

**ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM
GENERAL PERMIT FOR STORMWATER DISCHARGES
FROM PHASE II MUNICIPAL SEPARATE STORM SEWER SYSTEMS
TO PROTECTED SURFACE WATERS**

**Permit No. AZG2021-002
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 September 30, 2021 issuance of the Arizona National Pollutant Discharge Elimination System (AZPDES) Phase II Municipal Separate Storm Sewer System (MS4), No. AZG2021-002, 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 Phase II MS4 permit authorizes stormwater pollutant discharges of pollutants from small municipal separate storm sewer systems (MS4s) in Arizona to Protected Surface Waters, pursuant to federal conditions in 40 CFR § 122.34 and A.R.S. Title 49 Chapter 2, Article 3.1 *et seq.* State requirements for discharges to non-WOTUS protected surface waters 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 Phase II MS4 is applicable within the State of Arizona, except for Indian Country.

The public notice (PN) for the reissuance of the Phase II MS4 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.

Permit Section 1 - Coverage

Comment 1A: received from Gust Rosenfeld “The Coalition” and Maricopa County, via letter on July 29, 2021: In defining the scope of coverage under this General Permit, this subpart [1.1] should cite to 40 CFR 122.32(a)(1), which defines the portion of a small MS4 that is subject to regulation under the NPDES storm water program. Only that portion of a small MS4 that is located within an urbanized area is regulated.

Response 1A: ADEQ agrees that 122.32(a)(1) provides additional clarity for MS4s and the urbanized areas that are regulated. As such, permit part 1.1 has been revised to include reference to this regulatory citation "...Only that portion of a small MS4 that is located within an urbanized area is regulated."

Comment 1B: 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 1B: ADEQ agrees and has added the following language to the Phase II MS4 permit: *“This permit is not authorized for use by sites with stormwater discharges associated with MS4s 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 1C: received from the City of Prescott via Konveio on June 29, 2021: In rural areas, newly annexed areas are often undeveloped land that would not be considered urbanized areas [permit part 1.2(1)] in the current or next iterations of the census. AZPDES coverage in these areas would better be met via CGP. MS4 coverage should be limited to census defined urbanized areas.

Response 1C: Urbanized Areas (UA) are defined by the U.S. Bureau of Census and are designated based on criteria established by the EPA. Areas of annexed land that are part of an urbanized area are therefore subject to MS4 regulation. Additional information on urbanized areas can be found at: <https://www.epa.gov/npdes/stormwater-phase-ii-final-rule-fact-sheet-series>.

Comment 1D: received from Copeland Law via Konveio on July 30, 2021: Suggest adding the following clarification sentence under this eligibility section [1.2]: Sites excluded pursuant to A.R.S. 49-221(G)(2) need not secure a permit under this section.

Response 1D: This permit spells out requirements for which municipalities are required to obtain permit coverage, but it does not attempt to list every situation where the permit is not required. No change was made to the permit.

Comment 1E: received from Gust Rosenfeld “The Coalition” via letter on July 29, 2021: To the extent the Permit remains unchanged [permit part 1.2(3), the Permittees request that the compliance period be extended to three (3) years, consistent with the requirements of 40 CFR 122.42(d) and 40 CFR

122.47(a)(3)(ii).) Requiring full compliance within one year would impose an undue financial and resource hardship.

Response 1E: The references listed in the comment are specific to the first Phase II permits that were issued in the early 2000s. As the majority of requirements in the 2021 permit are not new requirements to the MS4, additional time is not needed for an MS4 to meet compliance. As has always been the case, if a MS4 has concerns related to a specific permit requirement, ADEQ encourages them to reach out for assistance.

Comment 1F: received from Gust Rosenfeld “The Coalition” via letter on July 29, 2021:

Should the last paragraph of this subpart [1.3] be paragraph number 1.3.6? If so, please revise accordingly.

Response 1F: ADEQ's intent for the last line of part 1.3 was to bring this topic forward for emphasis and was not a formatting error. However, as many have commented on this, ADEQ has formatted the last line (“*New or expanded point-source discharges directly to waters classified as an outstanding Arizona water are not authorized*”) as 1.3(6) for clarity.

Permit Section 2.0 Authorization

Comment 2A: received from Gust Rosenfeld “The Coalition” and Maricopa County, via letter on July 29, 2021: The 60-day timeframe is inconsistent with Part 4.0(1) which allows one year for the update of the Stormwater Management Program (“SWMP”). The 60-day requirement is unreasonable. Subpart 2.0(1) should be revised to be consistent with Part 4.0 and to allow one year for the update of the SWMP.

Response 2A: ADEQ agrees and has modified the language in 2.0(1) to allow one year for existing permittees to update their SWMP, as necessary.

Comment 2B: received from Yavapai County via Konveio on June 22, 2021: Please allow two (2) years for SWMP update [permit part 2.0(1)] after US Census data are released and WOTUS definition has been revised.

Response 2B: This is an AZPDES general permit which is reissued every five years. While ADEQ is aware of the update to census data and potential changes to the WOTUS rule, there are no specific time frames identified. ADEQ cannot justify delaying the permit based on federal actions with unknown timelines. No change was made to the permit.

Comment 2C: received from Yavapai County via Konveio on June 22, 2021: Consider changing [within the first 60 calendar days] to 180 days [in part 2.0(2)]. Also, delay the effective date of permit to a date when the 2020 US Census data have been released and the EPA and USACE have completed their reviews and actions regarding the definition of WOTUS.

Under 6.2 Public Participation and Involvement, the public shall annually be given the opportunity to participate in SWMP reviews, revisions, updates and implementation. This process requires the time necessary to be done well and properly.

Response 2C: ADEQ determined that 60-calendar days is sufficient time for MS4s to submit a Notice of Intent through the myDEQ Permitting/Compliance Portal. In reissuing the 2021 Small MS4 permit, ADEQ changed the permit type from a two-step to a comprehensive type permit, specifically to reduce the time required to submit data to ADEQ. On average, we anticipate the reduction in NOI entry time from over 20 hours per MS4 to less than 2 hours. Keeping the NOI submission window to 60 days is also consistent with the time frame ADEQ has provided for other AZPDES permits to gain coverage under a reissued permit. No change was made to the permit.

Comment 2D: received from the US EPA via letter on July 29, 2021: The draft small MS4 permit requires electronic submittal of notices of intent (NOIs) through myDEQ, including information consistent with the requirements of 40 CFR 122.28(b)(2)(ii) and 40 CFR 127, electronic submittal of notices of termination (NOTs) is not required – but should be for consistency with the regulations.

Response 2D: ADEQ is aware of the EPA electronic reporting requirements and is in the process of building the necessary systems within the myDEQ Permitting and Compliance Portal. The NOI has been updated for this new permit reissuance and a NOT will be put in place prior to the deadline of December 2025.

Permit Section 4.0 - Stormwater Management Program

Comment 4A: received from Yavapai County via Konveio on June 22, 2021: Consider changing the SWMP review/update frequency to biennial, or as needed after a major policy change [permit part 4.0(3)].

Response 4A: Pursuant to 40 CFR 122.34(d)(3)(iv) "Any changes made during the reporting period to the permittee's stormwater management program" shall be captured annually as part of reporting requirements," therefore this requirement stands and no change was made to the permit.

Comment 4B: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Improper Request for "Mapping Process" [permit part 4.1(2)] The permit calls for the Storm Water Management Program to include "the process and schedule for creating and maintaining an up-to-date map that includes, at a minimum, the storm sewer system, outfalls, and surface waters." In contrast, 40 CFR 122.34(b)(3)(i)(A) requires small MS4s to develop a storm sewer system map, but does not include a requirement to provide "the process and schedule for creating and maintaining" the map. The requirement to provide such additional information is not listed in the federal code. This permit requirement is therefore beyond those authorized by the federal regulations, without any specific authorization under Arizona law, and should be removed from the permit.

Response 4B: Per the Clean Water Act 402(p)(3)(B)(iii), ADEQ must issue MS4 permits that require controls to reduce the discharge of pollutants to the maximum extent practicable (MEP), including management practices, control techniques and system, design and engineering methods, and such other provisions as the State determines appropriate for the control of such pollutants. The regulations for small MS4s at 40 CFR 122.34(b) create a framework, with six Minimum Control Measures, however that regulation is not a "permit by rule." ADEQ cannot satisfy NPDES permit issuance requirements by reprinting the Code of Federal Regulations in an AZPDES permit. This permit is an appropriate expression of the "maximum extent practicable" standard prescribed in statute. Therefore, this permit requirement is no more stringent than the federal regulations.

A requirement to document on the Stormwater Management Program (SWMP) the "the process and schedule for creating and maintaining" the map of the MS4 is a reasonable requirement to ensure MS4 maps are kept up to date so IDDE efforts can be accurately and efficiently deployed. Additionally, ADEQ must report on "The date of the most recent storm sewer system map showing the location of all outfalls and names and locations of all waters of the U.S. that receive discharges from those outfalls" under 40 CFR Part 127 Appendix A. This Permit requirement aligns with that EPA reporting requirement.

Comment 4C: received from the City of Surprise via Konveio on July 27, 2021: This requirement [permit part 4.1(11)] is a repeat of the information requested in section 4.1(6)(a). If not, then more clarification is needed here.

Response 4C: In permit part 4.1(6)(a), the identification of personnel is related directly to a specific best management practice. In 4.1(11), the identification of personnel is related to the overall program. While there may be overlap, the identification is used for different reasons. No change was made to the permit.

Comment 4D: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: To improve clarity, this section [permit part 4.1] should be amended by adding language stating that this requirement applies only "within the urbanized area," consistent with the limitations of 122.32(a)(1).

Response 4D: ADEQ agrees and modified permit part 1.1 to include this language. No change was made to part 4.1 of the permit.

Comment 4E: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Requiring a "description of any other practices to achieve compliance..." [emphasis added] is overly broad and should be deleted [permit part 4.1(5)]. This is extremely broad and vague; and, if one practice is missed, it places the Permittee in noncompliance.

Response 4E: ADEQ agrees and has removed permit part 4.1(5) from the permit.

Comment 4F: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Please be consistent with terminology [permit part 4.2]. Substitute "program" for "plan".

Response 4F: Permit part 4.0 and subparts discuss the Stormwater management program. Documenting all the requirements of the program becomes the "plan." No change was made in the permit.

