

ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM
GENERAL PERMIT FOR STORMWATER DISCHARGES
ASSOCIATED WITH INDUSTRIAL ACTIVITY – MINERAL INDUSTRY
TO PROTECTED SURFACE WATERS

Permit No. AZG2019-002

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 January 1, 2020, issuance of the Arizona National Pollutant Discharge Elimination System (AZPDES) Mining Multi-Sector General Permit (MSGP), No. AZG2019-002, 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 Mining MSGP authorizes stormwater pollutant discharges in Arizona associated with category iii, Mineral Industry sites under 40 CFR 122.26(b)(14) in Arizona to Protected Surface Waters, pursuant to federal conditions in 40 CFR 122.26 (WOTUS) and state conditions in A.R.S Title 49 Chapter 2, Article 3.1 et seq.(non-WOTUS). State requirements for discharges to non-WOTUS protected surface waters are adopted pursuant to A.R.S. § 49-255.04 and are enforceable solely by the Arizona Department of Environmental Quality (ADEQ). All discharges authorized by this general permit shall be consistent with the terms and conditions of this general permit. The MSGP is applicable within the State of Arizona, except for Indian Country.

The public notice (PN) for the modified MSGP 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. Representatives of one law firm and one mining association submitted comments during the PN period.

Summary of Changes from draft permit to final permit

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

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

Response to Comments

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

Comment A1

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

Response A1

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

B. Comments received from the Arizona Mining Association (AMA) in a July 30, 2021 Letter that was emailed, with a red-lined version of the mining MSGP. The red-lined version of the MSGP included the requested changes in capital letters and removal of permit language using strike-out (however the strike-out language is not shown below). Also, if a comment was provided for a particular permit or fact sheet section, that comment is also listed with the requested editorial change.

Comment B1

Title Page. This general permit authorizes stormwater discharges associated with category iii, Mineral Industry sites, under 40 CFR 122.26(b)(14) TO Protected Surface Waters IN ARIZONA, pursuant to 40 CFR 122.26 (APPLICABLE TO DISCHARGES TO WOTUS ONLY) and A.R.S Title 49 Chapter 2, Article 3.1. CONDITIONS IN THIS PERMIT APPLICABLE TO discharges to non-WOTUS protected surface waters are ADOPTED SOLELY PURSUANT TO A.R.S. § 49-255.04 AND ARE enforceable solely by the Arizona Department of Environmental Quality (ADEQ). All discharges authorized by this general permit shall be consistent with the APPLICABLE terms and conditions of this general permit.

Response B1

Change made.

Comment B2

Part 1.1.1 Eligibility. This general permit authorizes stormwater discharges to protected surface waters which includes waters of the U.S. (WOTUS) and non-WOTUS protected surface waters, associated with "industrial activities" as defined in Appendix A from sites having primary industrial activities included in Table 1-1. The requirements APPLICABLE TO discharges to non-WOTUS protected surface waters are ADOPTED PURSUANT TO state LAW only, and ARE enforceable solely by ADEQ.

Response B2

Change made.

Comment B3

Part 1.1.3.1.15 Allowable Non-Stormwater Discharges for all Sectors of Industrial Activity. MINE DEWATERING DISCHARGES AT CRUSHED STONE, CONSTRUCTION SAND AND GRAVEL, OR INDUSTRIAL SAND MINING FACILITIES.

Comment: This is the only non-stormwater discharge listed in Table 2-2. Rewording like this retains the appropriate limitation for discharges to WOTUS but phrases it in such a way that it works for discharges to non-WOTUS as well (which are not subject to ELGs).

Response B3

Change made.

Comment B4

1.1.4.3 Discharges Currently or Previously Covered by another Permit. Unless the permittee receives written notification from ADEQ specifically allowing these discharges to be covered under this permit, the

following are not eligible for coverage under this general permit: 1. Stormwater or non-stormwater discharges associated with industrial activity that ARE currently..”.

Response B4

Change made.

Comment B5

Numerous sections. Add: APPLICABLE ONLY TO DISCHARGES TO WOTUS.

Comment: May be useful to have something like this in the header of appropriate sections, not just the text, to make more readily apparent to readers what sections apply only to discharges to WOTUS.

Response B5

Change made to numerous sections to add “applicable only to discharges to WOTUS.”

Comment B6

1.1.4.4 -Stormwater Discharges Subject to Effluent Limitations Guidelines and numerous permit sections that deal with ELG. ELGs do not apply TO discharges to non-WOTUS protected surface waters.

Response B6

Change made.

Comment B7

1.1.4.5 - New Dischargers and New Sources Based on Surface Water Quality Standards . "A new discharger or a new source (as defined in Appendix A) is ineligible for coverage FOR DISCHARGE TO A WOTUS under this permit if ADEQ determines that the discharge will cause or contribute to an exceedance of a surface water quality standard. In such a case, ADEQ may notify the applicant that an individual permit is necessary per Part 1.4, or alternatively ADEQ may authorize coverage under this permit when the applicant implements additional control measures, so that discharges from the site will meet applicable surface water quality standards. THIS SECTION DOES NOT APPLY TO DISCHARGES TO NON-WOTUS PROTECTED SURFACE WATERS. SEE A.R.S 49-255.05(B)(1).

Comment: Except for POTWs (not eligible to use this permit), new discharger and new source requirements are not applicable to discharges to non-WOTUS protected surface waters. ARS 49-255.04(B)(1).

