Part III.B.12 Notice of Intent Requirements, to myDEQ and to add non-compliance reports to myDEQ (Part IV.E.2). Currently, the only option is to provide coordinates and nearest surface water feature in a drop-down field. These updates to myDEQ should be made prior to the modified permit becoming effective. Please also include language in III.B.13 that an updated map is not required unless new PSW receiving waters are added and specify a timeframe for submittal of this updated map (e.g., monthly).

Response C17

No change made to the permit. No new mapping features were added. The NOI previously required a legible, scaled map showing the path from the initial release to the point of discharge to a surface water, with the wording change in this permit modification to add "protected" to surface water.

In accordance with the revised statute, ADEQ is required to issue the AZPDES general permits to incorporate State protected surface waters within 90 days from when HB 2691 is signed, by September 29, 2021. The ADEQ is currently updating GIS layers on a monthly basis, including adding, removing and changing identification of receiving waters, updated flow regimes, and assessments. myDEQ will be updated to include the most recent protected surface water list, however currently myDEQ allows the applicant to choose any protected surface water, regardless of distance.

Permittees should update the map whenever there are changes to the NOI, including when protected surface waters are added or removed. Because ADEQ's GIS work is ongoing, the permit has not specified the exact time frames permittees have to update maps. Permittees should update applicable maps as the information on protected surface waters becomes available and should be updated if a discharge location or protected surface water changes. Monthly appears to be a reasonable time frame, although that language was not added to the permit.

ADEQ anticipates adding non-compliance reports for AZPDES general permits to myDEQ in the near future. ADEQ will notify permittee's when this option becomes available.

Comment C18

Definitions: In Part VII.B, many of the definitions need to be reviewed for consistency between all of the stormwater general permits, the Arizona Administrative Code, and the Arizona Revised Statutes. 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 Arizona Administrative Code (AAC), and there are several varying definitions of perennial water, intermittent water, etc. across the draft stormwater general permits. Suggested changes to specific definitions follow:

- ADEQ and Department are both used as acronyms throughout the document. Please use one consistently.
- Cold Waters: The term "surface waters" is used in this definition. Please clarify if this definition means surface waters with or without protection or if it should be changed to PSW.
- ADEQ has changed the term "Discharge Point" to "Discharge" and revised the definition. "Discharge point" is used throughout the permit. Therefore, the definition for "discharge point" should be retained and "WOTUS" in that definition should be changed to PSW.
- Municipal Separate Storm Sewer System (MS4): The definition for MS4 has been removed and replaced with "Municipal Separate Storm Sewer". Because the term MS4 is used throughout the permit, the City strongly recommends retaining the MS4 definition. In addition, 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.

- Outstanding Arizona Water (OAW): Change "PSW" to "WOTUS PSW". Per ARS 49-221, ADEQ cannot include any OAW designation for a non-WOTUS PSW.
- 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 C18

The definitions are from the revised statute (A.R.S.), which supersedes any inconsistent definition currently in the rule (A.A.C.). The definitions in rule will be updated through the rulemaking process. Changes made from "Department" to "ADEQ" where appropriate. Added "protected" to cold water definition. Inserted "discharge point" back into the permit to provide more specificity. Change made to MS4 definition. Change made to clarify WOTUS protected surface waters for OAWs. Point source was changed to "protected surface water" and removed the word "WOTUS."

Comment C19

Definitions: 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 C19

Change made.

Comment 20

Definitions: Total Maximum Daily Load: Please add the text "protected surface" in the first and second sentence before "water". The City also suggests ADEQ add the following text or similar for non-WOTUS PSW "non-WOTUS PSWs cannot be added to the 303(d) list, but a state equivalent will be established by ADEQ".

Response C20

Change made to TMDL definition to be consistent with A.R.S.49-231(4).

Comment C21

Definition. The term "waters of the state" should be changed to "PSWs".

Response C21:

Change made to update definition of WOTUS.

D. Comments received from the City of Glendale by letter on July 28, 2021

Comment D1

General Comment. The City of Glendale supports the idea of state-specific protected surface waters. However, ADEQ's proposed modifications to the DMGP 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 DMGP 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 DMGP becomes effective after September 28, 2021
- The scope of the draft modified DMGP 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 DMGP on City operations. Therefore, the comments herein are based on available information to date which indicates the City does not discharge to a protected surface water. Glendale believes there is a remote possibility that a discharge of pollutants from de minimis activities (such as from potable water systems, well development and maintenance, etc.) may reach the municipal storm sewer system and/or a protected surface water, but is unsure that this remote possibility is enough to regulate Glendale's conduct.