Permit Section 5.0 - Water Quality Standards

Comment 5A: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021 on Permit Section 5.1: ADEQ has exceeded its authority in this subpart by effectively requiring Permittees to expend resources to conduct data gathering for ADEQ. Title 33 of the Clean Water Act, section 402(p)(3)(B)(ii) and (iii) provides, in relevant part, that permits for discharges from municipal storm sewers: "(ii) shall include requirements to effectively prohibit non stormwater discharges into the storm sewers; and (iii): shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of **such** pollutants." [Emphasis added.] The federal law does not require the Permittee to take on this burden with regard to non-stormwater discharges. All requirements for pollutant characterization that are not specifically related to a discharge of known pollutants to an impaired water, not-attaining water or an OAW, should be deleted.

Response 5A: ADEQ disagrees that the requirements of the permit exceed the Agency's authority. The authority is stated in the federal regulation, note to 40 CFR 122.34(d)(1), "The NPDES permitting authority may determine monitoring requirements for the permittee in accordance with State/Tribal monitoring plans appropriate to the watershed." Permit part 5.1 simply states that ADEQ has the authority to require analytical monitoring, should there be concerns regarding a discharge that may affect surface water quality standards. No change was made to the permit.

Comment 5B: received from the City of Surprise via Konveio on July 27, 2021: Add the acronym in parentheses at the end of the title [permit part 5.2] or the first time used in the document for clarification.

Response 5B: ADEQ agrees and has made the following revision to part 5.2: "Surface Water Quality Standards (SWQS)"

Permit Section 6.0 - Minimum Control Measures

Comment 6A: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Subparts 6.1(1)(a) and 6.1(2)(1), both identify homeowner associations as targeted groups. Please only include homeowner associations in 6.1.2.1

Response 6A: ADEQ agrees and has removed "homeowner associations" from permit part 6.1(2)(1) as a target audience.

Comment 6B: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Subpart 6.1(3), requiring the Permittee to "identify methods that it will use to evaluate the effectiveness of the educational messages and overall education program," is overly broad and beyond the scope of ADEQ's authority. 40 CFR 122.34(b)(1)(i) only requires that a Permittee distribute educational materials to the community, conduct outreach activities about the impacts of stormwater discharges on water bodies, and inform the public about the steps they can take to reduce pollutants in stormwater runoff. Requiring the Permittee to ensure that the target group received, digested, and is implementing the information is well beyond the scope of the wording set forth at 40 CFR 122.34(b)(1), and would impose an untenable financial and resource burden on the Permittee. Section 122.34(b)(1) does not impose a requirement to evaluate effectiveness or monitor changes in behavior of the community. This vague, ambiguous objective is beyond the scope of authorized requirements, and should be deleted from the permit.

Response 6B: EPA regulations under 40 CFR 122.34(d)(1) states, "operators of regulated small MS4s are required to evaluate the appropriateness of their identified BMPs and progress toward achieving their identified measurable goals. The purpose of this evaluation is to determine whether or not the MS4 is meeting the requirements of the minimum control measures." The requirement to evaluate effectiveness of outreach and education complies with this regulation, and ensures municipal resources are effectively used. No change was made to the permit.

Comment 6C: received from the City of Surprise via Konveio on July 27, 2021: Clarification is needed on the number of target groups and message changes are needed within the permit term. Is it a different one every year, same for permit, etc.

Response 6C: The permit states, *"At a minimum, the permittee shall provide public education, outreach to at least one (1) target group, and focus its efforts on conveying relevant messages using one (1) or more appropriate topics listed below during each year of the permit term."* AZPDES permits are issued for 5 years and the permittee has the option of choosing a different target group and topic each year of the permit term.

Comment 6D: received from Maricopa County via Konveio on July 8, 2021: Is this requirement [permit part 6.1(3)] in 40 CFR 122.34(b)(2)? Would ADEQ consider delaying this requirement until best practices and examples can be developed?

Response 6D: This requirement relates to 40 CFR 122.34(b)(1) which discusses the implementation of a public education and outreach program on stormwater impacts to the MS4. Identifying methods to evaluate the effectiveness of the education and outreach program ensures efforts by the municipality are effective. The municipality has significant discretion on how to evaluate that effectiveness. This is not a new requirement therefore, existing permittees must implement all requirements within one year of the effective date of the permit, as identified in 1.2(3). New permittees will have two years from the date of coverage of the permit to implement these requirements. No change was made to the permit.

Comment 6E: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Subpart 6.2(1) of the permit appears to be requiring a public notice for the annual report. This requirement goes beyond what is required under local public notice rules. The language of the permit should be revised to state only that, "All public involvement activities shall comply with state and local public notice requirements. The SWMP and all annual reports shall be available to the public." The third sentence of 6.2(1) should be deleted in its entirety.

Response 6E: Section 6.2.1 is not a requirement to "public notice" the SWMP and annual report, merely a requirement that they be made available to the public. The requirement to post the annual report and SWMP on the MS4s website is not a new requirement and ADEQ does not believe this requirement adds undue burden to the permittee. No change was made to the permit.

Comment 6F: received from the City of Prescott via Konveio on June 29, 2021: If you're going to require compliance with State public notice requirements [permit part 6.2(1)] please provide a reference for them or define Public Notice.

Response 6F: The intent of 40 CFR 122.34(b)(2) "*All public involvement activities shall comply with state and local public notice requirements.*" is to ensure that the general public has been given the notice and the opportunity to provide comment on the actions taken by the MS4 to reduce pollutants in stormwater that flows into protected surface waters. For reference, ADEQ's public notice requirements for general permits can be found at R18-9-A907(B). No change was made to the permit.

Comment 6G: received from Maricopa County via Konveio on July 8, 2021: Would it be possible to add clarifying language to this section [permit part 6.2(1)] to ensure it is not interpreted as a public meeting?

Response 6G: The phrase, "shall comply with state and local public notice requirements" in permit part 6.2(1) is from 40 CFR 122.34(b)(2) and does not contain the words "public hearing" or any references to public hearing requirements and there is no expectation to hold a public hearing to communicate updates. No change was made to the permit.

Comment 6H: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Also, in Subpart 6.2, Section 6.2(5) provides that the permittee shall "document the details of the public involvement and participation strategy." To follow the wording of the federal regulations and avoid confusion, the word "program" should be used instead of the word "strategy," as set forth in 40 CFR 122.34(b)(2).

Response 6H: ADEQ agrees and has replaced strategy with program. Permit part 6.2(5) is as follows: "The permittee shall document the details of the public involvement and participation program in the SWMP."

Comment 6I: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021; and Yavapai County via Konveio on June 22, 2021: Subpart 6.3(1) calls for annexed areas, and urbanized areas impacted by the Decennial Census, to be updated within 1 year of the effective date of the permit. Due to significant growth in many municipalities, Buckeye and Queen Creek for instance, the extreme volume of work required to complete the mapping and implementation of compliance measures of the newly annexed and urbanized areas could bankrupt the program funding, as well as cause a significant drain on staff. The Towns, Cities and Counties request that, pursuant to 40 CFR 122.42(d), in compliance with 40 CFR 122.47(a)(3)(ii), and with the authority allowed the state in 40 CFR 122.34(a), that new areas be considered in compliance by providing an interim schedule of compliance within a three-year period. This schedule could be updated with each annual report, with a minimum of 33% annually. Please adjust the wording to indicate municipalities will have up to three years to implement mapping updates from the effective date of the updated urbanized area from the Decennial Census and from annexation.

Response 6I: ADEQ understands that the timing of the reissuance of this permit may cause concern, relative to the 2020 Census and the potential for an increase in "Urbanized Areas (UAs)." ADEQ agrees to this request and has revised the permit to indicate that MS4s that have an increase in UA as a result of the 2020 Census, have three (3) years to complete this mapping. Mapping must be completed, at a minimum of 33% each year (permit years 1-3) and will be updated in the annual report. Supporting documentation should be maintained in the SWMP.

Comment 6J: received from Yavapai County via Konveio on June 22, 2021: Will ADEQ provide a mechanism, perhaps new EMAPS layers by which to know the location of other permit areas, including other MS4s?

Response 6J: ADEQ will implement a layer on EMAPS to include the 2020 Urbanized Areas and Municipal boundaries, once that data is available from the U.S. Census Bureau. Overlaying the Urbanized Areas with city boundaries in EMAPS will give the location of permitted areas.

Comment 6K: received from Maricopa County via Konveio on July 29, 2021: The existing Phase II permit holders have already created and continue to maintain system maps [permit part 6.3(1)]. If this is intended for new permittees, it should be clarified as such.

Response 6K: ADEQ understands that "mapping" a storm sewer system is dynamic. The permit requirement in part 6.3(1) is not new to existing permittees and providing one (1) year from the effective date of this permit to review and update existing maps should not impose a burden on the existing MS4s. The last two paragraphs of this part identify timeframes for new and existing permittees so there should be no question in the future, related to the completion of this requirement.

Comment 6L: received from the City of Surprise via Konveio on July 27, 2021: Do the non-stormwater discharges need to be listed in the municipality ordinance [permit part 6.3(6)] or can we reference the permit document or state law reference to include the list as amended?

Response 6L: This Permit requires the municipality to develop, implement, and enforce a Stormwater Management Program (SWMP), which includes adoption and implementation of local ordinance(s) or other regulatory mechanism(s) that provide adequate enforcement procedures to satisfy the requirements of this Permit. A municipality may incorporate by reference the permit section, so long as that ordinance is enforceable.

Comment 6M: received from Yavapai County via Konveio on June 22, 2021: Permit part 6.3(6) Non-Stormwater Discharges has been reworded. Has the spirit of that paragraph changed?

Response 6M: No, the intent is the same. Typically, the non-stormwater discharges listed in part 6.3(6) of the permit are not considered to be significant sources of pollutants. However, if a permittee determines that one of the discharges results in a significant contribution of pollutants, it is the permittees responsibility to treat the discharge as illicit and to respond accordingly.

Comment 6N: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Subpart 6.3(7) requires visual monitoring as a Best Management Practice ("BMP"), including wet weather and dry weather monitoring. Based on experience, wet weather monitoring is a wasteful activity. This onerous requirement should be removed.

Response 6N: Visual monitoring in part 6.3(7) is a permit requirement, not a best management practice. Please note that in the 2016 Small MS4 permit, reporting of wet weather visual monitoring was also a requirement. In this permit, ADEQ has removed the reporting requirement so that the MS4 can determine when to visually monitor outfalls. ADEQ does not feel that wet weather visual monitoring is a wasteful activity. If the permittee does not actually visit the outfall, the permittee cannot fully determine what illicit discharges may be occurring and is not managing their Illicit Discharge and Detection Elimination (IDDE) Program to its fullest potential.