Part 2.1.1 requires all discharges, including those to non-WOTUS protected surface waters, to not result in exceedances of applicable standards in the receiving water – including what could be classified as new sources or new dischargers if they were discharging to a WOTUS.

Response B7

Change made.

Comment B8

1.1.4.6 - New Dischargers and New Sources to Impaired Waters. This section does not apply TO discharges to non-WOTUS protected surface waters.

Response B8

Change made.

Comment B9

1.2 Permit Compliance. Any noncompliance with any of the requirements of this permit constitutes a violation of A.R.S. Title 49, Chapter 2, Article 3.1. NONCOMPLIANCE WITH REQUIREMENTS OF THIS PERMIT THAT APPLY TO DISCHARGES TO WOTUS ALSO CONSTITUTES A VIOLATION OF THE CLEAN WATER ACT. REQUIREMENTS OF THIS PERMIT THAT GOVERN DISCHARGES TO NON-WOTUS PROTECTED SURFACE WATERS WERE NOT ADOPTED PURSUANT TO THE CLEAN WATER ACT AND DO NOT CONSTITUTE EFFLUENT STANDARDS OR LIMITATIONS UNDER 33

U.S.C. § 1365. NONCOMPLIANCE WITH SUCH PERMIT REQUIREMENTS IS ENFORCEABLE SOLELY BY ADEQ PURSUANT TO A.R.S. TITLE 49, CHAPTER 2, ARTICLE 4.

Comment: Changes along these lines are essential to confirm that CWA enforcement, including citizen suits, may occur only with respect to violations of provisions related to discharges to WOTUS.

Response B9

Change made.

Comment B10

1.3.1.c Permit Authorization. Develop or update a SWPPP according to the requirements in Part 5 of this permit. An applicant seeking authorization, for a new discharge to an impaired water THAT IS A WOTUS or to a tributary within 2.5 miles upstream of an impaired water THAT IS A WOTUS (see Part 1.1.4.6) or for a new or expanded discharge to a tributary within 2.5 miles upstream of an Outstanding Arizona Water THAT IS A WOTUS (see Part 1.1.4.7) is required to submit a copy of the SWPPP electronically to the Department for review.

Response B10

Changes made.

Comment B11

Table 1-2. "New discharger" is a defined term in Appendix A and refers back to the CWA definitions that relate to limits on new sources and new dischargers. ADEQ may want to use the more generic "new discharges" here, as the reference in the table means only discharges that commence after the effective date of the permit. In the alternative, could simply use "discharges commencing after the effective date of the permit."

Response B11

Change made. ADEQ has changed the text to "discharges" instead of new "dischargers", as new discharger has a specific definition and is exempt from certain state (non-WOTUS) requirements.

Comment B12

1.4.1. ADEQ Requiring Coverage under an Alternative AZPDES Permit. DISCHARGES TO WOTUS (add to first paragraph). Insert second paragraph: DISCHARGES TO NON-WOTUS PROTECTED SURFACE WATERS: ADEQ MAY REQUIRE AN OPERATOR TO OBTAIN AUTHORIZATION UNDER AN INDIVIDUAL AZPDES PERMIT ONLY IF THE SHOWINGS REQUIRED BY A.R.S. § 49-255.04(C) ARE MADE. THE DISCHARGER MUST BE NOTIFIED IN WRITING AND INFORMED OF THE REASONS FOR THE DETERMINATION AND THE RIGHT TO APPEAL THE DETERMINATION THAT AN INDIVIDUAL PERMIT IS REQUIRED.

Response B12

Change made to Part 1.4.1, ADEQ requiring coverage under an alternative AZPDES Permit, to include the reference to A.R.S. § 49-255.04(C) for non-WOTUS protected surface waters. The process describing how ADEQ would request an alternative is the same for discharge to WOTUS and non-WOTUS protected surface waters. That process is described in paragraph three of that section.

Comment B13

1.4.2 Permittee Requesting Coverage under an Alternative Permit. Add IF THE APPLICATION IS FOR DISCHARGE TO NON-WOTUS PROTECTED SURFACE WATERS, THE APPLICANT NEED NOT SUBMIT THE INFORMATION REQUIRED BY 40 C.F.R. §§ 122.26(c)(1)(i)(E)(1) & 122.26(c)(1)(i)(G).

Comment: These provisions apply to new sources and new dischargers or refer to facilities subject to ELGs, and so are not pertinent to discharges to non-WOTUS protected surface waters.

Response B13

Change has been made to clarify that requirements under 122.26(c)(1)(i)(E)(1) & 122.26(c)(1)(i)(G) do not apply to dischargers to non-WOTUS protected surface waters.

Comment B14

1.6 Inactive and Unstaffed Sites. ADEQ retains the authority to revoke this exemption and/or the monitoring exception where it is determined that the discharge may; cause, or contribute to an exceedance of an applicable surface water quality standard in the protected surface water; exceeds an effluent limitations guideline IF THE DISCHARGE IS TO A WOTUS; exceeds a Wasteland Allocation for the protected surface water; or degrades water quality in A WOTUS CLASSIFIED AS an OAW. Comment: Suggest adding "wasteload allocation" as a defined term in Appendix A, referencing A.R.S. § 49-243(D).

Response B14

Change made to section and added a definition for wasteload allocation to Appendix A.

