

ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM
GENERAL PERMIT FOR PESTICIDE DISCHARGES
TO PROTECTED SURFACE WATERS
Permit No. AZG2021-003
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 modifications and the re-issuance of the Arizona National Pollutant Discharge Elimination System (AZPDES) Pesticide General Permit, No. AZG2021-003, 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 Pesticide General Permit (PGP) authorizes the discharge of pesticides in Arizona to Protected Surface Waters, pursuant to federal conditions in 40 CFR § 122.28 and A.R.S. Title 49 Chapter 2, Article 3.1 et seq. State requirements for discharges to non-WOTUS protected surface waters are enforceable solely by the Arizona Department of Environmental Quality (ADEQ). All discharges authorized by this general permit shall be consistent with the terms and conditions of this general permit. The PGP is applicable within the State of Arizona, except for Indian Country.

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

Summary of Changes from Draft Permit to Final Permit

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

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

Response to Comments

Permit Section – Cover Page

Comment: received from the City of Glendale via letter on July 28, 2021: Cover page - The cover page of the modified PGP shows a permit number of "AZG2021- xxx" but in the certification statement in Section 2.5 there is a reference to "AZG 2021-003." Please ensure consistent references once the permit number is determined.

Response: ADEQ agrees and has revised all references of the permit number, AZG2021-003 in the permit and fact sheet.

Permit Section 1 - Coverage

Comment 1A: received from the Gila River Indian Community via letter on July 30, 2021: The Gila River Indian Community ("Community"), a Federally-recognized Indian Nation with Reservation lands encompassing approximately 372,000 acres, has been actively monitoring the Arizona Department of Environmental Quality's (ADEQ) Arizona Surface Water Protection Program (Program), and has reviewed ADEQ's proposed modifications to the Arizona Pollutant Discharge Elimination System (AZPDES) General Permits (dated June 15, 2021). The Community notes and appreciates that ADEQ has added language explicitly disclaiming authority to regulate discharges on Tribal lands in two of the six General Permits (the Multi Sector General Permit and the De Minimis General Permit). The remaining four General Permits, however, do not include similar language. Given that Arizona lacks authority to regulate any and all discharges on Tribal lands, and to avoid any confusion by the regulated community, ADEQ should include similar disclaimers in the four General Permits that currently lack them. Therefore, the Community respectfully requests that ADEQ amend the proposed General Permits so that they all include the appropriate disclaimers.

Response 1A: ADEQ agrees and has added the following language to the PGP: *"This general permit covers the state of Arizona, except for Indian Country. This permit is not authorized for use by sites with discharges associated with pesticides on any Indian Country lands in Arizona. Authorization for discharges in Indian Country must be obtained through US EPA Region IX or other appropriate authority."*

Comment 1B: received from the City of Glendale via letter on July 28, 2021; and from the City of Phoenix via letter on July 30, 2021: Section 1.2 - In the modified PGP, "irrigation ditches and / or irrigation canals" are listed as included under Weed, Algae, and Vegetation (herbaceous and woody) Control. Are irrigation ditches and/or irrigation canals included in the definition of protected surface waters, or only if they are listed on the Protected Surface Water List? Should this reference be removed from the permit?

Similarly, in the Fact Sheet Section 1.2.b and Section 3.4, the examples use of irrigation ditches, irrigation canals, and earthen or concrete-lined canals are recommended to be revised to a water body that is more likely to be classified as a PSW. ADEQ has only designated drinking water source ditches and canals as "shall add" PSWs.

Response 1B: ADEQ appreciates the comment however, as of the writing of this document, some irrigation canals and ditches may be considered Waters of the U.S. (WOTUS) and thus are Protected Surface Waters. No change has been made to the permit or fact sheet.

Comment 1C: received from the City of Glendale via letter on July 28, 2021: Section 1.4-The first sentence is unclear. Should it read: "New or expanded point-source discharges directly to a protected surface water is classified as an Outstanding Arizona Water"?

Response 1C: ADEQ agrees and has revised permit part 1.4 as follows: "New or expanded point source discharges to protected surface waters that are classified as outstanding Arizona waters (OAWs) listed in A.A.C. R18-11-112 are prohibited."

Comment 1D: received from the City of Phoenix via letter on July 30, 2021: Please revise the permit to clarify that discharges within ¼ mile upstream of an OAW within the same water body are permissible provided the conditions of the permit for OAWs are met.

Response 1D: ADEQ has revised the 2021 PGP Fact Sheet part 1.4, adding information on discharges to OAWs. Discharges within ¼ mile upstream of an OAW, even when upstream but part of the same waterbody, are not automatically eligible for coverage and shall submit a NOI and PDMP to ADEQ for review and approval prior to granting of coverage.

