

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

**Permit No. AZG2019-001**

**RESPONSE TO COMMENTS**

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

**Administrative Record**

The accompanying Fact Sheet sets forth the basis for the September 29, 2021, permit modification and the January 1, 2020, issuance of the Arizona National Pollutant Discharge Elimination System (AZPDES) Industrial Multi-Sector General Permit (MSGP), No. AZG2019-001, by the Arizona Department of Environmental Quality (ADEQ). The September 29, 2021, permit modification included the addition of non-WOTUS protected surface waters in accordance with A.R.S Title 49 Chapter 2, Article 3.1.

The Industrial MSGP authorizes stormwater pollutant discharges in Arizona associated with categories i, ii, iv through ix and xi, pursuant to 40CFR 122.26(b)(14) (non-mining industrial activities) 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 two municipalities 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 City of Phoenix using Konveio on July 29, 2021 and by Letter on July 30, 2021**

#### **Comment B1**

Part 2.2.1.2. Correct "Section 2.2.1.2.1-10" to "Section 2.2.1.2.1 – 2.2.1.2.10".

#### **Response B1**

Change made.

#### **Comment B2**

Part 1.1. Typographical error, correct "protect" to "protected".

#### **Response B2**

Change made.

#### **Comment B3**

Part V.B.1. City suggests that "Section 2.2.1.2.1-10" be revised to "Section 2.2.1.2.1 – 2.2.1.2.10" for clarity.

#### **Response B3**

No change made. Could not find the reference.

#### **Comment B4**

Fact Sheet. The Fact Sheet includes brief remarks providing the background for the permit modification. Given the unique nature of this modification, the City recommends that this section be updated to include a summary of the state legislation and explanation of use of the term PSW for both WOTUS and non-WOTUS waters.

#### **Response B4**

Change made to Fact Sheet to include background information for permit modification.

#### **Comment B5**

General Comment. In the permit, ADEQ added the text "does not apply for discharges to non-WOTUS PSWs." ADEQ has not yet provided clarity on which PSWs are WOTUS and which are non-WOTUS. This is critical information for permittees to know which aspects of this permit apply and where. Please prioritize adding this critical information on WOTUS status to the PSW map and list. In addition, this permit should not become effective until the PSW map and list are final and accurately reflect the requirements in Arizona Revised Statutes (ARS) 49-221(G)."

#### **Response B5**

ADEQ is in the process of determining the jurisdictional status of Arizona surface waters since the remand of the federal Navigable Waters Protection Rule (NWPR). ADEQ is in the process of developing a map of flow regimes and which program regulates the waters to give clarity on whether a water is a protected

surface water and a WOTUS. Evaluations are ongoing through the application of ADEQ's Screening Toolkit. More information is available at [azdeq.gov/screeningtoolkit](http://azdeq.gov/screeningtoolkit).

ADEQ is required to issue the AZPDES general permits to incorporate State protected surface waters within 90 days from when HB 2691 is signed. The date the AZPDES general permits have to be issued is on September 29, 2021, therefore ADEQ cannot defer the effective date of the permits in order to finalize the GIS map or lists.

Pursuant to Section 7 of HB2691, ADEQ will publish an initial Protected Surface Water List (PSWL) within 30 days of the September 29th, effective date of the bill. Section 7 also requires that "[f]or non-wotus protected surface waters, the Director shall apply surface water quality standards established as of January 1, 2021" until specifically modified by that December 31, 2022 rulemaking. A draft version of the PSWL was shared with stakeholders and legislators during the legislative process."

#### **Comment B6**

ELG. At multiple locations throughout the Fact Sheet and Permit, the clarification that effluent limitation guidelines (ELG) do not apply to non-WOTUS PSW is not consistently provided. If it is correct that the ELG does not apply to non-WOTUS PSW, the City requests that this be consistently identified. It is also unclear here and other locations whether the caveat, "does not apply for discharges to non-WOTUS PSW" applies just to the Outstanding Arizona Waters (OAW) reference or to the entire sentence. Please reword to make ADEQ's intent clearer.