Comment B15

2.1.1 Water Quality Standards. The permittee shall control discharge from the site as necessary to not cause or contribute to an exceedance of an applicable surface water quality standard in the protected surface water. If at any time the permittee becomes aware, or ADEQ determines, that the site's discharge TO WOTUS causes or contributes to an exceedance of an applicable surface water quality standard, the permittee shall take corrective action as required in Part 3.1, document and report the corrective actions as required in Parts 3.2.

Comment: As noted below in comments to Part 3.0, corrective action should not apply to discharges to non-WOTUS protected surface waters.

Response B15

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

Comment B16

2.1.1.1. a and b Discharges to Water Quality Not-Attaining and Impaired Waters. FOR DISCHARGES TO NON-WOTUS PROTECTED SURFACE WATERS, THIS PROVISION BECOMES APPLICABLE ONCE ADEQ FINALIZES THE FIRST LIST PREPARED UNDER A.R.S. § 49-232(B), AS ADDED BY LAWS 2021, CHAPTER 325.

Response B16

Change not made. The new §49-232(K) as modified by Section 11 of HB2691(2021) is a gap-filling measure in the legislation. Pursuant to that section of HB2691, ADEQ will apply existing identification rules adopted in accordance with subsection D to impaired non-WOTUS protected surface waters until the Surface Water Protection Program (SWPP) rulemaking is completed.

During the SWPP rulemaking, ADEQ will modify the rules for identifying impaired waters. As part of the SWPP rulemaking, ADEQ will prepare a new list of impaired waters using the modified identification rules and any modified water quality standards. ADEQ will follow the publication requirements in the new 49-232(B) for the new impaired non-WOTUS protected surface water list.

Comment B17

2.1.1.1.c New Dischargers or New Sources to an Impaired Water and or Not-Attaining Water. THAT IS A WOTUS. [APPLICABLE ONLY TO DISCHARGES TO WOTUS] If the permittee's authorization to discharge under this permit relied on Part 1.1.4.6 for a new discharger or a new source to an impaired and or not-attaining water THAT IS A WOTUS, New discharger and new source provisions don't apply to discharges to non-WOTUS protected surface waters. A.R.S. § 49-255.04(B)(1).

Response B17

Change made.

Comment B18

2.2 Control Measures and Effluent Limits. The requirement to implement control measures in accordance with Part 2.2.1 applies to all sites THAT DISCHARGE TO WOTUS. Part 8 contains additional control measures imposed on a sector-specific basis FOR DISCHARGES TO WOTUS. CONSISTENT WITH PART 2.2.1.2, FOR DISCHARGES TO NON-WOTUS PROTECTED SURFACE WATER, A PERMITTEE MAY ELECT TO IMPLEMENT MEASURES DEFINED IN PART 2.2.1.2.1-10 AND 8.G OR 8.J, AS APPLICABLE, OR, IN THE ALTERNATIVE, CONDUCT ANALYTICAL MONITORING PURSUANT TO PART 6 AND PART 8.G.8 OR 8.J.8, AS APPLICABLE.

Comment: For discharges to non-WOTUS protected surface waters, A.R.S. § 49-255.04(C) authorizes use of BMPs rather than “effluent limits.” To the extent any of these measures represent technology-based effluent limits, they should not apply to discharges to non-WOTUS protected surface waters. It is unclear what measures in Part 2.2 are effluent limits and what are control measures; the former should not automatically represent BMPs for discharges to non-WOTUS protected surface waters.

Comment: This added language reflects the approach in Part 2.2.1.2.

Response B18

Change made.

Comment B19

2.2.1.2 Technology-Based Effluent Limits, Best Management Practices, and State-Specific Requirements. IN ORDER TO COMPLY WITH PART 2.1.1, A permittee discharging to non-WOTUS PROTECTED SURFACE waters shall EITHER (1) implement THE best management practices (BMPs) in Section 2.2.1.2.1-10 AND PART 8.G. OR 8.J, AS APPLICABLE, or (2) conduct routine analytical monitoring per Section 6.0 AND SECTION 8.G.8 OR 8.J.8, AS APPLICABLE SWQS. Numeric effluent limitation guidelines do not apply TO DISCHARGES TO NON-WOTUS PROTECTED SURFACE WATERS. Permittees discharging to non-WOTUS protected surface waters are subject to state requirements only per A.R.S. 49-255.04(C), enforceable solely by ADEQ.

Comment: Suggest striking “non-numeric” because referring to “non-numeric” BMPs suggests that there are numeric BMPs. That is not our understanding of BMPs. Comment: The stricken language suggested that the discharge itself must meet SWQS, but Part 2.1.1 refers to the effect of the discharge on the receiving water. The reference to Part 2.1.1 at the beginning of the suggested revised section ties this language to the overall permit requirement to not cause exceedance of SWQS in protected surface water

Response B19

Change made.

Comment B20

2.2.1.2.8 Employee Training. When and how to conduct inspections, record applicable findings, and take corrective actions AS REQUIRED IN PART 3.

Response B20

Change made.

Comment B21

2.2.2 Numeric Effluent Limitations Based on Effluent Limitation Guidelines. Table 2-2 below identifies specific regulated activities with effluent limitation guidelines and the locations of effluent limitation guidelines in this permit. Discharges from such activities TO WOTUS must meet the specified effluent limitation guidelines. Compliance with these effluent limits is to be determined based on discharges from these regulated activities independent of commingling with any other discharges allowed under this permit.

ELGs do not apply TO discharges to non-WOTUS protected surface waters.

Response B21

Change made.

Comment B22

3.0 Corrective Actions. Comment: The corrective action concept is questionable under federal law and should not be applied to stormwater discharges to non-WOTUS surface waters.