Comment 6O: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Subpart 6.3(7)(a) requires written procedures for conducting visual monitoring of outfalls, and sets forth minimum requirements for such procedures. Please address how a Permittee with no direct outfalls, for instance, those that utilize Field Screening Points, can achieve compliance with this requirement, and address whether those Permittees are exempt from this requirement.

Response 6O: If a MS4 has no outfalls, only interconnections with other MS4s, then they may choose field screening points in lieu of outfalls to meet the visual monitoring requirements. Language from the 2016 Small MS4 Permit has been added to 6.3.7.d, stating that for municipalities with fewer than five outfalls, screening points shall be at locations where stormwater leaves the Small MS4's permitted area including locations where stormwater may discharge to another MS4 or other conveyance.

Comment 6P: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Subpart 6.3(7)(b) requires a Permittee to visually monitor at least 20% of all outfalls each year, and that all outfalls be monitored at least once within the 5-year permit term. Please address how a Permittee with no direct outfalls, for instance, those that utilize Field Screening Points, can achieve compliance with this requirement, or whether those Permittees are exempt from this requirement. Furthermore, it has been found that representative screening is sufficient for knowing the types of materials that may be found at outfalls from similar land use types (based on dry weather screening). The Permittees request that sampling of a representative percentage of each land use type be accepted instead of 20% of all outfalls each year.

Response 6P: ADEQ modified the language in 6.3.7.b to remove the requirement that all outfalls be visually monitored once in the five year permit term. The requirement to screen 20% of total outfalls remains, but the municipality can prioritize or de-prioritize based on local knowledge or land use type. Additionally, ADEQ added language to permit part 6.3.7 to address those permittees with fewer than (5) five outfalls, allowing for field screening points to be used in lieu of outfalls to meet the visual monitoring requirements.

Comment 6Q: received from the City of Peoria via Konveio on June 24, 2021: Does the draft eliminate the 5 specifically identified outfalls and replace it with the requirement to perform visual monitoring of 20% of all outfalls per year [permit part 6.3(7)]?

Response 6Q: The requirement to report visual wet weather monitoring data at five representative locations was removed from the 2021 draft permit. The requirement to visually monitor 20% of outfalls is a current annual requirement and does not replace the wet weather monitoring, it is simply a different requirement.

Comment 6R: received from the City of Surprise via Konveio on July 27, 2021: Will the monitoring required in this section [permit part 6.3(7)], be credited to the monitoring required in Section 7?

Response 6R: No. The requirements for visual monitoring in part 6.3(7) are based on observations of the outfall location for color, odor, sheen, etc. in the discharge. The Stormwater Characterization Monitoring requirements in part 7.0 are for taking a sample of the discharge and having a laboratory characterize the sample for the list of EPA's priority pollutants. These two monitoring types provide different data and are not interchangeable.

Comment 6S: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Subpart 6.3(10), "Reporting Non-Permitted Dischargers," requires Permittees to implement a program to identify facilities and activities that discharge to the MS4 without a permit. 6.3(10)(b) requires the Permittee to report suspected illegal dischargers on a monthly basis. No such reporting obligation exists at the federal level. Thus, this requirement appears to be beyond those authorized by the federal regulations, without any specific authorization under Arizona law. In addition, the obligation to undertake monthly reporting on an ongoing basis is burdensome. This obligation should be deleted from the proposed permit. The AZPDES administering agency, ADEQ, is the entity that has the authority to seek such information. ADEQ should not impose these financial requirements on the Permittees of this general permit.

Response 6S: A facility discharging into an MS4 that should, but does not, have AZPDES permit coverage for that discharge is an illicit discharge to the MS4 (Illicit discharge is defined at 40 CFR 122.26(b)(2) as any discharge to a municipal separate storm sewer that is not composed entirely of storm water, except discharges pursuant to an NPDES permit). The permit requirement to report such a facility is a simple countermeasure that will help ADEQ and the municipality stop the illicit discharge expeditiously. ADEQ disagrees that sending a monthly email with information on these "non-filers" is burdensome. Please note that if there are no non-filers then no monthly report need be made. No change was made to the permit.

Comment 6T: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Subpart 6.4(2)(f) references specific construction site inspection frequencies which are overly burdensome and place a financial and resource drain on Permittee staff. 40 CFR 122.34(b)(4) requires the MS4 to "develop and

implement and enforce a program," it does not require the frequency of inspections that are being imposed by this permit. By providing such specificity in inspection frequencies, ADEQ is overstepping its authority.

Response 6T: Per the Clean Water Act 402(p)(3)(B)(iii), ADEQ must issue MS4 permits that require controls to reduce the discharge of pollutants to the maximum extent practicable (MEP), including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. This permit is an appropriate expression of the "maximum extent practicable" standard prescribed in statute. The regulations for small MS4s at 40 CFR 122.34(b) create a framework, with six Minimum Control Measures, but are not a "permit by rule." Therefore, this permit requirement is not more stringent than the federal regulations.

Comment 6U: received from Yavapai County via Konveio on June 22, 2021: 6.4(2)(f) is a new requirement for Construction Activity Stormwater Runoff Control. Difficult to say whether County inspectors would be able to safely access a construction site within 24 hours after a significant storm event. Additionally, this is a large, rural County that may not have the staff needed to inspect every construction site within 24 hours. Please consider creating requirements specifically for Rural Small MS4s (throughout this permit).

Response 6U: The requirement for a MS4 to inspect construction sites is not new to this permit. The required frequency of inspections was added to this permit to ensure that discharges from construction sites to impaired and not-attaining waters do not contain pollutants that are common to construction (debris, trash, etc.). ADEQ understands that MS4s may not be able to inspect each construction site for each rain event, hence compliance is met if 80% of sites are inspected annually. No change was made to the permit.

Comment 6V: received from Maricopa County via Konveio on July 9, 2021: Has ADEQ evaluated the impact of increased inspection requirements on permittees and regulated industry? Will additional guidance be provided to determine which construction sites are discharging to an impaired or non-attaining protected surface water? Without clarity, one may assume that all discharges eventually make it to a surface water, which would mean that this requirement applies to most private and public construction.

Response 6V: This Permit requires the municipality to inspect only those construction sites that discharge into its MS4. Creating a map of the MS4 will help municipalities understand the scope of their inspection requirements. ADEQ has changed the Permit to require weekly inspections of construction sites only if the site discharges to waters impaired or non-attaining for turbidity or Suspended Sediment Concentration (SSC). Additionally, language requiring only quarterly inspection of sites five acres or less has been added. Requiring inspections at a regular frequency is part of how ADEQ meets "comprehensive" MS4 permit requirements (as noted by EPA in their comments on the permit). In permit part 6.3(1)(c) the permittee is required to have an up-to-date map of the MS4, including the name and location of all protected surface waters within the municipality. Therefore, the permittee should know of the impaired/not-attaining/OAW waters receiving discharges from their regulated areas. In permit part 6.4(2)(b) Construction Activity Stormwater Runoff Program Components, the permittee is required to implement an inventory of all construction activities that disturb (1) one or more acres within their MS4. With this information, the MS4 should be able to determine which sites qualify for weekly inspections as detailed in 6.2(f)(1). No change was made to the permit.

Comment 6W: received from Maricopa County via Konveio on July 22, 2021: We request that Section 6.4(2)(f) be amended to include a distance between a construction site and a protected water. Without this additional information, a permittee may imply that potentially all construction sites within their municipality must meet the requirements of this section.

Response 6W: ADEQ has revised the existing language as follows: Sites (1) one acre or larger that are within 1/4 mile of an impaired or not-attaining protected surface water shall be inspected every week, and within 24 hours of the occurrence of each storm event of 0.5 inches or greater in a 24 hour period.

Comment 6X: received from the City of Surprise via Konveio on July 27, 2021:

How will this [permit part 6.4(4)] be tracked? The NOI requires a designated representative for the site, would this meet the requirement or is additional education/training needed? Are we duplicating tracking of citizen input under MCM#2?

Response 6X: Permit part 6.4(4) discusses Construction Activity Operator Education and Public Involvement. This is not a new permit requirement. Typically, MS4s provide education and outreach through flyers distributed during construction plan review; or at job site meetings; or through training events, which are all "trackable" events. This requirement serves a dual purpose - to enhance the outreach efforts in MCM 1 as well as to ensure that construction operators understand the consequences of stormwater discharges from their sites into the MS4.

Comment 6Y: received from Yavapai County via Konveio on June 23, 2021: Please add language in the permit to describe what should be considered "new" development and redevelopment, i.e. 6 months, 1 year, etc.

Response 6Y: ADEQ has added information regarding post construction new development and redevelopment in the 2021 Small MS4 Fact Sheet, including links to helpful documents from the US EPA.

Comment 6Z: received from the City of Surprise via Konveio on July 27, 2021: What is the minimum requirement for post construction BMPs inspections and follow-up? 1x per permit term: 2x per permit term, all post-construction BMPs every year, etc.?

Response 6Z: In the 2021 Small MS4 permit, there are no minimum requirements for post construction BMP inspections and follow-up.

Comment 6AA: received from the US EPA via letter on July 29, 2021: In our earlier comments, we recommended additional permit requirements in several areas. However, we had also recommended that quantitative post-development runoff requirements be included in section 6.5 of the permit such as on-site management of the runoff from a particular design storm. We had noted that many of the small MS4s are in the Phoenix area, and we suggested requirements similar to those in the 2020 Phoenix MS4 permit (on-site retention of the 100-year, 2-hour storm). For small MS4s in the Tucson/Pima County area, requirements similar to the 2020 MS4 permits for Tucson/Pima County could be used. For other areas of the State, the requirements in the draft small MS4 permit (section 6.5(2)) could be used – with the caveat that the design standards to be developed would be quantitative. Such requirements would better align the permit with the joint requirements of 40 CFR 122.34(b)(5) for post-construction controls and 40 CFR 122.34(a) for “clear, specific and measurable” requirements.

Response 6AA: Many small MS4s have adopted quantitative post-construction standards similar to the Phase I MS4s, municipalities that have been under MS4 permit coverage since the early 2000s. ADEQ does not have sufficient information at this time to prescribe a state-wide quantitative post-construction standard for small MS4s. However, new monitoring requirements in the small MS4 permit may provide information about whether a quantitative post-construction standard is necessary to meet the MEP standard in Arizona in future permit issuances.

Comment 6AB: received from the City of Surprise via Konveio on July 27, 2021: Could a definition of what the State calls a Site Plan be provided? This definition should include the documents that are acceptable for tracking post construction BMPs. Different Land Use processes can provide this information so clarification is needed on which process you would like to have reviewed and tracked.