Comment 1E: received from the City of Glendale via letter on July 28, 2021: The last paragraph is unclear. Should it read: "1) it is acceptable to proceed under this general permit and the PDMP does not requires revisions... "?

Response 1E: ADEQ agrees and has revised 1.4(b) as follows: "Within 31 calendar days of receipt of the PDMP and a complete and accurate NOI, ADEQ will notify the operator whether: 1) it is acceptable to proceed under this general permit; 2) the PDMP requires revisions; or 3) there is cause for eligibility denial. If notification is not received in this time frame, the operator may assume coverage under this permit."

Permit Section 2 - Authorization to Discharge

Comment 2A: received from the City of Phoenix via letter on July 30, 2021: The City requests that the effective date of the reissued PGP be January 1, 2022. This will allow current permittees to submit an Annual Report for the entire reporting year 2021, and not require an additional Annual Report covering one or two months of 2021 under the reissued permit.

Response 2A: ADEQ understands the concern, but cannot delay the reissuance of the new permit. Instead, ADEQ has made changes to the permit and fact sheet to waive annual reporting on the PGP for the few months between permit issuance and the start of the first full permit year. Please see additional information permit part 8.5 Annual Report and in the 2021 PGP Fact Sheet.

Comment 2B: received from the City of Glendale via letter on July 28, 2021: The City of Glendale supports the idea of state-specific protected surface waters. However, ADEQ's proposed modifications to the PGP 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 PGP creates confusion as to the parties' rights and obligations. 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 PGP becomes effective after September 28, 2021?

The scope of the draft modified PGP 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 PGP on City operations. Therefore, the comments herein are based on available information to date which indicates the City may discharge to a protected surface water (as of the date of this letter, Bonsall Park Lake is included on the Draft Protected Surface Water List).

Response 2B: Pursuant to Section 7 of HB2691, ADEQ will publish an initial Protected Surface Water List (PSWL) within 30 days of the September 29th, 2021 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 31st, 2022, rulemaking. A draft version of the PSWL was shared with stakeholders and legislators during the legislative process. The PSWL can be found on ADEQ's website at: <http://www.azdeq.gov/surface-water-protection-permitting>.

Comment 2C: received from the City of Phoenix via letter on July 30, 2021; and from the City of Glendale via letter on July 28, 2021: In Sections 2.1 and 2.2.b of the permit, ADEQ has removed the clarification that only "decision maker operators" are required to submit an NOI when "engaging in one or more of the pesticide discharge activities identified in Section 2.4". The text in these permit sections now require "applicator operators" to also submit an NOI when they are not also a "decision maker operator". Permit Sections 2.4 and 3.2, Fact Sheet page 9, and later in permit section 2.2 clearly states that operators that only act as applicators are not required to submit an NOI. Please clarify these sections to clearly state throughout the permit that only decision maker operators are required to submit an NOI. The City requests this clarification is also made to Section 2.12 Change in Operators.

Response 2C: ADEQ believes that permit part 2.4 Pesticide Discharges Requiring a NOI clearly identifies that the "Decision Maker" is the entity that is required to submit a NOI: "Operators (decision makers) discharging pesticides characterized by one (1) or more of the following categories must submit a complete and accurate NOI,"; as well as in permit part 6.0, Pesticide Discharge Management Plan Preparation: "Decision makers required to submit an NOI (pursuant to section 2.4) ..." However, ADEQ has revised permit part 2.12 as follows: "For projects where the operator (decision-maker) changes..."

Comment 2D: received from the City of Phoenix via letter on July 30, 2021: Please clarify the permit across all applicable sections to reflect that the submittal and approval of an NOI and PDMP to ADEQ is only required if the PSW is impaired or not-attaining for an active ingredient of the pesticide or its degradant.

Response 2D: ADEQ agrees and has modified permit parts 1.3, 2.4, 2.9, 6.0 and 8.5 to indicate that a NOI/PDMP/Annual Report is only required if discharges of a pesticide (the active ingredient or degradant) are the same parameter that the waterbody is impaired for. Please see these sections in the permit and fact sheet for additional information.

Comment 2E: received from the City of Phoenix via letter on July 30, 2021: Please revise Section 2.5.k NOI Requirements to clarify that the NOI must include discharges "within ¼ mile upstream of an impaired, not-attaining, or OAW" instead of "potential to reach".

Response 2E: ADEQ has removed the phrase "potential to reach" in permit part 2.5(k). The revised language states, "Whether the pesticide will be applied directly to an impaired or not-attaining protected surface water; or within ¼ upstream of an OAW."