Comment: These clarifications are not necessary because the entire Part should not be applicable to discharges to non-WOTUS protected surface waters.

Response B22

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

Comment B23

5.3 Required SWPPP Modification and 5.5 SWPPP Availability. Add FOR DISCHARGES TO WOTUS and (ONLY IF THE SWPPP COVERS DISCHARGES TO WOTUS).

Response B23

Change not made to Part 5.3- Required SWPPP Modification. Permittees that discharge to a WOTUS or non-WOTUS protected surface water, are required to modify their SWPPP to address corrective actions. New dischargers or new sources to waters identified as impaired that are non-WOTUS protected surface waters, do not have to submit their SWPPP for ADEQ review. Change made to Part 5.5 to specify that the SWPPP shall be made available to the EPA, when the discharge is to a WOTUS. New or expanded discharges to an OAW, are only applicable to discharges to WOTUS and require a SWPPP to be submitted.

Comment B24

5.5 SWPPP Submittal. Note: a SWPPP does not have to be submitted for a new discharger or new source if the discharge is to a non-WOTUS PROTECTED SURFACE WATER THAT IS IDENTIFIED AS AN impaired or not-attaining water.

Response B24

Change made.

Comment B25

5.6 Additional SWPPP Documentation Requirements. Corrective action documentation (see Part 3.2) [APPLICABLE ONLY TO DISCHARGES TO WOTUS].

Response B25

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

Comment B26

6.0 Analytical Monitoring Program. In addition to visual assessments required in Part 4.2, the permittee shall analyze stormwater samples, in accordance with Part 6 and any sector-specific requirements in Part 8, FOR DISCHARGES TO WOTUS. CONSISTENT WITH PART 2.2.1.2, FOR DISCHARGES TO NON-

WOTUS PROTECTED SURFACE WATERS, A PERMITTEE MAY ELECT TO IMPLEMENT THE MEASURES DEFINED IN PARTS 2.2.1.2.1-10 AND 8.G OR 8.J, AS APPLICABLE, IN LIEU OF CONDUCTING THE ANALYTICAL MONITORING OTHERWISE REQUIRED PURSUANT TO THIS PART 6 AND PART 8.G.8 OR 8.J.8, AS APPLICABLE.

Response B26

Change made.

Comment B27

6.1 1 Analytical Monitoring Types. Effluent Limitation Guidelines (ELGs) (does not apply to DISCHARGES TO a non-WOTUS protected surface water); Outstanding Arizona Water (does not apply TO DISCHARGES TO A non-WOTUS protected surface water).

Response B27

Change made.

Comment B28

This permit has no action levels. This paragraph should be deleted. Alternatively, it should be revised to state that the NOI certificate may specify which fraction is required for metals testing, with an explanation as to why a particular fraction is being required.

Response B28

Language referencing action levels has been deleted. The NOI currently does not have the ability to provide a justification for total or dissolved, however the permit provides the dissolved, total fraction or both, in the sampling requirements found in the tables in Part 8. The NOI will populate which fraction, total, dissolved or both is required. No change made to the NOI Certificate.

Comment B29

6.2.1 General Analytical Monitoring. "For those discharges to non-WOTUS protected surface waters, if the parameter includes an analysis for total metals, the permittee can substitute the dissolved fraction for that parameter IF THE MOST STRINGENT SWQS APPLICABLE IN THE NON-WOTUS PROTECTED SURFACE WATER IS EXPRESSED AS DISSOLVED."

Response B29

Changed to "For those discharges to non-WOTUS protected surface waters, if the parameter includes an analysis for total metals, the permittee can substitute the dissolved fraction for that parameter, as long as there is a SWQS in the non-WOTUS protected surface water for that parameter that is expressed as dissolved. The metals that are subject to the dissolved fraction and may have a SWQS in a non-WOTUS protected surface water include: cadmium, chromium III, copper, lead, nickel, silver and zinc."

Comment B30

6.2.3 Impaired and Not-Attaining Waters Monitoring. The discharge of a pollutant TO WOTUS above an applicable an adopted a Waste Load Allocation (WLA) or Total Daily Maximum Load (TMDL) for a not-attaining water, requires corrective action pursuant to permit Part 3.0. FOR DISCHARGES TO NON-WOTUS PROTECTED SURFACE WATERS, PART 6.2.3 BECOMES APPLICABLE ONCE ADEQ FINALIZES THE FIRST LIST PREPARED UNDER A.R.S. § 49-232(B), AS ADDED BY LAWS 2021, CHAPTER 325.

Response B30

No change made for the corrective action comment-see Response B25.

The new §49-232(K) as modified by Section 11 of HB2691(2021) is a gap-filling measure in the legislation. Pursuant to that section of HB2691, ADEQ will apply existing identification rules adopted in accordance with subsection D to impaired non-WOTUS protected surface waters until the SWPP rulemaking is completed.

During the SWPP rulemaking, ADEQ will modify the rules for identifying impaired waters, including TMDLs. As part of the SWPP rulemaking, ADEQ will prepare a new list of impaired waters using the modified identification rules and any modified water quality standards. ADEQ will follow the publication requirements in the new 49-232(B) for the new impaired non-WOTUS protected surface water list.

Comment B31

6.3 Accelerated Monitoring. ELGs and associated accelerated monitoring do not apply TO DISCHARGES TO non-WOTUS protected surface waters.

Response B31

Change made.