Example locations where these changes may be needed include:  
Fact Sheet Section II.B Summary of Changes from the 2010 MSGP;  
Fact Sheet Section IX.A.1 Analytical Monitoring Types, third bullet point;  
Fact Sheet Section IX.B.4. Outstanding Arizona Water Monitoring (Part 6.2.4);  
Fact Sheet Section IV.C. Authorization Under the 2019 MSGP.

#### **Response B6**

Change made to insert *Applicable only to discharges to WOTUS* to the appropriate sections. If this caveat is inserted into the title of a permit section, or is the introductory sentence for that entire permit section, that condition applies to the entire section. Otherwise, if the caveat only applies to a portion of that section (ie SWPPP submittal in Obtaining Authorization to Discharge- Part 1.3.1.1.c.), that permit section would identify the applicability for that caveat.

#### **Comment B7**

Textual. "At multiple locations throughout the Fact Sheet and Permit, the City observed inconsistent use of the term "protected surface waters". Alternate terms used include "waterbody," "receiving channel", "receiving water", "state waters", WOTUS, and "waters". In many instances, it appears that these terms should change to either PSW, WOTUS PSW, or Non-WOTUS PSW.

In addition, some places that need WOTUS or Non-WOTUS added in front of PSW do not have those distinctions and some places that should use PSW are still using WOTUS. Please do a thorough check for consistency in the use of the new terminology throughout these documents. Example locations include:

- Fact Sheet IV.A.2 Allowable Non-Stormwater Discharges, 5th paragraph
- Fact Sheet Section VI. Correction Actions (Part 3), Conditions Requiring Corrective Action
- Fact Sheet Section IX.B.3.c Impaired Waters Monitoring Frequency
- Permit Section 2.1.1 Water Quality Standards
- Permit Section 3.1.1 Conditions Requiring Corrective Action
- Permit Section 8.L.11 Sector L Exemption from MSGP
- Appendix A Definition of Discharge of a Pollutant"

#### **Response B7**

Change made to incorporate protected surface water and or remove inconsistent wording.

**Comment B8**

Ephemerals. ADEQ has retained the use of ephemeral waters as examples of a protected surface water. For example, in the Fact Sheet section IX.B.1 Routine Analytical Monitoring, ADEQ uses the following example to explain how a parameter action level was developed, "If the protected surface water was a tributary and not listed in Appendix B..., the tributary rule... would be used to calculate the action level (for example, an unlisted tributary that is ephemeral would use aquatic and wildlife-ephemeral and partial body contact)." Since so few ephemeral waters are now PSWs (ADEQ only included the ephemeral reaches of the 8 major rivers as non-WOTUS PSW), it would be more relevant to include an intermittent or perennial example. Please review the permit and replace examples that use ephemeral waters or tributaries, as appropriate, with more relevant examples of PSWs.

**Response B8**

Change made to include an example of a perennial water in the Fact Sheet section IX.B.1.

It should be noted 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. For example, some ephemerals and canals that may have been removed in previous versions of the draft permit based on the June 21, 2020 NWPR, will now be regulated as protected surface waters because they are WOTUS.

**Comment B9**

Tributary. "Impaired and Outstanding Arizona Waters: The City agrees with use of the word "upstream" throughout the permit and Fact Sheet related to discharges within ¼ mile of impaired, not-attaining, and OAW. However, the addition of the word "tributary" in this context effectively excludes discharge within 1/4 mile upstream of the impaired, non-attaining, OAW, etc. reach within the same river/water body. The City is not certain this was ADEQ's intent. In addition, tributary is not defined.

If needed to meet ADEQ's intent, please clarify this language throughout the fact sheet and permit to clearly indicate that the various requirements apply to discharges within ¼ mile upstream of the noted reach whether the discharge is within the same water body or a tributary.

Example locations include:

- Fact Sheet Section 1.1.4.6 "New Dischargers and New Sources to Water Quality Impaired Waters";
- Fact Sheet Section 1.1.4.7 "New Discharges and New Sources to Outstanding Arizona Waters";
- Fact Sheet Section IV.C. "Authorization Under the 2019 MSGP" (Part 1.3);
- Permit Section 1.1.4.6.3 "New Dischargers and New Sources to Impaired Waters";
- Permit Section 1.1.4.6.2 & 3 "New or Expanded Discharges to Outstanding Arizona Waters";
- Permit Section 1.3.1.c "Obtaining Authorization to Discharge".