Response 6AB: The components of site plan review are identified in permit part 6.4(2)(c) and are the same for construction and post-construction. ADEQ added a note in part 6.5(3) to include "see permit part 6.4(2)(c) for site plan review requirements."

Comment 6AC: received from Yavapai County via Konveio on June 23, 2021: Is the intent here to have MS4 managers drive all County streets, roads, and highways to inspect for pollution at risk related intervals, same as for facilities and activities, and keep inspection records under Good Housekeeping?

Response 6AC: The intent of Section 6.6 Pollution Prevention and Good Housekeeping is to have the municipality develop and implement an operations and maintenance program that addresses polluted stormwater runoff. That program must have control measures for reducing or eliminating the discharge of pollutants from streets, roads, highways. A program could include, for example, street sweeping, regular vactoring of catch basins, and anti-littering campaigns along public roadways.

Comment 6AD: received from Maricopa County via Konveio on July 9, 2021: What is the definition of a facility/activity? What is the definition of a high, medium, and low risk facility? We recommend adding guidance on how to define risk categories.

Response 6AD: In Appendix A of this permit, a facility is defined as *"any "point source" or other facility (including land or appurtenances thereto), that is subject to regulation under the AZPDES Program."* See permit part 6.6(1)(a-g) for a listing of possible facilities/activities. In determining risk, each MS4 must determine what facilities/activities have the highest risk of discharging pollutants to a protected surface water. Please see additional information in the 2021 MS4 Fact Sheet. This is not a new permit requirement and existing MS4s have already created an inventory and priority risk analysis for facilities in their regulated area.

Comment 6AE: received from Maricopa County via Konveio on July 9, 2021: Are facilities that are managed by another county department under a separate MSGP with the state, included in this requirement [permit part 6.6(2)(a)]?

Response 6AE: Facilities that are covered by an AZPDES MSGP should not be included in the MS4s inventory of facilities, as the MSGP has its own requirements for eliminating pollutants in discharges to protected surface waters. However, if a facility is owned or operated by the MS4 and does not have MSGP coverage, it must be included in the MS4 regulated area and inventory.

Comment 6AF: received from Yavapai County via Konveio on June 23, 2021: Please consider 1 year (high, medium), and 2 year (low) inspection frequencies [permit part 6.6(2)(c)] for large, rural counties.

Response 6AF: The requirement to inspect high risk facilities quarterly is based on their risk of impact to protected surface waters. The higher risk facilities your municipality has, the more quarterly inspections must occur; the permit scales up or down depending on how many such facilities as municipalities own or operate. Though a county MS4 may be large, that does not change the risk of a facility. This requirement applies only to facilities that discharge to the MS4. Mapping the MS4 will help the County to understand the scope of their inspection requirements. As the 2021 Small MS4 Permit is a "general permit," ADEQ is not inclined to separate requirements between the various types of MS4s (cities, towns, universities, hospitals). However, as identified in permit part 2.4, "pursuant to A.A.C. R18-9-C902, a person [MS4] may request ... to obtain coverage under an individual permit." MS4s interested in discussing an individual permit are encouraged to contact ADEQ prior to obtaining a NOI for this permit. No change was made to the permit.

Comment 6AG: received from the City of Surprise via Konveio on July 27, 2021: Is the State requiring individual O&M Manuals for each site [permit part 6.6(2)(g)] or can one O&M Manual be created with sections that address the individual needs of each site?

Response 6AG: One O&M manual could be created with sections that address the individual needs of each site, so long as the permittee describes management of those sites and maintenance activities, maintenance schedules, and long-term inspections procedures. The O&M manual must be detailed enough that in audit an MS4 can show how they applied that manual at a particular site.

Comment 6AH: received from the US EPA via letter on July 29, 2021: In our comments on the early draft permit, we had recommended that ADEQ include a requirement for a detailed trash management plan (with measurable requirements) to reduce discharges of trash from the MS4s, given the growing concerns regarding trash in receiving waters and the increasing attention this issue is receiving at the EPA such as the Trash Free Waters program. We did not find such a requirement in the revised permit and we reiterate our previous comment.

The Clean Water Act (section 402(p)(3)(B)(iii)) requires discharges of pollutants from MS4s to be reduced to the MEP, and the term “pollutant” is broadly defined in NPDES regulations (40 CFR 122.2), and includes items such as “solid waste” and “garbage.” The guidance accompanying the small MS4 stormwater regulations at 40 CFR 122.34(b)(6) also specifically mentions “floatables” and other debris as pollutants to be controlled in MS4 discharges. However, few specific requirements related to trash can be found in the permit itself. Consistent with our above recommendation for clear, specific and measurable requirements in MS4 permits, we recommend that ADEQ consider adding a requirement to the permit for the development and implementation of a specific plan (with measurable requirements) to reduce discharges of trash from the MS4s.

Response 6AH: Existing permit part 6.6(2)(g) requires the MS4 to “*develop maintenance activities, maintenance schedules, and long-term inspections procedures for structural and non-structural stormwater controls to reduce floatables, trash, and other pollutants discharged from the MS4,*” and ADEQ believes this requirement is sufficient at this time. No change was made to the permit.

Comment 6AI: received from the US EPA via letter on July 29, 2021: Although NPDES regulations do not include a requirement for a specific item called an “AMP,” the regulations at 40 CFR 122.41(e) do require “proper operation and maintenance” of all facilities and systems for controlling pollutant discharges that are used by a permittee to achieve compliance with permits. As noted in our earlier comments, we consider AMPs to be a useful tool for achieving more consistent performance of the pollutant control systems used to achieve compliance with permits, thereby providing improved protection of the environment, while also minimizing the costs associated with the operation of these systems.

We also recognize that AMP requirements were not included in ADEQ’s recently reissued MS4 permits for Phase I MS4s in late 2020 (e.g., for the City of Phoenix) in Arizona. ADEQ had pointed out that it has been encouraging AMPs outside the framework of the permits. As an alternative to requiring an AMP in the small MS4 permit, we suggest that the fact sheet describe ADEQ’s efforts to ensure planning efforts by permittees in Arizona that are comparable to AMPs.

Response 6AI: ADEQ chose not to include specific requirements for an Asset Management Program (AMP) in the construct of a general permit. Existing permit part 6.6(2) requires the MS4 to develop an inventory of facilities, prioritize those facilities based on the types of pollutants stored/found at each facility and perform inspections on each facility, based on priority. ADEQ is aware that many of the MS4s use software applications to manage their assets and will provide outreach to the MS4s on this topic after the permit is issued. No change was made to the permit, however, ADEQ has included information regarding AMPs in the 2021 Small SM4 Fact Sheet.

Comment 6AJ: received from the US EPA via letter on July 29, 2021:

A retrofit plan is a recommendation of the EPA’s 2010 MS4 Permit Improvement Guide (EPA 833-R-10-001). Support for a retrofit plan in the permit can also be found in the Phase II stormwater regulations at 40 CFR 122.34(a) through (c) that require controls to reduce pollutant discharges in runoff to the MEP, to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act.

We also recommend a focus on green infrastructure controls for any retrofit projects since the water quality benefits of green infrastructure for new developments (and other benefits such as groundwater recharge) would also result from the retrofit of such controls in existing developed areas.

Response 6AJ: In this 2021 Small MS4 permit, ADEQ is requiring the MS4s to implement Stormwater Characterization Monitoring for the first time. As that data becomes available at the end of permit year two, ADEQ will evaluate the data and recommend a retrofit plan as a countermeasure for MS4s that have exceedances of surface water quality standards identified by this monitoring. No change was made to the permit.

Permit Section 7.0 - Monitoring Requirements

Comment 7A: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021:

- The requirements of Part 7.0 and its subparts are confusing and lack clarity regarding the scope of applicability. It is unclear which provisions are applicable to all small MS4 systems and which are applicable to those that discharge to impaired, not attaining, or OAWs.
- As stated above, ADEQ does not possess the legal authority to impose characterization requirements on a small MS4 system; therefore, Appendix B and Subpart 7.1.b should be deleted.
- Furthermore, regarding Note #2 of Appendix B, ADEQ requires the collection of samples "manually"; if ADEQ can provide the legal authority for Part 7.0, characterization, please allow auto sampling as it is a safer and more effective means of sampling under wet weather conditions.
- Furthermore, vague and/or overly broad terms like, "assess the overall health...", should be deleted from the permit (Subpart 7.1.d) Such terms make it impossible for a municipality to comply with the requirement and may result in an abuse of discretion if enforcement is attempted by ADEQ.

Response 7A:

- The first paragraph of permit part 7.0 states "All MS4s are required to perform Stormwater Characterization Monitoring as set forth in this section. Additionally, MS4s that have stormwater discharges to impaired or not-attaining waters, OAWs, or waters with TMDLs shall monitor for the impairments, as outlined in this section."
- 40 CFR 122.34(d)(1) states "*the permit must require the permittee to evaluate compliance with the terms and conditions of the permit, including the effectiveness of the components of its storm water management program, and the status of achieving the measurable requirements in the permit.*" The note to paragraph (d)(1) states "*the NPDES permitting authority may determine monitoring requirements for the permittee in accordance with State/Tribal monitoring plans appropriate to the watershed...*" This note allows ADEQ sufficient authority to require analytical monitoring.
- Note 2 of Appendix B has been revised as follows: " The permittee shall collect discrete samples and shall attempt to include the "first flush" (first 30 minutes of stormwater discharge) of a qualifying storm event whenever possible to do so. Auto Sampling equipment may be used, if available."
- Permit part 7.1(1)(d) requires the assessment of the overall health of a waterbody that is impaired/not-attaining or is an OAW. While this may seem overly broad to the general public, permittees that discharge to these waters typically know what to look for to provide an assessment and ADEQ is always willing to provide outreach and training upon request. No changes were made to the permit.

Comment 7B: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021:

- Part 7 of the permit sets forth stormwater monitoring requirements. Subpart 7.2, however, imposes a characterization requirement on all small MS4 systems. The imposition of characterization requirements on small MS4 systems is not authorized. By its terms, 40 CFR 122.26(d) establishes requirements for "large and medium" municipal separate storm sewer discharges. 40 CFR

122.26(d). The requirements in 40 CFR 122.26(d)(2)(iii), which establish certain sampling and characterization requirements for large and medium systems, do not establish authority for the imposition of such sampling and characterization requirements on small MS4 systems. Pursuant to ARS §49-104.A.16 and ARS §49-255.01.B, the imposition of such requirements on small MS4 systems is beyond the scope of ADEQ's authority, and the purported sampling and characterization requirements should be removed from the permit. Furthermore, the imposition of such requirements on small MS4 systems imposes an unreasonable financial and resource burden of the municipality.