Comment B32

6.4.3 Substantially Identical Outfalls. The Mining MSGP does not have "routine" analytical monitoring. This is probably a carry-over/typo from the non-mining MSGP. "General" is the term used in Part 8.G.8.1.

Response B32

Change made from routine to general.

Comment B33

7.2.4 Planned Changes Report. 7.2.1 THE REQUIREMENT TO PROVIDE NOTIFICATION IF THE CHANGE WOULD QUALIFY THE SITE AS A NEW SOURCE (APPENDIX B, SUBSECTION 12.A(1)) APPLIES ONLY IF THE FACILITY DISCHARGES TO A WOTUS.

Response B33

Change made.

Comment B34

8.G.1.1 Covered Discharges from Active Facilities.. FOR DISCHARGES TO WOTUS, only the stormwater discharges from the areas described in Table 8.G.1.1 and the allowable non-stormwater discharges identified in Part 1.1.3 are covered. FOR DISCHARGES TO NON-WOTUS PROTECTED SURFACE WATERS, ALL DISCHARGES OF STORMWATER, AS WELL AS THE ALLOWABLE NON-STORMWATER DISCHARGES IDENTIFIED IN PART 1.1.3, ARE COVERED.

Comment: The stormwater/mine drainage/process wastewater distinction, and associated discharge prohibitions, are based on the technology-based ELGs for ore mining and dressing found at 40 C.F.R. Part 440, Subpart J. These ELGs do not apply to discharges to non-WOTUS protected surface waters, per A.R.S. § 49-255.04(B)(2). The general permit section of HB 2691 (A.R.S. 49-255.04(C)) applies these same limits to general AZPDES permits for discharge to non-WOTUS protected surface waters (general permits are "subject to the limitations prescribed in subsection B of this section . . .").

Response B34

Change made, except the word "all" in discharges of stormwater (only authorized stormwater is allowed). Clarification made in this section to identify that ELGs that are referenced in this section apply to WOTUS only.

Comment B35

TABLE 8.G.1.1- Footnotes. Note 1: Stormwater runoff from these sources DISCHARGED TO WOTUS is subject to the AZPDES program for stormwater unless mixed with discharges subject to 40 CFR Part 440 that are regulated by another permit prior to mixing. Non-stormwater discharges from these sources are subject to AZPDES permitting and may be subject to the effluent limitation guidelines under 40 CFR Part 440 WHEN DISCHARGED TO WOTUS. Discharges from overburden/waste rock and overburden/waste rock-related areas are not subject to 40 CFR Part 440 unless they: (1) drain naturally (or are intentionally diverted) to a point source; and (2) combine with "mine drainage" that is otherwise regulated under the Part 440 regulations. For such sources, coverage under this permit FOR DISCHARGES TO WOTUS is available if the discharge composed entirely of stormwater does not combine with other sources of mine drainage

that are subject to 40 CFR Part 440, and that meets other eligibility criteria contained in Part 1.1 of this permit. Permit applicants bear the initial responsibility for determining the applicable technology-based standard for such discharges TO WOTUS. NOTE 2: STORMWATER DISCHARGED TO NON-WOTUS PROTECTED SURFACE WATERS IS NOT SUBJECT TO THE RESTRICTIONS IN THIS TABLE 8.G.1.1.

Response B35

Change made to clarify that ELGs apply to WOTUS only and do not apply to non-WOTUS protected surface waters.

Comment B36

8.G.2.1 Prohibition of Stormwater Discharges. Stormwater discharges not authorized by this permit: discharges TO WOTUS from active metal mining facilities that are subject to effluent limitation guidelines for the Ore Mining and Dressing Point Source Category (40 CFR Part 440). DISCHARGES TO NON-WOTUS PROTECTED SURFACE WATERS ARE NOT SUBJECT TO THIS PROHIBITION.

Response B36

Change made.

Comment B37

8.G.4 Stormwater Discharges Associated with the Exploration and Construction Phases of Mining (Clearing, Grading, and Excavation Activities), Once the areas subject to construction and exploration activities are stabilized or the area(s) become part of the mining operation, the control measures, inspections, monitoring, and other requirements in Parts 8.G.4 are no longer required; however, the site remains subject to THE APPLICABLE PROVISIONS OF Parts 1 through 7, Parts 8.G.5 through 8.G.9, and all other applicable provisions of this permit.

Response B37

Change made.

Comment B38

8.G.4.3.1.b Inspection Schedule. Inspection Schedule for Sites within 2.5 miles of a Special Water. If any discharge point from the construction site is within 2.5 miles upstream of an impaired WATER or A WOTUS THAT IS CLASSIFIED AS AN outstanding Arizona water, the permittee shall inspect the site at least once every 7 calendar days. WITH RESPECT TO NON-WOTUS PROTECTED SURFACE WATERS, THE ENHANCED INSPECTION FREQUENCY CALLED FOR BY THIS PARAGRAPH, IF APPLICABLE, BEGINS ONCE ADEQ FINALIZES THE FIRST LIST PREPARED UNDER A.R.S. § 49-232(B), AS ADDED BY LAWS 2021, CHAPTER 325.

Response B38

No change was made, except to add "impaired water or a WOTUS that is classified as an OAW."

The new §49-232(K) as modified by Section 11 of HB2691(2021) is a gap-filling measure in the legislation. Pursuant to that section of HB2691, ADEQ will apply existing identification rules adopted in accordance with subsection D to impaired non-WOTUS protected surface waters until the SWPP rulemaking is completed.