Comment 2F: received from the City of Phoenix via letter on July 30, 2021: Permit Section 2.5.i NOI Requirements includes the phrase “unknown washes” after “PSW”. Please remove the phrase “unknown washes” because ADEQ has designated only the ephemeral reaches of the eight major rivers as ephemeral PSWs. All other ephemeral channels are excluded from being PSWs.

Response 2F: Permit part 2.5(i) discusses unnamed washes, not unknown washes. The Protected Surface Waters List may contain unnamed washes as the Navigable Waters Protection Rule (NWPR) has been vacated and ephemeral washes may be designated as WOTUS. No change has been made to the permit.

Comment 2G: received from the City of Glendale via letter on July 28, 2021: Section 2.10 - Missing "calendar days" after "seven (7)" in the first sentence.

Response 2G: ADEQ appreciates the comment and has added "calendar days" in permit part 2.10, as follows: "If ADEQ notifies an operator within seven (7) calendar days of receipt of the NOI..."

Comment 2H: received from the City of Glendale via letter on July 28, 2021: Section 2.12 - This section is not clear on whether a new NOI is required, or if the permittee shall amend an existing NOI, if there is a change in applicator during the five-year permit term. Section 2.4 states that the decision-maker is required to submit the NOI when activities involve more than one operator, but the applicator could change during the permit term.

Response 2H: Permit part 2.12 Change in Operators states "... the new operator shall file for an NOI and receive an authorization certificate prior to the first pesticide discharge." As applicators are not required to obtain an NOI, there are no requirements when/if an applicator changes. No change was made to the permit.

Comment 2I: received from the City of Glendale via letter on July 28, 2021: Sections 2.15 and 2.20: Remove or revise redundant language regarding operators covered under this permit that are not required to submit an NOI.

Response 2I: ADEQ agrees and has removed permit part 2.20 as it is duplicative of language in part 2.15.

Comment 2J: received from the City of Glendale via letter on July 28, 2021: Sections 2.16 and 2.19 - Remove or revise redundant language regarding termination of authorization at midnight of the day that a complete and accurate NOI is received by the department.

Response 2J: ADEQ agrees and has removed permit part 2.19 as it is duplicative of language in part 2.16.

Permit Section 4 – Surface Water Quality Based Effluent Limitations

Comment 4A: received from the City of Glendale via letter on July 28, 2021: Section 4.0-This section of the permit refers 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 PGP - existing SWQSs in Arizona Administrative Code, Title 18, Chapter 11, Article 1, or new SWQSs yet to be established? Existing SWQS

for discharges to WOTUS and new SWQSs for discharges to non-WOTUS protected surface waters? Please clarify.

Response 4A: Existing Surface Water Quality Standards (SWQS) would apply to WOTUS and non-WOTUS PSWs alike. SWQS are set in A.A.C. Title 18, Chapter 11. The 2016 SWQS remain applicable to protected surface waters until changed via rulemaking and subsequent approval by EPA (the latter applies only to WOTUS PSWs). No change was made to the permit.

Permit Section 5 - Site Monitoring

Comment 5A: received from the City of Glendale via letter on July 28, 2021: Sections 5.1 and 5.2- Remove or revise redundant language regarding visual assessment of the area to and around where the pesticide(s) were applied.

Response 5A: Permit parts 5.1 and 5.2 are different requirements in that 5.1 discusses visual monitoring during the application of a pesticide, while 5.2 discusses visual monitoring after the application of a pesticide. No change was made to the permit.

Permit Section 7 - Corrective Action

Comment 7A: received from the City of Glendale via letter on July 28, 2021: Section 7.4(3) -Add "calendar" after "thirty (30)" and before "days" and, in 7.4(3)(h), add "business" after "five (5)" and before "days." Also, what is the difference between 7.4(3)(i) and 7.4(3)(j)?

Response 7A: ADEQ agrees and has added "calendar" and "business" as requested in permit part 7.4(3). ADEQ also agrees that 7.3(i) and (j) are duplicative and has removed (j) from the permit.

Permit Section 8 - Recordkeeping

Comment 8A: received from the City of Glendale via letter on July 28, 2021: Section 8.3(a) - Should the references to EPA be deleted? Or should ADEQ be added?

Response 8A: ADEQ agrees and has removed references to EPA in this permit part. The new language is as follows: "a. Copy of the NOI submitted to ADEQ, any correspondence exchanged between the Decision-maker and ADEQ specific to coverage under this permit, and a copy of the ADEQ acknowledgment letter with the assigned permit tracking number."