- The Imposition of a Requirement to Perform Wet Weather Monitoring is Not Authorized. Similar to Section 7.1, ADEQ lacks the authority in Section 7.2 to require small MS4 systems to perform wet weather monitoring. This requirement is thus beyond the limits of what is required under federal law, and is not specifically authorized by the Arizona legislature. Pursuant to ARS § 49-104.A.16 and ARS § 49- 255.01.B, the imposition of this requirement on small MS4 systems is beyond the scope of ADEQ's authority, and the purported sampling and characterization requirements should be removed from the permit. Similarly, to the extent ADEQ is attempting to incorporate sampling and monitoring requirements for small MS4 systems in order to "set a baseline," or because the ADEQ may find the information useful, this does not provide a basis for including these requirements in the permit, and is similarly beyond the scope of ADEQ's authority.
- To the extent these provisions in Part 7 are cross-referenced and included in other sections of the permit, those sections should be revised to eliminate the cross-reference and requirement. In particular, Section 5.1, regarding Water Quality Based Effluent Limitations, should be revised to remove the reference to Part 7. Section 5.1 cites Clean Water Act 402(p)(3)(B)(iii) as authority for including in the permit provisions that ensure that discharges under the permit do not cause or contribute to a violation of surface water quality standards. This section 5.1, which is focused on pollution reduction and avoidance of surface water quality standards exceedance, does not alter the scope of ADEQ's authority to impose monitoring requirements in the absence of an indication of exceedance of surface water quality standards. As such, the reference to monitoring under Part 7 should be removed from Section 5.1. Similarly, Part 6.3.7 of the permit calls for visual monitoring as a Best Management Practice, including wet weather and dry weather monitoring. The requirement for, and reference to, wet weather monitoring should be removed.

Response 7B: ADEQ disagrees that the monitoring requirements referenced exceed ADEQ's authority. 40 CFR 122.34(d)(1) states "*the permit must require the permittee to evaluate compliance with the terms and conditions of the permit, including the effectiveness of the components of its storm water management program, and the status of achieving the measurable requirements in the permit.*" The note to paragraph (d)(1) states "*the NPDES permitting authority may determine monitoring requirements for the permittee in accordance with State/Tribal monitoring plans appropriate to the watershed...*" This note provides ADEQ sufficient authority to require analytical monitoring.

Comment 7C: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Wet Weather Sampling is Dangerous, Ineffective and Inefficient.

Response 7C: Permit part 7.2(5) Adverse Climatic Conditions states that "*Sampling of a qualifying storm event is not required during adverse climatic conditions,*" such as local flooding, high winds, and electrical storms. If a MS4 determines that attempting to collect samples for analytical monitoring is unsafe, the MS4 may opt to take the sample at another time or use a no discharge indicator code on their DMR for that sampling event. ADEQ does not believe that wet weather sampling is ineffective and inefficient. Wet weather sampling is one of the only ways to capture empirical data to determine the contribution of stormwater pollutants that are discharged from MS4s into Arizona's protected surface waters. No change has been made to the permit.

Comment 7D: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021:

- Beyond the lack of authority for the stormwater sampling requirements in Section 7, wet weather screening is an ineffective method for investigating illicit discharges in the desert environment, and

poses unnecessary safety risks, and should therefore be removed from the permit as a policy matter. Other, far more effective practices exist, such as a dry weather direct inspection program covering all outdoor activities of commercial/industrial properties that discharge to the MS4, mapping of the storm system, dry weather screening, and direct inspection of the right-of-way. Experience has demonstrated that these dry weather Best Management Practices are safer and more effective methods than the proposed wet weather monitoring.

- As set forth in 40 CFR 122.26(d)(2)(iii), USEPA regulations apply these wet weather sampling requirements to large or medium MS4s, assuming larger, more complex stormwater systems with significantly greater flow. In attempting to apply these requirements in a permit applicable to small MS4 systems, ADEQ has provided no supporting evidence or justification that the significant burdens and risks imposed are warranted. The underlying assumptions supporting these requirements are particularly discordant in the desert environment. The average rain event is less than 0.5 inches, so few rains produce actual flow from discharge points. Initial rain conditions create very slippery roadway surfaces, making staff safety during travel a significant concern. To the extent rain events are significant enough to allow sufficient flow for monitoring, they are likely to also create washouts, road shut downs, dangerous flow levels, and unpassable washes, creating risk for municipal staff. In addition, the typical storms in Arizona include dangerous lightning strikes, adding to the danger of being outdoors near trees with a long reach sampling pole.
- Further, most discharge locations are at least 30 minutes or more from any office, making effective collection of first flush samples unlikely. In addition, most rains occur at night, and can often occur on weekends. Staff will be required to be on standby, and will potentially need to have the capability to be on call 24 hours a day, 7 days a week. This "storm chasing" would impose a significant after-hours staffing cost that would produce little benefit, representing an inefficient use of resources.
- Thus, even if ADEQ had proper authority, the proposed wet weather sampling requirements would not be warranted, since they would put small MS4 system employees at risk with little or no benefit, and at significant cost. In practice, given that receiving ephemeral waterways like the Queen Creek wash only contain flow during storm events, attempted sampling of such flow is inherently dangerous.

Response 7D: ADEQ welcomes data, information, or studies that support the commenter's conclusions on the efficacy of non-analytical monitoring. Requirements for this one-time characterization monitoring will inform IDDE efforts in ways visual monitoring cannot. Levels of metals, e. coli, PCBs, PAHs, etc. cannot be assessed by visual observation. Stormwater sampling can be done safely, as decades of Phase I MS4 sampling demonstrate. The permittee has significant leeway in placing the monitoring locations. Prudent selection of locations will allow safe monitoring.

Comment 7E: received from the City of Peoria via Konveio on June 30, 2021: What is the difference between "impaired" and "not attaining" waters? I presume that a water that is impaired, has one or more pollutant parameters that are exceeding existing water quality standards. This may result in a water not attaining a designated use (e.g. Aquatic & Wildlife warm). Can conditions of impaired and not attaining be mutually exclusive?

Response 7E: Not Attaining Waters (Category 4) have available data and/or information which indicate that at least one designated use is not being supported, but a TMDL is not required because either a TMDL has already been completed (4a) or a plan is in place to attain water quality standards within the next assessment cycle (4b), or the impairment is caused by pollution but not a pollutant (4c).

Comment 7F: received by the City of Surprise via Konveio on July 27, 2021: A process is needed to address the possibility of exemption from the Monitoring Requirements. Many permit holders will not have actual outfalls at identified waters of the State and will need to be able to document their non-participation in this requirement of the permit.

A watershed approach could create a model for cost sharing with applicable permit holders and more defined monitoring within specific reaches. The suggestion of approaching from a watershed perspective is great. This would assist in addressing participation issues and create a better monitoring response.

Response 7F: ADEQ understands that not all small MS4s have outfalls to directly protected surface waters. The Permit requires sampling from “at least three (3) outfalls *or locations* within the MS4, representative of stormwater pollution from the MS4 for stormwater characterization monitoring.” (Emphasis added.) An MS4 without outfalls must choose at least three locations within the MS4 that are representative of stormwater pollution under Section 7.2.4. ADEQ is interested in discussing a watershed approach with MS4 permittees for future permits, however to date, this has not been brought up by the MS4 community as an option for discussion. No change was made to the permit.

Comment 7G: received from Maricopa County via Konveio on July 9, 2021: Which portion of state statute or federal regulation form the basis of the requirements in section 7.1?

Response 7G: 40 CFR 134(a) states that *“the NPDES permitting authority must include permit terms and conditions to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), ... Such terms and conditions may include narrative, numeric, or other types of requirements (e.g., implementation of specific tasks or best management practices (BMPs), BMP design requirements, performance requirements, adaptive management requirements, schedules for implementation and maintenance, and frequency of actions).”*

Comment 7H: received from Yavapai County via Konveio on June 23, 2021: Will a category key, or reference to it {permit part 7.1(2)} be included in this permit?

Response 7H: There are various locations on the ADEQ website that offer information on impaired or not-attaining waters and OAWs. ADEQ suggests using EMAPs from the home page and choosing the link associated with Impaired Waters or OAWs which open the maps to those specific GIS layers. EMAPs can be found by clicking here: <http://www.azdeq.gov/emaps> No change has been made to the permit.

Comment 7I: received from the City of Peoria via Konveio on June 30, 2021: This section needs additional clarification in situations where the storm system is contiguous with neighboring municipalities that have the outfall locations within their jurisdiction. As it reads, if you do not directly discharge to one of the items listed in 7.1(2) you will not need to monitor.

Response 7I: Permit part 7.1(2) states: *“the permittee shall identify outfall locations in the SMWP that... discharge to impaired/not-attaining/OAWs.”* If a municipality does not directly discharge into one of the waters listed in 7.1(2), no monitoring is required.

Comment 7J: received from Dr. David C. Bell, Air Force Regional Environmental Coordinator via letter on July 29, 2021: Section 7.2 of the revised MS4 GP adds new stormwater characterization monitoring requirements to the permit. Large and Medium Phase I MS4s may be required to collect characterization data, but per Federal Register (FR.) Vol. 64, No. 235, pg 68768, the operator of a Small Phase II MS4 is currently not required to follow the application requirements of § 122.26(d)(1)(iii) (Part 1 source identification), § 122.26 (d)(1)(iv) (Part 1 discharge characterization), and § 122.26(d)(2)(iii) (Part 2 discharge characterization data), even if applying as a co-permittee. While 40 CFR 122.26(d)(2)(iii) and (iv) allow some authority for requiring the collection of characterization data for Large and Medium Phase I MS4s, that specific authority does not apply to Small Phase II MS4s and thus should not be utilized for inclusion into this MS4 GP. In accordance with FR. Vol. 64, No. 235, which amended the regulations to require coverage for Small MS4s, the EPA believes that Small Phase II MS4 operators implementing the 6 minimum measures do not require more stringent limitations to meet water quality standards. (See FR. Vol. 64, No. 235, pg. 68769 “For purposes of today’s rule, EPA recommends that, in general, NPDES permits for small MS4s should not require the conduct of any additional monitoring beyond monitoring that the small MS4 may be already performing.”). The AF understands that under 40 CFR 122.34(c), the State can include

other applicable requirements that are more stringent, however Arizona law prohibits the Arizona Department of Environmental Quality (ADEQ) from implementing environmental requirements that are more stringent than federal requirements unless specifically authorized by the legislature (ARS Section 49-104). Section 7.2 of this proposed MS4 GP is overreaching ADEQ's legislative authority. To that end, we are requesting that you eliminate the Section 7.2 stormwater characterization monitoring requirements.