Response D1

ADEQ will update the rules to reflect the revised statute through a rule making process. One of the main features of the new Arizona Surface Water Protection Program (SWPP) is that it requires the Director of ADEQ to maintain and publish a protected surface water list (PSWL). Specifically, Sec. 7, Paragraph (G) of HB2691(2021) requires that "[t]he Director shall maintain and publish a protected surface waters list. The Department shall publish the initial list on the Department's website and in the Arizona Administrative Register within thirty days after the effective date of this amendment to this section. Not later than December 31, 2022, the Department shall adopt by rule the protected surface waters list." The current PSW list is located at: <https://www.azdeq.gov/node/8170>.

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. A draft version of the PSWL was shared with stakeholders and legislators during the legislative process.

The Initial PSWL is enforceable along with existing water quality standards. ADEQ will add and remove waters from the Initial PSWL during the rulemaking process. ADEQ will also revisit numeric and narrative standards during the rulemaking process.

ADEQ is willing to work with permittees to assess their discharge location and the near-by protected surface water(s).

Comment D2

Fact Sheet: The title on the Fact Sheet should match the title of the permit. Replace "Waters of the United States" with "Protected Surface Waters."

Response D2

Change made.

Comment D3

Fact Sheet: Update the second introductory paragraph to describe the modification made in July 2021 to incorporate language for protected surface waters.

Response D3

Change made.

Comment D4

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 June 1, 2021, with an effective date of June 1, 2021.

This permit was modified on _____, 2021.

The modified permit becomes effective on-----□ 2021.

This permit and the authorization to discharge expires on ----□ 2026.
Signed this ___ day of _____ __, 2021. "

Response D4

Edits made to include modification and modification effective date. The original expiration of May 31, 2026 will remain the same.

Comment D5

Cover Page: Also, the word "pollutant" has been added to "This permit specifically authorizes only De Minimis discharges of pollutants ... " Adding "pollutant" is redundant since "discharge" is defined in the permit as "any addition of any pollutant ... "

Response D5

Change made.

Comment D6

Part I.B.1.c- Should this also list Table D?

Response D6

Change made.

Comment D7

I.B.4.c, ill.B.10 and more - These sections of the permit refer to "applicable surface water quality standard (SWQS)." However, HB2691 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 DMGP - 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 D7

No change made. 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 D8

Part 11.A.3 - Change "approval date" to "issue date" as indicated on the top of page 5 of the Fact Sheet

Response D8

Change made.

Comment D9

Part 11.A.4-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 D9

Change made to remove the phrase "to a tributary" and to preserve the language in this section as issued June 1, 2021. Language was added to Part I.C.14 "Prohibited Discharges" to clarify that no new or expanded point source discharges to OAWs are permitted.

A tributary could be any flow regime, ephemeral, intermittent and or perennial.

Comment D10

Part ill.B.10.k - Should this be re-written as "The protected surface waters, including streams or waterbodies ... "?

Response D10

Changed to protected surface water or waters. Currently, the myDEQ system allows one outfall to one receiving water. There is not an option to select multiple protected surface waters for one outfall. There may be an option in the future when the applicant can choose the nearest non-WOTUS and WOTUS protected surface water, but currently that is not an option in the on-line permitting system..

Comment D11

Part ill.B.10.1- Why is the discharge limited to "through stormwater flows"? Wouldn't de minimis discharges to ephemeral drainages be regulated, whether or not stormwater is involved?

Response D11

Change made to include other flows. If the surface water initially receiving the discharge is not a protected surface water, but there is a risk of reaching a protected surface water through stormwater or other flows, the operator should evaluate that risk, and apply for coverage accordingly.

Comment D12

Part IV.D. 2.c.ii- Should Table D also be referenced here?

Response D12

No change made. The sentence refers to perennial, intermittent, or effluent-dependent waters, so Table B and C are correct.

Comment D13

Part IV.D. 6 - Please specify if the "15 days" is working days or calendar days. The language in IV.D specifies "14 calendar days"..

Response D13

Change made to insert the word calendar days.

Comment D14

V.P.1.e - Should these references to "waters of the U.S" be changed to "protected surface waters"?

Response D14

Change made. Waters of the US was changed to protected surface waters to be consistent with Arizona's new Surface Water Protection Program (SWPP), in accordance with A.R.S Title 49 Chapter 2, Article 3.1.