Please add a definition for "tributary" to clarify if this includes unregulated tributaries, tributaries that are a PSW or both. In addition, please clarify that "tributary" only applies to surface channels and not to the storm drain system.

**Response B9**

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 MSGPs 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. A tributary could be any flow regime, ephemeral, intermittent and or perennial, could be a WOTUS and or non-WOTUS and could include a surface channel as it relates to an MS4 conveyance.

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 B10**

SWPPP requirements. There are multiple locations where ADEQ notes that submittal of a Stormwater Pollution Prevention Plan (SWPPP) is not required for non-WOTUS PSW that are impaired or not-attaining. For clarity, please update these references throughout the Fact Sheet and Permit to reference WOTUS PSW specifically in these sections for those requirements that only apply to WOTUS PSW and not to non-WOTUS PSW. In addition, the reference to ARS 49-225-05(B)(1) in some of these sections (e.g., Section 1.1.4.6) is incorrect.

**Response 10**

Change made to update the sections. The reference to a SWPPP submittal not being required for impaired, not-attaining protected surface waters, is specific to new dischargers and new sources (A.R.S 49-255.04.B.1) to non-WOTUS protected surface waters. Reference removed.

**Comment B1**

Notice of Intent and Stormwater Pollution Prevention Plans: In the Fact Sheet Section IV.C and Appendix B Table 1-2 of the permit, this language requires a new Notice of Intent (NOI) and fee to be submitted by February 28, 2020, to reapply for coverage. This appears to be a remnant from the 2019 permit reissuance. The City requests clarifying language in the permit that a new NOI will not be required for existing permittees under this modification unless the addition of a non-WOTUS PSW results in a change in discharge point or receiving PSW. In this case, the NOI should be considered a revised/modified NOI with no fee for existing permittees. Since ADEQ is continually updating the list of non-WOTUS PSWs and will likely be doing so for a long time, this seems the best way to approach the uncertain status of some water bodies and the sudden changes to that status as ADEQ continues to gather information on the status of water bodies as PSWs.

**Response B11**

Changes made to include NOI requirements, and fee considerations for permittees already covered by January 1, 2020 MSGP in both the Permit (Table 1-2) and in the Fact Sheet.

**Comment 12**

Definitions: In Appendix A, many of the definitions need to be reviewed for consistency between all the stormwater general permits, the Arizona Administrative Code (AAC), and the ARS. These definitions should all be consistent, such as "ephemeral water", "intermittent water", "perennial water", "not-attaining water", and "TMDL".

For example, ADEQ has revised the definition of perennial water so that it is no longer consistent with the definition in the AAC, and there are several varying definitions of perennial water, intermittent water, etc. across the draft stormwater general permits.

Suggested changes to specific definitions follow:

- ADEQ and Department are both used as acronyms throughout the document. Please use one consistently.
- Municipal Separate Storm Sewer and Municipal Separate Storm Sewer System (MS4): The definition for Municipal Separate Storm Sewer appears to be the definition for MS4. Which is this intended to be? The City also questions why the definition of Municipal Separate Storm Sewer would only apply to non-WOTUS PSWs in small MS4s. The draft language in the city's Phase I MS4 permit implies that it applies to all PSWs, not just WOTUS PSWs. Either this definition needs to be updated or the language in the draft MS4 permit needs to be changed to make it clear it only applies to WOTUS PSWs. Also, the definition reference to 40 CFR 122.32 is also incorrect.
- Not-Attaining Water: The double negative in subsection 'c' of this definition "or the impairment of the surface water is due to pollution but not a pollutant, for which a Total Maximum Daily Load (TMDL) load allocation cannot be developed" is confusing and the comma after "pollutant" is unnecessary and could contribute to misinterpretation. The City recommends that ADEQ consider a re-write for clarity. Is the point that the impairment is the result of a pollutant for which a TMDL can be established, but simply has

not yet? In addition, the City suggests that ADEQ revise the first sentence to match the text used for this definition in the proposed Construction General Permit “a PSW is assessed as impaired, but is not placed on the 303(d) List or equivalent for non-WOTUS protected state waters because...”, and clarify this throughout the permit.