During the SWPP rulemaking, ADEQ will modify the rules for identifying impaired waters, including TMDLs. As part of the SWPP rulemaking, ADEQ will prepare a new list of impaired waters using the modified identification rules and any modified water quality standards. ADEQ will follow the publication requirements in the new 49-232(B) for the new impaired non-WOTUS protected surface water list.

Comment B39

8.G.5 Additional Control Measures for the Active and Inactive Mining Phases. PERMITTEES DISCHARGING TO WOTUS SHALL COMPLY WITH PARTS 8.G.5, 8.G.6, 8.G.7 AND 8.G.8 DURING THE ACTIVE AND INACTIVE MINING PHASES. PERMITTEES DISCHARGING TO NON-WOTUS PROTECTED SURFACE WATERS DURING THE ACTIVE AND INACTIVE MINING PHASES SHALL

IMPLEMENT ONE OF THE FOLLOWING TWO APPROACHES IN ORDER TO DEMONSTRATE THAT DISCHARGES DO NOT CAUSE OR CONTRIBUTE TO AN EXCEEDANCE OF APPLICABLE SWQS IN THE NON-WOTUS PROTECTED SURFACE WATER (SEE PART 2.1.1): (1) COMPLY WITH THE CONTROL MEASURE, SWPPP AND INSPECTION REQUIREMENTS OF PARTS 8.G.5, 8.G.6 AND 8.G.7; OR (2) COMPLY WITH THE INSPECTION REQUIREMENTS OF PART 8.G.7 AND THE ANALYTICAL MONITORING REQUIREMENTS OF PART 8.G.8.

Comment: This language is consistent with the approach set forth in Part 2.2.1.2. Moreover, pursuant to A.R.S. 49-255.04(C), analytical monitoring can be required for discharges to non-WOTUS protected surface waters only if BMPs are not sufficient to achieve SWQS.

Response B39

No changes made to Part 8.G.5. The option of choosing control measures or analytical monitoring has been added to Part 2.2, Part 2.2.1.2, Part 6.0, and Part 8.G.8 for non-WOTUS protected surface waters. Part 8.G.6- Additional SWPPP Requirements for Mining Operation applies to both WOTUS and non-WOTUS protected surface waters (with the exception of control measures portion, if permittee chooses the analytical monitoring option for non-WOTUS protected surface waters). All permittees must prepare a SWPPP. New source and new dischargers to impaired waters, do not have to submit the SWPPP for review if the discharge is to a non-WOTUS protected surface water.

Part 8.G.8 is not required for non-WOTUS protected surface waters, unless ADEQ finds that BMPs are not sufficient to protect surface water quality standards, pursuant to A.R.S 49-255.04 (C). This language has been added to the third paragraph in Part 8.G.8. Permit Part 2.2.,Part 2.2.1.2, Part 6.0, and Part 8.G.8 has been edited to distinguish between WOTUS and non-WOTUS control measure and or analytical monitoring provisions.

Comment B40

Part 8.G.5.1.3. Treated runoff may be discharged as a stormwater source regulated under this permit provided THAT IF THE DISCHARGE IS TO A WOTUS, the discharge is not combined with discharges subject to effluent limitation guidelines for the Ore Mining and Dressing Point Source Category (40 CFR Part 440).

Response B40

Change made.

Comment B41

Part 8.G.5.3. Certification of Discharge Testing. (unauthorized non-stormwater discharges) Test or evaluate all outfalls covered under this permit for the presence of specific mining-related non-stormwater discharges such as (1) seeps or adit discharges (SEE PART 8.G.2.2), or (2) IN THE CASE OF DISCHARGES TO WOTUS ONLY, discharges subject to effluent limitations guidelines (e.g., 40 CFR Part 440), such as mine drainage or process water. The certification may be kept with the site's SWPPP consistent with Part 8.G.6.6.

Response B41

Change made.

Comment B42

Part 8.G.6.6. Certification of Permit Coverage for Commingled Non-Stormwater Discharges (APPLICABLE ONLY TO DISCHARGES TO WOTUS): If the permittee is able to certify, consistent with Part 8.G.5.3 above, that a particular discharge TO WOTUS composed of commingled stormwater and non-stormwater is covered under a separate AZPDES permit, and that permit subjects the non-stormwater portion to effluent limitations prior to any commingling, such certification shall be retained with the SWPPP.

Response B42

Change made.

Comment B43

8.G.8 Monitoring and Reporting Requirements. ACTIVE SITES THAT DISCHARGE TO WOTUS MUST COMPLY WITH ALL APPLICABLE MONITORING REQUIREMENTS OF THIS PART 8.G.8. ACTIVE SITES THAT DISCHARGE TO NON-WOTUS PROTECTED SURFACE WATERS AND THAT ELECT TO CONDUCT ANALYTICAL MONITORING RATHER THAN IMPLEMENTING THE CONTROL MEASURES AND SWPPP REQUIREMENTS OF PARTS 8.G.5 AND 8.G.6 MUST COMPLY WITH ALL APPLICABLE MONITORING REQUIREMENTS OF THIS PART 8.G.8. ACTIVE SITES THAT IMPLEMENT THE CONTROL MEASURES AND SWPPP REQUIREMENTS OF PARTS 8.G.5 AND 8.G.6 ARE NOT REQUIRED TO CONDUCT ANALYTICAL MONITORING UNDER THIS PART 8.G.8.