Permit Section 9 - Standard Conditions

Comment 9A: received from the City of Glendale via letter on July 28, 2021: Section 9.16, Effect of an Upset-This paragraph mentions "part c. of this section" but there is no "part c". Please clarify what section this is referring to. And Section 9.16(d)-This does not follow the format of the rest of this section. Should it be "5" or should "a" through "c" be added?

Response 9A: ADEQ agrees and has modified the formatting of permit part 9.16, Upset.

Comment 9B: received from the City of Glendale via letter on July 28, 2021: Sections 9.16 and 9.17: These sections are applicable to a treatment facility, not the application of pesticides. Can these sections be removed from the permit?

Response 9B: All AZPDES permits contain the Standard Permit Conditions set forth in 40 CFR 122.41. No change was made to the permit.

Comment 9C: received from the City of Glendale via letter on July 28, 2021: Section 9.17(d)(3)-This paragraph mentions "part e of this section" but there is no "part e." Please clarify what section this is referring to.

Response 9C: ADEQ agrees and has modified permit part 9.17(d)(3) as follows: "The operator submitted notices as required under part c of this section."

Permit Section 11 - Definitions and Acronyms

Comment 11A: received from the City of Phoenix via letter on July 30, 2021: In Section 11, many of the definitions need to be reviewed for consistency between all of the stormwater general permits, the Arizona Administrative Code, and the Arizona Revised Statutes. These definitions should all be consistent, such as "ephemeral water", "intermittent water", "perennial water", "not-attaining water", and "Total Maximum Daily Load (TMDL)". For example, ADEQ has revised the definition of perennial water so that it is no longer consistent with the definition in the Arizona Administrative Code (AAC), and there are several varying definitions of perennial water, intermittent water, etc. across the draft stormwater general permits.

Response 11A: ADEQ appreciates the comment and has reviewed and revised, as necessary, the definitions in all permits for consistency. Please note that all definitions have been revised to the language in the Surface Water Protection Program as defined in A.R.S. 49-201.

Comment 11B: received from the City of Phoenix via letter on July 30, 2021: ADEQ and Department are both used as acronyms throughout the document. Please use one consistently.

Response 11B: ADEQ agrees and has replaced all references to "the Department" with "ADEQ" throughout the permit and fact sheet.

Comment 11C: received from the City of Phoenix via letter on July 30, 2021: Not-Attaining Water: This definition is not consistent with AAC R18-11-601(11) or the other revised general permits and appears to be the same as "Impaired Waters". Please revise this definition for consistency among permits and the AAC. In addition, when revising, consider the city's comment on this definition in the other general permits: "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 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."

Response 11C: ADEQ agrees and has revised the definition of Not-Attaining Water in part 11, Definitions. The new definition is as follows: "*Not-Attaining Water – a protected surface water is assessed as impaired, but is not placed on the 303(d) List or equivalent for non-WOTUS protected state waters because: a. A TMDL is prepared and implemented for the protected surface water; b. An action, which meets the requirements of R18-11-604(D)(2)(h), is occurring and is expected to bring the protected surface water to*

attaining before the next 303(d) List submission; or c. The impairment of the protected surface water is due to pollution but not a pollutant, for which a TMDL load allocation cannot be developed.”

Comment 11D: received from the City of Phoenix via letter on July 30, 2021:

Non-WOTUS Protected Surface Water: Please add a definition for this term consistent with that included in the De Minimis General Permit and the Multi-Sector General Permit.

Response 11D: ADEQ agrees and has added "Non-WOTUS Protected Surface Water – means a protected surface water that is not a WOTUS," to part 11 - Definitions.

Comment 11E: received from the City of Phoenix via letter on July 30, 2021: Outstanding Arizona Water (OAW): Change “PSW” to “WOTUS PSW”. Per ARS 49-221, ADEQ cannot include any OAW designation for a non-WOTUS PSW.

Response 11E: ADEQ revised the existing definition of outstanding Arizona Water in the PGP as follows: "a protected surface water that is a WOTUS and has been designated by ADEQ as an outstanding state resource under A.A.C. R18-11-112."

Comment 11F: received from the City of Phoenix via letter on July 30, 2021: 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.”

Response 11F: ADEQ appreciates the comment. The definition from HB2691 (2021) in the draft PGP is as follows: "*Surface Water Quality Standards (SWQS) - means a standard adopted for a protected surface water pursuant to A.R.S. 49-221 and, in the case of WOTUS, pursuant to A.R.S. 49-222.*" No change was made to the permit.