- Outstanding Arizona Water (OAW): Change “PSW” to “WOTUS PSW”. Per ARS 49-221, ADEQ cannot include any OAW designation for a non-WOTUS PSW • Point Source: In this definition, the term “WOTUS” should be removed so it just reads “PSW”. By ADEQ's own definition, PSW includes both WOTUS and non-WOTUS.
- Primary Industrial Activity: This definition has typographical errors which were added during the 2019 permit reissuance. Per email correspondence with the ADEQ permit writer on 5/23/2019, this definition should mirror the EPA language at 40 CFR and the EPA MSGP. The edit was not meant to expand oversight. Please correct this permit language to be consistent with the EPA language as discussed. This includes changing the “or” in the first sentence to “and”, removing the “(2)”, and adding the word “narrative”.
- PSW: Across the general permits and fact sheets, terms other than “PSW”, “non-WOTUS PSW”, and “WOTUS PSW” are used to describe regulated waters such as “waterbody,” “receiving channel”, “receiving water”, “state waters” and “waters”. The City suggests these documents be reviewed for consistency. Use of multiple terms causes confusion and reduces permit clarity.
- Surface Water Quality Standards (SWQS): The City recommends this definition be revised as follows: “Standards adopted for a “non-WOTUS” PSW pursuant to A.R.S. § 49-221 and, in the case of waters of the U.S. “WOTUS PSW”, pursuant to A.R.S. § 49-222.”
- Total Maximum Daily Load: Please add the text “protected surface” in the first and second sentence before “water”. The third sentence should be revised from “WOTUS” to “WOTUS PSW”. The City also suggests that the text in the first sentence for non-WOTUS protected state waters “non-WOTUS PSWs cannot be added to the 303(d) list, but a state equivalent will be established by ADEQ.”
- Waters of the U.S.: The term “waters of the state” should be changed to “PSWs”.

## **Response 12**

The definitions are from the revised statute which supersedes any inconsistent definition found in current rule. The definition in rule will be updated through the rulemaking process. ADEQ has updated the definitions in the permit(s) where appropriate. ADEQ has removed the Department and replaced ADEQ where appropriate.

## **C. Comments received from the City of Glendale by Letter on July 28, 2021**

### **Comment C1**

General Comment. The City of Glendale supports the idea of state-specific protected surface waters. However, ADEQ's proposed modifications to the DMGP are based on language in House Bill 2691 (to become Arizona Revised Statute 49-221), not requirements approved through a rule-making process. Early implementation and pre-emptive changes to the DMGP creates confusion as to the parties' rights and obligations. For example:

- House Bill 2691 (HB2691) was signed by the Governor on May 5, 2021, and becomes effective on September 28, 2021. Is it ADEQ's intention that the modified DMGP becomes effective after September 28, 2021?
- The scope of the draft modified DMGP is specific to discharges to protected surface waters. While ADEQ has posted a Draft Protected Surface Waters List, HB2691 states the Protected Surface Waters List must be adopted by rule by December 31, 2022. Why is the permit being modified now, when there is uncertainty on which surface waters will be regulated? How can those waters be regulated for the next year and a half if they ultimately are not included in the final List in December 2022?
- Due to the current uncertainty regarding which surface waters are “protected surface waters,” the City cannot assess the true impact of the modified DMGP on City operations. Therefore, the comments herein are based on available information to date which indicates the City does not discharge to a protected surface water.

Glendale believes there is a remote possibility that a discharge of pollutants from de minimis activities (such as from potable water systems, well development and maintenance, etc.) may reach the municipal

storm sewer system and/or a protected surface water, but is unsure that this remote possibility is enough to regulate Glendale's conduct."