FOR DISCHARGES TO NON-WOTUS PROTECTED SURFACE WATERS, PERMITTEES MAY ELECT TO ANALYZE ONLY FOR THE DISSOLVED FRACTION WHEN CONDUCTING METALS SAMPLING CALLED FOR IN PARTS 8.G.8.1 AND 8.G.8.2 IF THE MOST STRINGENT SWQS APPLICABLE IN THE NON-WOTUS PROTECTED SURFACE WATER TO WHICH THE DISCHARGE OCCURS IS EXPRESSED AS DISSOLVED. OTHERWISE, MONITORING SHALL BE FOR TOTAL METALS.

Response B43

Change partially made, except for the inclusion of Part 8.G.5-Additional Control Measures for the Active and Inactive Mining Phases. and Part 8.G.6- Additional SWPPP Requirements for Mining Operations. All permittees must prepare a SWPPP, however it may look different for discharges to non-WOTUS protected surface waters (contain a site map, describe pollutant sources, describe controls measures or analytical monitoring). Permit Part 2.2. Part 2.2.1.2, Part 6.0, and Part 8.G.8 have been edited to distinguish between WOTUS and non-WOTUS control measures and or analytical monitoring provisions for non-WOTUS protected surface waters.

The second paragraph of the comment that was changed to "For those discharges to non-WOTUS protected surface waters, if the parameter includes an analysis for total metals, the permittee can substitute the dissolved fraction for that parameter, as long as there is a SWQS in the non-WOTUS protected surface water for that parameter that is expressed as dissolved. The metals that are subject to the dissolved fraction and may have a SWQS in a non-WOTUS protected surface water include: cadmium, chromium III, copper, lead, nickel, silver and zinc."

Comment B44

Table 8.G-8.2 Footnote. NOTE: CONSISTENT WITH PARTS 6.2 1 AND 8.G.8, FOR DISCHARGES TO NON-WOTUS PROTECTED SURFACE WATERS, PERMITTEES MAY ELECT TO ANALYZE ONLY FOR THE DISSOLVED FRACTION WHEN CONDUCTING METALS SAMPLING CALLED FOR IN THIS TABLE IF THE MOST STRINGENT SWQS APPLICABLE IN THE NON-WOTUS PROTECTED SURFACE WATER TO WHICH THE DISCHARGE OCCURS IS EXPRESSED AS DISSOLVED.

Response B44

Change not made to Tables, as text was inserted in Part 8.G.8. See Response B43, second paragraph.

Comment B45

Appendix A- Definitions. Discharge –means any addition of any pollutant to protected surface waters from any point source BUT DOES NOT INCLUDE THE ADDITION OF DREDGED OR FILL MATERIAL TO NON-WOTUS PROTECTED SURFACE WATERS. Comment: New language reflects full definition at ARS 49-255(2).

Response B45

Change made.

Comment B46

Appendix A- Definitions. Point Source – means any discernible, confined and discrete conveyance, including, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants are or may be discharged to A WOTUS or OTHER protected surface water. Point source does not include return flows

from irrigated agriculture. Comment: Could also just say “protected surface water” here (with no reference to WOTUS), as WOTUS are a subcategory of protected surface waters.

Response B46

Change made.

Comment B47

Appendix A- Definitions. "Waters of the United States (WOTUS) –means navigable waters as defined by Section 502(7) of the Clean Water Act.

Comment: Suggest deleting “waters of the state that are also” because “waters of the State” is not a defined term in this appendix. Alternatively, could define WOTUS as “protected surface waters that are also navigable waters as defined by Section 502(7) of the Clean Water Act.”

Response B47

Change made.

Comment B48

A.2. Abbreviations and Acronyms. TSDf – Treatment, Storage, or Disposal Facility. Comment: Probably not necessary (acronym does not appear to be used anywhere in the permit).

Response B48

Change made.

Comment B49

Appendix B. Standard Permit Conditions. 1. Duty to Comply. a. The permittee shall comply with all conditions of this permit. FOR DISCHARGES TO WOTUS, any permit noncompliance constitutes a violation of the Clean Water Act; A.R.S. Title 49, Chapter 2, Article 3.1; and A.A.C. Title 18, Chapter 9, Articles 9 and 10, and is grounds for enforcement action, permit termination, revocation and reissuance, or modification, or denial of a permit renewal application.

Response B49

Change made.

Comment B50

Appendix B. Standard Permit Conditions. 12. Reporting Requirements. A.1. A PERMITTED FACILITY DISCHARGES TO A WOTUS AND AN alteration or addition to THE [A1] facility may meet one of the criteria for determining whether a facility is a new source in 40 CFR 122.29(b) (incorporated by reference at A.A.C. R18-9-A905(A)(1)(e)). Comment: Changes suggested because new source classifications are not pertinent if the discharge is to a non-WOTUS protected surface water

Response B50

Change made.

Comment B51

Appendix B. Standard Permit Conditions.17. Requiring Coverage under an Individual Permit [A1] or an Alternative General Permit. This section needs to be revised as it applies to discharges to non-WOTUS protected surface waters in order to reflect ARS 49-255.04(C).

Response B51

Change made.

Comment B52

Appendix C. For any sectors required to conduct sampling for a hardness dependent metal (I.E., CADMIUM, CHROMIUM III, COPPER, LEAD, NICKEL, SILVER, AND ZINC), the hardness of the receiving protected surface water (if stormwater is discharged to a perennial or intermittent stream) or the hardness

of the stormwater discharge (if the stormwater discharge is to an ephemeral wash) shall be analyzed.