Comment D15

VII.A-Add "WOTUS" to the acronym list.

Response D15

Change made.

Comment D16

VII.B (multiple definitions) -Add "ARS" before referencing sections of Arizona Revised Statutes. Also, for "Public water system," change "Code" to "Statute."

Response D16

Change made.

Comment D17

VII.B, De Minimis Discharge-Should "waters of the U.S." be changed to "protected surface waters?"

Response D17

Change made. Waters of the US was changed to protected surface waters to be consistent with Arizona's new Surface Water Protection Program (SWPP), in accordance with A.R.S Title 49 Chapter 2, Article 3.1.

Comment D18

VII.B, definition of "Municipal Separate Storm Sewer" and definition of "Non-WOTUS protected surface water" -Please capitalize "WOTUS."

Response D18

Change made.

Comment D19

VII.B, Operator-Please add space between the definition of Notice of Termination and the definition of Operator.

Response D19

Change made.

Comment D20

Appendix A, A.1, Second Paragraph- the first and second sentences are the same.

Response D20

Change made, remove duplicate sentences.

Comment D21

Appendix A, A.3.b-Include a reference to Table D?

Response D21

Change made to include reference to Table D.

E. Comments received from the Arizona Mining Association (AMA) by letter on July 30, 2021

Comment E1AMA did not prepare a redline of the de minimis permit. However, the revisions we suggest to the Mining MSGP and the CGP should be mirrored in the de minimis permit. Below are some examples of changes that should be made to this permit (the list is not intended to be exhaustive): 1. The enforcement language in Part V.A should be modified to clarify that violations of permit conditions applicable to discharges to non-protected surface waters do not constitute violations of the CWA.

Response E1

Changes made to clarify enforcement language for WOTUS and non-WOTUS protected surface waters in both the Permit and Fact Sheet.

Comment E2

Numerous provisions in the permit (as well as Appendix A, Table D) impose additional requirements or prohibitions on discharges to OAWs or impaired waters. The OAW concept is not incorporated into the state protected surface water program, and for non-WOTUS protected surface waters, any impaired waters provisions should apply only once ADEQ has finalized the initial list of impaired waters under the state program (reflecting new state surface water quality standards). All of these provisions should be modified accordingly.

Response E2

The definition of OAW in the permit has been edited to read: *means a WOTUS protected surface water designated under A.A.C. R18-11-112.* Any permit requirements that are associated with an OAW, does not include any non-WOTUS protected surface waters, as incorporated by the revised definition for OAW.

Under this permit modification, a clarifying sentence was added to Part I.C.14 Limitations on Coverage to include: *“New or expanded point-source discharges directly to water that is classified as an Outstanding Arizona Water (OAW) under A.A.C. R18-11-112 (C)(2).”* No other requirements or prohibitions were added for OAWs.

The currently approved impaired waters list applies to WOTUS and non-WOTUS protected surface waters. The new §49-232(K) as modified by Section 11 of HB2691(2021) is 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 E3

Several of the discharge prohibitions in Part IV.B repeat surface water quality standards that apply to WOTUS. The permit should reflect that these standards may not apply to non-WOTUS protected surface waters once ADEQ adopts new standards that apply to such waters (by December 31, 2022).

Response E3

Change made to Part IV.B.5 to clarify degradation as it relates to OAWs (WOTUS only). The current surface water quality standards (SWQS) in rule A.A.C. R18-11 are enforceable and apply to WOTUS and non-WOTUS protected surface waters. Specifically, pursuant to Section 7 of HB2691, 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 an opportunity to review and comment through the public participation process.

Comment E4

The discharge prohibition tied to antidegradation (Part IV.B.5) does not apply to non-WOTUS protected surface waters, and the permit should be clarified accordingly. See A.R.S. § 49-221(A)(1)(a)-(b).

Response E4

Change made to clarify Part IV.B.5.

Comment E5

The definition of “discharge” in Part VII.B should be modified to more closely track the definitions in HB 2691 (by excluding the discharge of dredged or fill material to non-WOTUS protected surface waters). See A.R.S. § 49-255(2).

Response E5

Changes made to include part (b) of A.R.S. § 49-255(2) to the definition of a discharge.

Following this Response to Comments document for DMGP, is the Response to Comments that were received addressing all the general permit modifications and re-issuance. General comments pertained to all six general permits or were submitted as a cover letter not related to a specific general permit.

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 Copel and 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.

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 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.