**Response C1**

State statute takes precedence over current rule. ADEQ will update the rules to reflect the revised statute through a rule making process.

Yes, the current MSGP, effective January 1 ,2020, is being modified and those modifications will become effective on September 29, 2021.

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

Pursuant to Section 7 of HB2691, ADEQ will publish an initial PSWL within 30 days of the September 29th, effective date of the bill. Section 7 also requires that "[f]or non-WOTUS protected surface waters, the Director shall apply surface water quality standards established as of January 1, 2021" until specifically modified by that December 31,2022 rulemaking. A draft version of the PSWL was shared with stakeholders and legislators during the legislative process.

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

The potential permittee should evaluate, using current resources for WOTUS and non-WOTUS protected surface waters, to evaluate whether the discharge has potential to reach a protected surface water. Once that risk is assessed, the applicant should apply for coverage accordingly. ADEQ is willing to work with applicants to assist with that determination.

**Comment C2**

Cover Page - The sequence of the permit effective date, permit modification date, and the date the permit was signed is confusing. Also, is the original expiration date still valid or will the expiration date be changed to five years from the modification date? To better clarify the dates, the City requests the permit language be modified to read:

This permit was originally issued on May 15, 2019, with an effective date of January 1, 2020. This permit was modified on \_\_\_\_\_, 2021.

The modified permit becomes effective on \_\_\_\_\_, 2021.

This permit and the authorization to discharge expires on \_\_\_\_\_, \_\_\_\_

Signed this \_\_\_ day of \_\_\_\_\_, 2021."

**Response C2**

Edits made to include modification and modification effective date. The original expiration of December 31, 2024 will remain the same.

**CommentC3**

Also, the word "pollutant" has been added to "This general permit specifically authorizes stormwater pollutant discharges ..." Adding "pollutant" is redundant since "discharge" is defined in the permit as "any addition of any pollutant ..."

**Response C3**

Change made to remove pollutants from stormwater discharges.

**Comment C4**

Section 1.1 - In the modified MSGP, ADEQ is proposing to add "pollutants" to the first sentence. See previous comment regarding the redundancy of adding "pollutants" when the definition of "discharge" is specific to pollutants.

**Response C4**

Change made to remove pollutants from stormwater discharges.

**Comment C5**

Section 1.1- In the third paragraph, correct the typographical error by adding "-ed" to the end of "protect."

**Response C5**

Change made.

**Comment C6**

Sections 1.1.3, 1.1.4.6, 1.6.4, 2.1.1 and more - These sections of the permit refer to applicable surface water quality standard (SWQS). However, HB2691 includes new language at ARS 49-221(A)(2): "Adopt by rule, water quality standards for non-WOTUS protected surface waters, by December 31, 2022 ... and as determined necessary in the rulemaking process." It is unclear to the City which standards would be applicable to the discharges under the MSGP - existing SWQSs in Arizona Administrative Code, Title 18, Chapter 11, Article I, or new SWQSs yet to be established? Existing SWQS for discharges to WOTUS and new SWQSs for discharges to non-WOTUS protected surface waters? Please clarify. Modifications to the MSGP should be made after rules are adopted into Arizona Administrative Code.

**Response C6**

No change made. The current surface water quality standards in rule A.A.C. R18-11 are enforceable and apply to WOTUS and non-WOTUS protected surface waters, SWQS for non-WOTUS protected surface waters will be updated through the rulemaking process.

Specifically, pursuant to Section 7 of HB2691, ADEQ will publish an initial PSWL within 30 days of the September 29th, effective date of the bill. Section 7 also requires that "[f]or non-WOTUS protected surface waters, the Director shall apply surface water quality standards established as of January 1, 2021" until specifically modified by that December 31, 2022 rulemaking.

Permittees will be notified of any changes to the SWQS and will have any opportunity to review and comment through the public participation process. In accordance with the revised statute.

ADEQ is required to issue the AZPDES general permits to incorporate State protected surface waters within 90 days from when HB 2691 is signed, by September 29, 2021 and cannot wait till after the rules are revised in Arizona Administrative Code.