Response 7J: ADEQ disagrees that the Phase II stormwater rule does not authorize monitoring. The Phase II rule preamble states unambiguously that “[p]ermitting authorities can specify monitoring or other means of evaluation when writing permits.” The Phase II rule itself states at Note to 40 CFR 122.34(d)(1), “[t]he NPDES permitting authority may determine monitoring requirements for the permittee in accordance with State/Tribal monitoring plans appropriate to the watershed.” The commenter’s quote from the Phase II rule is with regards to the first permit cycle of Phase II MS4 permits, not subsequent permit reissuances; the next sentence after the commenter’s Phase II rule quote begins, “In the second and subsequent permit terms...”

The Phase II rule encourages the permitting authority to consider these factors in determining monitoring requirements:

- (1) To characterize water quality and ecosystem health in a watershed over time, (2) to determine causes of existing and future water quality and ecosystem health problems in a watershed and develop a watershed management program, (3) to assess progress of watershed management program or effectiveness of pollution prevention and control practices, and (4) to support documentation of compliance with permit conditions and/or water quality standards.

The Permit’s stormwater characterization monitoring and monitoring related to TMDLs, impaired/non-attaining waters, and OAWs aligns with the above factors.

Comment 7K: received from Yavapai County via Konveio on June 24, 2021: [permit part 7.2] For all parameters in Appendix B? Is ADEQ going to provide training or a handbook with detailed instructions and an equipment list for Stormwater Characterization Monitoring?

Response 7K: ADEQ's requirements for Stormwater Characterization Monitoring indicate that discrete or grab samples be taken to meet this requirement. ADEQ intends to provide outreach training to all MS4s, as necessary. ADEQ also encourages MS4s that have not participated in analytical monitoring to discuss consumables (bottles, etc.) and equipment with their lab of choice to ensure samples will be collected in a manner that the lab can process.

Comment 7L: received from Yavapai County via Konveio on June 24, 2021: 7.2(2) states that the permittee shall conduct stormwater characterization monitoring for qualifying storm events. For all parameters in Appendix B? Is ADEQ going to provide training or a handbook with detailed instructions and an equipment list for Stormwater Characterization Monitoring?

Response 7L: The Permit Section 7 details which parameters must be included in Stormwater Characterization. This Characterization monitoring continues and improves our AZPDES program goals of reducing pollutants to the Maximum Extent Practicable and protecting human health and the environment. Characterization monitoring will help the municipality better understand the nature of its pollutant discharge from its MS4. Such analytical monitoring can help with topics from tracing illicit discharges to identifying crossed connections with sanitary sewers, to public education/health alerts. AZPDES permits of all types may require monitoring of discharges. The permittee, as the discharger of pollutants, has the responsibility to monitor those pollutants. ADEQ has a robust ambient monitoring program that assesses water quality throughout the state, but the permittee is responsible for monitoring the discharge of pollutants from its outfalls.

Comment 7M: received from Mohave County via Konveio on July 201, 2021: Collecting samples [permit part 7.2] during flow events is almost impossible due to the distance from our office to the site (more than 1 hour drive) and because there is no staff available at night or weekends. This should be modified.

- The list of potential pollutants [permit part 7.2] is very extensive and could be burdensome to Mohave County. Also, due to drought conditions there may not be any flow in our outfalls during that time period.

Response 7M:

- ADEQ understands that some MS4s cover significant areas across the state, especially for counties. ADEQ will provide assistance with training and mobilization, if requested, to assist any MS4 with collecting analytical monitoring data. However, ADEQ requires that the MS4 will, even outside of normal business hours, collect samples for Stormwater Characterization monitoring. As mentioned in other responses, this monitoring is one time only within the first two years of permit coverage and the MS4 chooses the locations for monitoring. No changes have been made to the permit.
- The list of parameters in the Stormwater Characterization Sampling requirement of permit part 7.2 are parameters from EPA's priority pollutant list. This is a one-time only sampling event at three locations, within the first two years of permit coverage and encourages MS4s to implement this requirement to the maximum extent practicable. ADEQ understands that the climatic conditions in Arizona may not allow for sample collection. Pursuant to a good-faith effort to collect the samples, the Discharge Monitoring Report will include No Discharge codes (NODI) should this situation occur.

Comment 7N: received from Mohave County via Konveio on July 201, 2021: The information desired in this paragraph [Fact Sheet Section 7.0] is almost impossible for Mohave County to obtain. It is very unlikely that county staff could be on site to monitor the volume, duration or flow rate. A flow rate measurement would require sensors that don't exist in all our outfalls.

Response 7N: Part 7.0 of the 2021 Small MS4 Fact Sheet has been revised to remove the last sentence of the second paragraph, "*the permit requires the permittee to maintain monitoring records, including the volume, duration and flow rate of stormwater discharge.*" These parameters are not required for Stormwater Characterization Monitoring in this permit.

Comment 7O: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Subpart 7.2(4) requires the identification of three outfalls or "locations" within the MS4; there is no authority to regulate "locations". The use of that term is vague and/or overly broad and should be deleted.

Response 7O: The locations may be within the MS4 (so long as the location is representative of stormwater pollution from the MS4), rather than at the outfall from the MS4, giving the municipality more control over the monitoring location. No change was made to the permit.

Comment 7P: received from Maricopa County via Konveio on July 9, 2021: Recommend that ADEQ specify all the locations [permit part 7.2(4)] to be tested and the parameters to be tested for to ensure the permittee meets the requirements (add clarity to expected monitoring requirements).

Response 7P: Permit part 7.2(4) explains that the permittee shall identify three (3) outfalls, including the land use (residential, commercial and industrial). Appendix B of the permit identifies the parameters to be analyzed. ADEQ would be happy to discuss outfall locations with any MS4 but it is the permittees responsibility to identify outfall locations as part of the requirements of permit part 6.3(1), Storm Sewer Mapping.

Comment 7Q: received from Maricopa County via Konveio on July 9, 2021: Does this exclude the use of collection devices (auto samplers that are capable of collecting a first flush)?

Response 7Q: Auto-Samplers or other collection devices are an acceptable means of collecting a stormwater sample, however, ADEQ is not requiring these in the permit as it is understood that not all MS4s have sampling equipment or the means to acquire these devices for the limited use required in this permit.

Comment 7R: received from Yavapai County via Konveio on June 24, 2021: Will ADEQ provide some form of SAP [Sampling and Analysis Plan, permit part 7.3] guidance?

Response 7R: Permit part 7.3 provides several requirements that should be included in a Sampling and Analysis Plan. Additionally, ADEQ has created Sampling and Analysis Plan (SAP) templates for various AZPDES general permits and will make a template available to the MS4s prior to the effective date of the permit.

Comment 7S: received from Yavapai County via Konveio on June 24, 2021: A comment on Storm Event Records: Seemingly identical significant rainfall events often produce highly variable outfall flows. Light rain at a specific location will sometimes translate to good outfall flows for grab sampling. Other times, heavy rain at the same location will generate runoff in a different direction. YCFCD has an extensive system of precipitation and stream gages that helps guide our MS4 analytical and visual monitoring efforts. It can still be hit or miss.

Response 7S: ADEQ appreciates your comment and understands that storm events in Arizona are unpredictable. We recommend that MS4s attempt to obtain wet season sampling if required, and document no discharge codes (NODI) on the Discharge Monitoring Report as applicable. No change was made to the permit.

Comment 7T: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: Please clarify whether Subpart 7.5 only requires monitoring for an impaired water, not-attaining water, and/or OAW. A requirement beyond monitoring of an impaired water, not-attaining water, and/or OAW is beyond ADEQ's authority. To the extent such an obligation is imposed on waters that are not impaired waters, not-attaining waters, or OAWs, the requirement should be removed.

Response 7T: ADEQ agrees that additional clarity is needed in permit part 7.5 and has added a leading statement as follows: *"All MS4s that have discharges to impaired or not-attaining waters or OAWs shall perform analytical monitoring as per the frequencies and deadlines stated in this section."* ADEQ disagrees, however, that requiring analytical monitoring is outside our scope of authority. Please see the response to comment 7J. Also note - this analytical monitoring is in addition to the Stormwater Characterization monitoring as described in permit parts 7.2.

Comment 7U: received from Maricopa County via Konveio on July 9, 2021: Section 7.5 reads that the operator shall conduct analytical monitoring a minimum of two (2x) times per wet season throughout the duration of permit coverage. Section 7.2(1) reads that the permittee shall sample stormwater discharges from the MS4, as required in Appendix C, one (1) time within the first two (2) years of the effective date of the permit. These two requirements seem to be in conflict if a permittee has three outfalls, is that correct?

Response 7U: There are two separate analytical monitoring requirements. Permit part 7.2 discusses Stormwater Characterization Monitoring that is required of ALL small MS4s, regardless of whether they have an "outfall" or if the monitoring location is where stormwater leaves their MS4 and enters another MS4 (a location). Permit part 7.5 discusses wet weather monitoring that is only required if the MS4 discharges to an impaired or not-attaining water or an OAW. As these two types of monitoring are different, the requirements are different.

Comment 7V: received from the City of Prescott via Konveio on July 8, 2021: So if we have 100 outfalls we'd be sampling 25 of them and each of those 2 times per cool season and 2 times per warm season? If so, that seems excessive. If not, please clarify the language here.

Response 7V: ADEQ has revised the permit requirements for wet season analytical monitoring of impaired and/or not-attaining waters and OAWs from 2-times per wet season to 1-time per wet season. The number of samples required, listed in Table 7, has also been revised: 1-4 outfalls = sample all; 5-20 outfalls = sample 5; over 20 outfalls = sample 10.

Comment 7W: received from the City of Prescott via Konveio on July 8, 2021: Remove the word “contain”

Response 7W: ADEQ agrees and removed the word "contain" from permit part 7.5(2).

Comment 7X: received from Yavapai County via Konveio on June 24, 2021: Are operators required to possess and use monitoring instruments and equipment [permit part 7.5(3)(a)]?