Comment: This permit does not contain action levels, so references to such levels should be deleted.

Response B52

Change made.

Comment B53

Appendix C. Strike Tables and 2nd paragraph under what is hardness.

Response B53

Change made to remove formulas and leave rule reference to how formulas can be obtained.

Comment B54

Reporting of Hardness Values- strike 2nd sentence.

Comment: There are no permit limits established in this permit.

Response B54

Change made.

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

ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM

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

Six General Permits

RESPONSE TO GENERAL COMMENTS

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

Administrative Record

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

Permits that were modified include:

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

Permit that were re-issued include:

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

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

Response to Comments

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

Comment A1

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

Response A1

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

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

Comment B1

Without explanation, the draft general permits include the addition of the phrase “of pollutants” after “discharge.” This proposal adds a redundancy because “discharge,” by definition, is the addition of

pollutants. A.R.S. § 49-255(2). Despite the redundancy, if the phrase is added on the cover page, it should be added to every “discharge” reference in the general permit to avoid ambiguity.

Response B1

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

Comment B2

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

Response B2

Change made.

Comment B3

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

Response B3

See Response B1.

Comment B4

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

Response B4

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

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

The approach in the AZPDES general permits is to identify those areas of the permit that only apply to WOTUS. Currently, the Protected Surface Water List (PSWL) is located on ADEQ's Surface Water

Protection Program (SWPP) website at: <https://www.azdeq.gov/SWPP>. Pursuant to Section 7 of HB2691, ADEQ will publish an initial PSWL by October 29, 2021.

Comment B5

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

Response B5

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

Comment B6

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

Response B6

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

Comment B7

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

Response B7

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

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

Comment B8

The proposed general permits contain the addition of reference to discharges to “tributaries” of OAWs, but not directly to streams that may contain a downstream segment on the same stream that is an OAW (a discharge to a tributary is different than a discharge to a different stream segment). As proposed, these general permits incorrectly distinguish discharges to tributaries of OAWs and discharges upstream of OAWs. Current examples of OAWs where this distinction is relevant are Cienega Creek, Aravaipa Creek, and Davidson Canyon. We suggest that ADEQ strike the addition of the “tributary to” an OAW and replace it with “upstream of” an OAW, consistent with past and current general permit provisions.

Response B8

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

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

Comment B9

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

Response B9

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

Comment B10

For example, section 5.5 of the proposed MSGP indicates a Stormwater Pollution Prevention Plan (SWPPP) submittal is not required for discharges to an OAW. Similarly, section 6.2.4 of the MSGP

eliminates OAW monitoring for discharges to non-WOTUS protected surface waters. These proposed exemptions are unrelated to the statutory limitation on adoption of an OAW water quality standard. Rather, they indiscriminately reduce or eliminate water quality protections for OAWs, whether they are WOTUS or not. Each of the proposed general permits contain similar provisions that inappropriately eliminate monitoring and other requirements for discharges that may impact OAWs. We believe ADEQ should ensure that the general permits maintain the protections that apply to OAWs, especially those that are WOTUS.

Response B10

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

Section 5.5 of the MSGP includes a statement that "a SWPPP does not need to be submitted for discharges to a non-WOTUS impaired, not-attaining and or OAW." That statement is prefaced by non-WOTUS. Since there are no non-WOTUS OAWs, that portion of the sentence pertaining to non-WOTUS OAWs was removed. Since all OAWs are WOTUS, the SWPPP submittal and OAW monitoring will apply for new or expanded discharges to upstream segments of an OAW. The MSGP includes a number of generic statements, in certain OAW permit sections, to identify that sections of the permit would not apply for those discharges solely to non-WOTUS protected surface waters. Any applicant discharging to an upstream segment of an OAW would be subject to the Federal WOTUS rule and would be subject to SWPPP and monitoring provisions defined in the permit.

Comment B11

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

Response B11

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

Comment B12

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

Response B12

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

Comment B13

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

Response B13

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

C. Gila River Indian Community (GRIC) by Letter on July 30, 2021**Comment C1**

The Community notes and appreciates that ADEQ has added language explicitly disclaiming authority to regulate discharges on Tribal lands in two of the six General Permits (the Multi-Sector General Permit and the De Minimis General Permit). The remaining four General Permits, however, do not include similar language. Given that Arizona lacks authority to regulate any and all discharges on Tribal lands, and to avoid any confusion by the regulated community, ADEQ should include similar disclaimers in the four General Permits that currently lack them. Therefore, the Community respectfully requests that ADEQ amend the proposed General Permits so that they all include the appropriate disclaimers.

Response C1

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

D. City of Phoenix by Letter on July 30, 2021**Comment D1**

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

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

Response D1

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

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

Comment E1

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

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

Response E1

ADEQ considered two separate permits, but ultimately decided that one permit was simpler for our customers and ADEQ. Particularly, if a site with multiple outfalls discharged to both a WOTUS and non-WOTUS protected surface water, coverage under one permit was deemed more straightforward. ADEQ believes it has adequately identified those sections of the permit(s) that apply to WOTUS only, and or do not apply to non-WOTUS protected surface waters.

Comment E2

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

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

ADEQ's proposed permits, but the only way to completely eliminate the risk is to adopt entirely separate permits for discharges to non-WOTUS protected surface waters.

Response E2

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

Comment E3

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

Response E3

See Response E2.

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

Comment F1

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

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

Response F1

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