**Comment C7**

Table 1-2 -Does a new category need to be created for existing dischargers that now need to be covered by this permit due to the incorporation of protected surface waters? Such facilities would not qualify for the NOI submission deadline in row 1, nor do they qualify as "new dischargers" in row 3 ( "commence discharging after the effective date of this permit").

**Response C6**

Changes made to include NOI requirements, and fee considerations for permittees already covered by January 1, 2020 MSGP in both the Permit (Table 1-2) and in the Fact Sheet.



**Comment C8**

Draft Protected Surface Waters List. As a further complication, although there is a Draft Protected Surface Waters List, facilities do not have a definitive list of which waters are regulated as "protected surface waters." Once the modified MSGP is finalized, does ADEQ expect facilities to submit NOIs based on the Draft Protected Surface Waters List?

**Response C8**

A modified NOI is not expected unless there is a change in a discharge point or protected receiving water. The initial PSWL will be published within 30 days of September 29, 2021, if not sooner. The initial PSWL will be updated regularly as information becomes available. If there is a change on a protected surface water after the initial list is published, the permittee should modify their NOI. There is no fee to modify the NOI, unless a change to the NOI would trigger the review of a SWPPP (adding an outfall to impaired protected surface water that is a WOTUS).

**Comment C9**

Existing NOI Coverage. Also, for facilities with existing coverage under the MSGP, is ADEQ requiring a revised NOI be submitted to indicate protected surface waters based on the Draft Protected Surface Waters List? This appears to be the intent in row 7 of the table.

**Response C9**

That was not the intent of row 7 in Table 1-2, however the same conditions apply for NOI modification, including if there is a change to a protected surface water.

**Comment C10**

Again, modifications to the MSGP should be made after rules are adopted into Arizona Administrative Code and the Protected Surface Waters List is finalized.

**Response C10**

No change made. The current surface water quality standards in rule A.A.C. R18-11 are enforceable and apply to WOTUS and non-WOTUS protected surface waters. SWQS will be updated through the rulemaking process.

Specifically, pursuant to Section 7 of HB2691, ADEQ will publish an initial PSWL within 30 days of the September 29th, effective date of the bill.

Section 7 also requires that "[f]or non-WOTUS protected surface waters, the Director shall apply surface water quality standards established as of January 1, 2021" until specifically modified by that December 31, 2022 rulemaking. Permittees will be notified of any changes to the SWQS and will have any opportunity to review and comment through the public participation process.

ADEQ is required to issue the AZPDES general permits to incorporate State protected surface waters within 90 days from when HB 2691 is signed, by September 29, 2021 and cannot wait till after the rules are adopted in Arizona Administrative Code for the PSWL (the initial list to be published within 30 days of September 29, 2021) and for the updates to water quality standards (have up until December 31, 2022).

**Comment C11**

Section 2.2.1.2 - Should "non-WOTUS state waters" be "non-WOTUS protected surface waters"?

**Response C11**

Change made.

**Comment C12**

Section 6. 1. 1 - Please correct the typographical error by adding "to" in the second and fourth bullet points so they read "does not apply to non-WOTUS protected surface water."

**Response C12**

Change made.

**Comment C13**

Section 8.N.6- Why are the parameters in Table 8.N-1 highlighted? Is ADEQ proposing a change to these parameters?

**Response C13**

The highlight was in error. There are no changes to these parameters in Table 8.N-1.

**Comment C14**

Appendix A, Part A-2, A-3, A-6 and A-8-Add "ARS" before referencing sections of Arizona Revised Statutes.

**Response C14**

Change made.

**Comment C15**

Page A-2. Discharge Point -Please correct the typographical error by deleting "are."

**Response C15**

Change made.

**Comment C16**

Page A-S -in "Non-WOTUS Protected Surface Water. "

**Response C16**

Change made to capitalize the word WOTUS.

**Comment C17**

Abbreviations and Acronyms. Page A-9 - Recommend adding "SWQS" to the list of acronyms. Consider deleting "WQS" since all instances in the permit are as "SWQS."

**Response C17**

Change made.

Following this Response to Comments for the Industrial 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](http://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.