Response 7X: For wet weather analytical monitoring of outfalls that discharge to impaired and/or not-attaining waters and OAWs, the MS4 is required to have available the monitoring equipment necessary to take samples and submit them to a lab (or analyzed at a lab operated by the MS4). MS4s also have the option to contract out the monitoring parts of this permit. This is not a new requirement - existing MS4s effectively implemented analytical monitoring in the previous permit.

Comment 7Y: received from Yavapai County via Konveio on June 24, 2021: Does [permit part 7.5(3)(b)] this include simple Colilert testing for E. coli? By moving Colilert testing in-house, we've had a 6-fold increase in the number of samples analyzed with much greater reliability, and tremendous cost savings over the past two years. The capability to respond to storm events and run samples 7 days a week has helped us gain a much greater understanding of seasonal E. coli loading in the MS4.

Response 7Y: ADEQ agrees and included a permit part 7.5(3)(b) which lists Colilert as an acceptable means of "field testing" for E. coli.

Comment 7Z: received by the City of Surprise via Konveio on July 27, 2021: What is the intent of the Analytical Monitoring [permit part 7.7] especially at the Small MS4 level and on non-WOTUS waters?

Response 7Z: Permit part 7.7 describes the Discharge Monitoring Report (DMR) that is required for analytical monitoring of impaired/not-attaining waters or OAWs. The intent of implementing analytical monitoring is to gather data to better understand the contribution and impact of pollutants in stormwater discharges from MS4s on Arizona's protected surface waters. The agency will evaluate this data from the broader MS4 community and use it to inform and improve the next iteration of the Phase II MS4 permits with the goal of enhancing environmental protection. Protecting non-WOTUS protected surface waters is equally important to protecting WOTUS protected surface waters. However, no monitoring of non-protected surface waters is required.

Permit Section 8.0 - Program Assessment, Recordkeeping, and Reporting

Comment 8A: received from the City of Prescott via Konveio on July 8, 2021: Can you provide examples for what the self-evaluation could or should look like?

Response 8A: ADEQ agrees additional information is needed and has added examples of Program Evaluations as identified in permit part 8.1(1), in the 2021 Small MS4 Fact Sheet.

Comment 8B: received from Gust Rosenfeld “The Coalition” via letter on July 29, 2021; and the City of Surprise via Konveio on July 29, 2021: The recordkeeping provisions in the permit are inconsistent and, in some instances, violate the federal regulations. Subpart 8.2 requires records to be kept for "three (3) years", while Subpart 9.11.b requires records to be kept for "three (3) years from the date permit coverage ends". The permit provisions should be consistent and in compliance with the federal regulations.

Response 8B: ADEQ agrees and has revised permit part 8.2(1) as follows: "the permittee shall keep all records required by this permit for a period of three (3) years from the date permit coverage ends."

Comment 8C: received from the US EPA via letter on July 29, 2021: In our comments on the early draft permit, we noted that although the permit required the submittal of annual reports (section 8.3 and Appendix A), the permit lacked a deadline for the electronic submittal of the reports consistent with the e-reporting regulations. The current e-reporting deadline is December 21, 2025 in accordance with a deadline extension signed by the EPA on September 23, 2020; this deadline needs to be included in the permit.

Response 8C: The electronic reporting rule is a requirement for the permitting agency and as such, ADEQ chooses not to include this in the permit language. ADEQ will, however, modify the fact sheet to include information on e-reporting (including statutory citations) with an implementation schedule and estimated completion dates.

Comment 8D: received from the US EPA via letter on July 29, 2021: Section 8.3 of the permit should also include the requirements for an annual report listed at 40 CFR 122.34(d)(3)(i) through (v). We understand that myDEQ does not currently accommodate MS4 annual reports. The e-reporting regulations (40 CFR 127, Table 2) require the electronic submittal of the data elements at 40 CFR 122.34(d)(3)(i) through (v) in a small MS4 annual report.

Response 8D: The annual report covers 40 CFR 122.34(d)(3)(i) through (v). Currently myDEQ accepts electronic annual reports and ADEQ is working to ensure compliance with the e-reporting rule by the December, 2025 deadline.

Permit Section 9 - Standard Permit Conditions

Comment 9: received from Yavapai County via Konveio on June 24, 2021: Please consider delaying the 2021 permit until EPA and USACE have completed their reviews and actions [permit part 9.2 Duty to Reapply]

Response 9: As this is an AZPDES general permit which is reissued every five years and ADEQ has no knowledge of when EPA may revise the definition of wotus, ADEQ cannot justify holding the permit for future events.

Permit Section 10 - Definitions

Comment 10A: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: This permit purports to change several definitions from the language provided under federal and state regulations. As previously noted, ADEQ may not adopt standards for stormwater discharges that are more stringent than those set forth in the federal regulations, unless specifically authorized to do so by the Arizona legislature. Where the legislature does authorize variation from the federal requirements, the variation must be limited to that specifically authorized. It is not appropriate to define a term in a permit in a manner which is different from the applicable statutes and regulations. All terms in the permit should be defined in a manner consistent with federal and state regulations.

Response 10A: The commenter did not specify which definitions they believe are not consistent with State and Federal Law. ADEQ has reviewed the definitions and have determined that they are consistent with A.R.S. 49-255 et seq. and relevant federal statute and regulation.

Comment 10B: received from Pima County via email on July 27, 2021: Add the citation of Arizona Administrative Code R18-11-107(C) requiring the extra protection for these waters [Tier 3 Antidegradation Protections].

Response 10B: ADEQ agrees and has added the statutory citation A.A.C. R18-11-107(C), which provides antidegradation protection to outstanding Arizona waters, where applicable; and added the definition and citation for antidegradation in permit part 10, Definitions.

Comment 10C: received from the City of Surprise via Konveio on July 27, 2021: [MS4 definition] At the end of the first sentence add: ...reduce the pollution of "surface waters" from nonpoint sources. The reference to point source items to control in a non-point source permit definition may cause confusion. Why are we specifically calling these sites and items out? If we are monitoring the plant sites for industrial releases under the non-point source permit that should be clearer at the beginning.

Response 10C: ADEQ is not clear on the comment regarding non-point source discharges. This AZPDES permit is specifically for "point-source" discharges of stormwater from the MS4 to protected surface waters. ADEQ is happy to discuss this further with the commenter upon request.

Comment 10D: received from the City of Surprise via Konveio on July 27, 2021: [MS4 definition] Why does the municipality having jurisdiction over disposal of sewage, industrial wastes, or other wastes have to be an identifier in having jurisdiction over stormwater?

Response 10D: Not all MS4s are municipalities. For example, the small MS4 permit in Arizona includes state universities, military bases, and VA hospitals. These non-traditional MS4s have jurisdiction over pollutants that are present on their "campuses" including stormwater, and are therefore regulated under the AZPDES program.

Comment 10E: received from the City of Surprise via Konveio on July 27, 2021: [MS4 definition] Are schools under the Municipal MS4 permits or do they have their own Non-traditional MS4 permit?

Response 10E: The three state Universities (ASU, UA and NAU) are regulated "non-traditional" MS4s. No additional schools are regulated at this time.

Appendix C - TMDL Requirements

Comment C1: received from Maricopa County via Konveio on July 12, 2021; and Yavapai County via Konveio on June 24, 2021: Gust Rosenfeld "The Coalition" via letter on July 29, 2021:

- Maricopa County's UUA does not extend to the Gila River between Centennial Wash to Gillespie Dam; we do not have outfalls in that area. With that in mind, does Appendix C apply to Maricopa County? If it does, where should the outfall be located if the area is not part of the UUA? Furthermore, if the requirement applies, what is the purpose of the action plan? Are there expectations for permittees to take enforcement action on properties that may be responsible for the exceedance of the WLA (runoff)? This may include agricultural operations. We recommend adding clarifying language indicating that Appendix C may not apply now but that things could change if the UUA extends into this area with the recent census.
- No part of the Yavapai County MS4 exists in or near the vicinity of Oak Creek. While most of the Yavapai County MS4 resides in the Granite Creek watershed, it is several reaches away from Watson Lake. There are no Yavapai County outfalls to Watson Lake.
- The City of Buckeye does not have development, land ownership, or stormwater systems that discharge to the impaired area of the Gila River or areas upstream of this reach. In addition, the City of Buckeye has no flow to reach 15070101-008 of the Gila River.

Response C1: Appendix C of this permit lists the existing TMDLs that include MS4s - either specifically by name or by reference. If your MS4 is listed and you have no outfalls to the not-attaining waterbody, you are not required to perform analytical monitoring.

Comment C2: received from the City of Prescott via Konveio on June 29, 2021: Are TMDLs applicable if they haven't undergone their 5 year review as stipulated by ARS 49-234.J? Is there a plan or schedule in place to review them?

Response C2: Yes, the plans are still applicable. ADEQ's Surface Water Quality Improvement team will be putting this process into practice as required by 49-234(J).

Comment C3: received from the City of Prescott via Konveio on June 29, 2021: ADEQ has proposed a change to the E. coli FBC SWQS. If that proposal is approved by the EPA how will it be reflected in this permit and in the TMDL?

Response C3: Standards are set in TMDLs and once approved by EPA, the standards carry forward throughout the life of the TMDL, regardless of the current SWQS.

Comment C4: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: The inclusion of provisions specific to an identified municipality is inappropriate for a General Permit; Appendix C should be deleted. Instead, Subpart 1.3.5 already addresses the requirements that a small MS4 system must adhere to if it discharges to such impaired or not-attaining waters.

Response C4: ADEQ disagrees that listing potential TMDL contributors is inappropriate. If not included in the permit, MS4 staff may be unaware that discharges from their MS4 may impact a waterbody with an active TMDL. The addition in Appendix C provides notification to the MS4 that additional requirements, such as analytical monitoring, may be required. Please note that at any time, a small MS4 may opt out of the general permit and choose an individual AZPDES permit, as identified in part 2.4. No change was made to the permit.

Comment C5: received from Gust Rosenfeld "The Coalition" via letter on July 29, 2021: The Town of Queen Creek stormwater management system discharges to ephemeral waters that are not ephemeral reaches of major rivers specifically listed in paragraph (1)(b) of 49.221. Therefore, pursuant to the express language of the adopted amendments, the requirements of the stormwater general permit do not, and should not be, applied to Queen Creek's stormwater discharges, since the Queen Creek stormwater management system does not discharge to a WOTUS, or to a Non-WOTUS Protected Surface Water. In fact, Section 49.221(G)(2)(k) makes clear that such a discharge to an ephemeral waterway is not subject to regulation. Under these circumstances, the Town of Queen Creek's stormwater management system is not subject to regulation under the proposed MS4 permit. While the Town of Queen Creek believes its stormwater system discharges are not regulated under the proposed MS4 permit, Queen Creek recognizes that circumstances may change going forward, due to growth, potential alterations in discharge sources and locations, or other changes. Queen Creek therefore joins in these comments on the proposed regulations.

Response C5: Queen Creek is listed on the Protected Surface Waters List because its flow regime is not ephemeral. However, the vacatur of the NWPR moots this point, as Queen Creek is likely WOTUS under pre-2015 WOTUS rules. ADEQ is willing to discuss applicability of the permit with any MS4.

Comments Relative to Waters, Surface Water Protection Program, Protected Surface Waters

Comment W1: received from Maricopa County via Konveio on July 27, 2021: Are ephemeral waters (other than ephemeral reaches of major rivers - ARS 49-221(1)(b)) subject to regulation as Non-WOTUS Protected Surface Waters?

Response W1: Ephemeral waters not part of the eight major rivers cannot be non-WOTUS protected surface waters. However, ephemeral waters may be WOTUS as the NWPR was vacated on August 30, 2021 by an Arizona District Judge.

Comment W2: received from the City of Prescott via Konveio on June 29, 2021: When will ADEQ have a definitive list of protected (state and WOTUS) receiving waters? This could be a relatively easy map product for ADEQ's EMAPS, any consideration for providing permittees with such a resource. Given the whiplash permittees are experiencing between the current WOTUS rule, the State Program and the current administration's stated desire to re-define WOTUS having this would be very useful in the coming year(s). It might also help us (or you) identify AZPDES non-filers.

Response W2: ADEQ agrees that a map of protected surface waters benefits everyone. The Protected Surface Waters List and EMAPS layer will become available no later than October 29, 2021.

Comment W3: received from Pima County via email on July 27, 2021: 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..."

Response W3: ADEQ agrees and has revised all general permits for consistency in regards to impaired waters and outstanding Arizona waters.

Comment W4: received from Yavapai County via Konveio on June 22, 2021: Rather than moving forward with the 2021 permit, please consider extending the 2016 Permit until reviews and actions are complete regarding the 2020 Navigable Waters Protection Rule. From the June 9 EPA Office of Public Engagement letter, "EPA, Army Announce Intent to Revise Definition of WOTUS...Upon review of the Navigable Waters Protection Rule, the agencies have determined that the rule is significantly reducing clean water protections. The lack of protections is particularly significant in arid states, like New Mexico and Arizona, where nearly every one of over 1,500 streams assessed has been found to be non-jurisdictional. The agencies are also aware of 333 projects that would have required Section 404 permitting prior to the Navigable Waters Protection Rule, but no longer do.

As a result of these findings, today, the Department of Justice is filing a motion requesting remand of the rule. Today's action reflects the agencies' intent to initiate a new rulemaking process that restores the protections in place prior to the 2015 WOTUS implementation, and anticipates developing a new rule that defines WOTUS and is informed by a robust engagement process as well as the experience of implementing the pre-2015 rule, the Obama-era Clean Water Rule, and the Trump-era Navigable Waters Protection Rule.

The agencies' new regulatory effort will be guided by the following considerations:

- Protecting water resources and our communities consistent with the Clean Water Act.
- The latest science and the effects of climate change on our waters.
- Emphasizing a rule with a practical implementation approach for state and Tribal partners.
- Reflecting the experience of and input received from landowners, the agricultural community that fuels and feeds the world, states, Tribes, local governments, community organizations, environmental groups, and disadvantaged communities with environmental justice concerns."

Response W4: ADEQ must reissue AZPDES permits every five years under R18-9-C903(A)(1). The repeal of the Navigable Waters Protection Rule (NWPR) may change the receiving water regulated by the permit, but ADEQ may not delay reissuance of the permit based on court rulings and federal rulemakings with an unknown timelines.

EPA Remand Rule and Electronic Reporting

Comment R1: received from the US EPA via letter on July 29, 2021: We also understand that ADEQ has recently raised questions about the specific data elements that are required to be submitted electronically (as outlined in the EPA's Implementation Technical Paper No. 9 (Version 2),¹ dated June 30, 2021), and whether the draft permit is consistent with those requirements. We note Appendix A to the permit, which further elaborates on the information for an annual report to be provided in response to 40 CFR

122.34(d)(3)(i) through (v), requires that nearly all the relevant data would be available for electronic submittal. However, in a few cases, Appendix A omits certain required data elements such as the date of the most recent mapping of the MS4 outfalls. Given that this issue was only recently raised we have not had time to identify all such issues, and we suggest that Region 9 and ADEQ work together prior to final permit issuance to ensure that all necessary data is required to be reported. Appendix A should also be noted in section 8.3 of the permit.

Response R1: ADEQ appreciates the collaborative assistance from EPA in assuring compliance with the e-reporting rule and has added the date of the most recent mapping of MS4 outfalls to the annual report.

Comment R2: received from the US EPA via letter on July 29, 2021: In our comments on the early draft small MS4 permit, we noted that the draft permit must include adequate conditions to ensure consistency with the EPA's 2016 small MS4 Remand Rule (81 FR 89320). The Remand Rule clarifies: (1) the procedures to be used when using general permits (see 40 CFR 122.28(d)); (2) the requirement that the permit establish the terms and conditions necessary to meet the MS4 permit standard (i.e., "to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act"); and (3) the requirement that permit terms must be established in a "clear, specific, and measurable" manner (see 40 CFR 122.34(a)). For this permit, ADEQ is proposing a one-step comprehensive general permit; as such, the permit itself must include adequate requirements to ensure compliance with 40 CFR 122.34(a) for permit terms and conditions that are "clear, specific and measurable."

Response R2: ADEQ's reissuance of this MS4 General Permit meets the EPA's Remand Rule by adopting a "one-step, comprehensive" permit under 40 CFR 122.28(d)(1) that includes all requirements necessary to meet the MEP standard in Arizona.

ADEQ's Permitting Authority

Comment 1: received from Gust Rosenfeld "The Coalition" via letter on 7/29/21: ADEQ's authority to impose requirements pursuant to the permit is limited by ARS § 49-104.A.16, which provides: Unless specifically authorized by the legislature, ensure that state laws, rules, standards, permits, variances and orders are adopted and construed to be consistent with and no more stringent than the corresponding federal law that addresses the same subject matter. This paragraph does not adversely affect standards adopted by an Indian tribe under federal law.

And ARS § 49-255.01.B, which provides: The director shall adopt rules to establish an AZPDES permit program consistent with the requirements of sections 402(b) and 402(p) of the clean water act. This program shall include requirements to ensure compliance with sections 307 and requirements for the control of discharges consistent with sections 318 and 405(a) of the clean water act. ***The director shall not adopt any requirement that is more stringent than or conflicts with any requirement of the clean water act. The director may adopt federal rules pursuant to section 41-1028 or may adopt rules to reflect local environmental conditions to the extent that the rules are consistent with and no more stringent than the clean water act and this article.*** (Emphasis added.)

As applied to the proposed general stormwater permit, these statutory provisions make clear the general proposition that ADEQ may not adopt standards for stormwater discharges that are more stringent than those set forth in the federal regulations, unless specifically authorized to do so by the Arizona legislature. Where the legislature does authorize variation from the federal requirements, the variation must be limited to that specifically authorized.

In the recently enacted HB 2691 (with an effective date of September 29, 2021), the legislature established expanded permitting authority for ADEQ that goes beyond the limits of the federally-regulated Waters of the United States ("WOTUS"), authorizing ADEQ to adopt standards for certain additional "Waters of the State" that are not WOTUS, but which are nevertheless subject to protection under Arizona state law. These waters are designated as "Non-WOTUS Protected Surface Waters." The amendments to Section 49-

221(A)(1) provide that, upon adoption, ADEQ shall apply existing surface water quality standards (the standards that were previously adopted for WOTUS) to the Non-WOTUS Protected Surface Waters, until such time as separate standards are adopted for the Non-WOTUS protected surface waters. Section 49-221(A)(2) provides that ADEQ must adopt standards for Non-WOTUS Protected Surface Waters by December 31, 2022. Consistent with the limitations of A.R.S. §§ 49-104.A.16 and 49-255.01, HB 2691 emphasizes that the regulations established pursuant to ADEQ's newly granted permitting authority over discharges to non-WOTUS protected surface waters shall likewise be no more stringent than those imposed under the federal program, stating, "The rules adopted by the director under this subsection shall not include any requirement that is more stringent than the requirements of the clean water act." A.R.S. 49-255.04(E).

Importantly, while "Waters of the State" are defined to include "perennial waters" and certain "intermittent waters," they do not include "ephemeral waters." See A.R.S. § 49-201(50). An "intermittent water" is defined as "a surface water or portion of a 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 water, such as melting snowpack." A.R.S. § 49-201(23). In contrast, ephemeral waters are not within the scope of "Waters of the State." "Ephemeral waters" are defined as "a surface water or portion of surface water that flows or pools only in direct response to precipitation." A.R.S. § 49-201(17).

Consistent with this distinction, Section 49-221(G)(2)(k) of the recent HB 2691 amendments provides that the Protected Surface Waters List shall not contain any ephemeral waters, except for the ephemeral reaches of major rivers specifically listed in paragraph (1)(b) of 49-221. Thus, ephemeral waters other than these specific reaches of major rivers are not subject to regulation as Non-WOTUS Protected Surface Waters.

Furthermore, to the extent ADEQ is relying on 40 CFR 122.28(a)(1) as its authority, that section of the CFR was not adopted by Arizona. (Arizona Administrative Code ("AAC") R18-9-A905(A)(11)(d) and R18-9-C901.) The broader authorities to establish general permits set forth therein do not apply in Arizona, and are therefore not available to ADEQ as a basis for imposing expanded permitting requirements. The general permit must be consistent with the limits imposed by AAC R18-9-C901.

Response 1: Please see the responses to comments regarding permit part 1.1, where ADEQ has agreed to add 40 CFR 122.32(a)(1) in this part. Additionally, ADEQ believes this permit appropriately incorporates federal requirements to meet the MEP standard, as explained in Comment X above. Please note that based on an August 30, 2021 Federal District Judge's order vacating and remanding the NWPR, ephemerals may be regulated as protected surface waters because ephemerals can be WOTUS.

The following commented on this permit:

City of Peoria
City of Prescott
City of Surprise
Copeland Law
Gila River Indian Community
Gust Rosenfeld "The Coalition"
Maricopa County
Mohave County
Pima County
US EPA
Yavapai County

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.

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 MultiSector 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 Baggio, 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.