Comment 11G: received from the City of Phoenix via letter on July 30, 2021: Total Maximum Daily Load: Please add the text “protected surface” in the first and second sentence before “water”. The 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.

Response 11G: ADEQ has revised the definition of TMDL as follows: "Total maximum daily load" means an estimation of the total amount of a pollutant from all sources that may be added to a protected surface water, while still allowing the protected surface water to achieve and maintain applicable surface water quality standards. Each total maximum daily load shall include allocations for sources that contribute the pollutant to the water. Total Maximum Daily Loads for Waters of the U.S. shall meet the requirements of section 303(d) of the Clean Water Act (33 USC 1313(d) and regulations implementing that statute to achieve applicable surface water quality standards."

Comment 11H: received from the City of Phoenix via letter on July 30, 2021: Waters of the U.S.: The term “waters of the state” should be changed to “PSWs”.

Response 11H: ADEQ agrees and has revised the definition of WOTUS as follows: "protected surface waters that are also navigable waters as defined by Section 502(7) of the Clean Water Act."

Comment 11I: received from the City of Phoenix via letter on July 30, 2021: WOTUS Protected Surface Water: For consistency between general permits, add a definition for this term as included in the De Minimis General Permit and the Multi-Sector General Permit.

Response 11I: ADEQ added the definition as follows: "'WOTUS protected surface water"- means a protected surface water that is a WOTUS.

Comment 11J: received from the City of Glendale via letter on July 28, 2021: Section 11.0, Adverse Incident - "Distressed or dead juvenile and small fishes" should be assigned as "a. "

Response 11J: ADEQ agrees and has formatted the subtext of the definition of Adverse Incident.

Comment 11K: received from the City of Glendale via letter on July 28, 2021: Section 11.0-The definition for "applicator" is listed twice.

Response 11K: ADEQ agrees and has removed the duplicative definition of Applicator.

Comment 11L: received from the City of Glendale via letter on July 28, 2021: Acronyms - Recommend adding "OAW," "SWQS," and "WOTUS" to the list of acronyms.

Response 11L: ADEQ agrees and has added OAW, SWQS and WOTUS to the acronyms page.

Comment 11M: received from the City of Phoenix via letter on July 30, 2021; and from the City of Glendale via letter on July 28, 2021: Please also 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.

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

Response 11M: ADEQ has removed language relating to tributaries and ¼ mile upstream of impaired waters and OAWs, therefore no definition is required.

Comment 11N: received from Copeland Law via Konveio on July 30, 2021: Suggest adding the following clarification sentence [to definition of protected surface waters]: Sites excluded pursuant to A.R.S. 49-221(G)(2) are not included within these permitting requirements.

Response 11N: This permit spells out requirements for which pesticide decision makers are required to obtain permit coverage, but it does not attempt to list every situation where the permit is not required. No change was made to the permit.

Comment 11O: received from the City of Phoenix via letter on July 30, 2021: Although this latest draft is primarily to incorporate Protected Surface Waters (PSW) in the permit with the existing surface water quality standards, the City observed that changes requested in the prior comment period on this open fact sheet have not been incorporated. The City's current comments are geared toward the addition of PSW but the city expects all applicable comments from our original comment letter (dated May 11, 2021) to be addressed in the next version. We are not re-stating these comments but instead are providing a copy of the May 11 letter as a resubmittal.

Response 11O: ADEQ appreciates the City's informal comments and if applicable, the permit and/or fact sheet has been revised accordingly.

Comment 11P: received from the City of Phoenix via letter on July 30, 2021: The permit language in sections 1.3, 2.5.k, 2.9, and 6.0 are not consistent in the language and requirements for discharges to impaired/not attaining waters and their tributaries. The City requests that ADEQ review these sections carefully to clarify the requirements and criteria in each section. For example, ADEQ has revised sections 2.9 and 6.0 of the permit and fact sheet to no longer allow direct discharges to impaired or not-attaining waters by revising these sections to state they only apply to "applicants proposing a pesticide discharge to a tributary within ¼ mile...". This conflicts with permit and fact sheet section 1.3 and fact sheet section 4.0(e) which allows direct discharge to impaired or not attaining waters and only requires the submittal and approval of a Notice of Intent (NOI) and Pesticide Discharge Management Plan (PDMP) to ADEQ if the water is impaired or not attaining for an active ingredient or degradant of the pesticide. The City believes the language as included in Section 1.3 is appropriate and the other sections of the permit and fact sheet should be updated for consistency. Direct discharges to the noted PSW reach should be allowed within the same water and not just discharges to tributaries.

Response 11P: ADEQ has revised the permit and fact sheet, where appropriate, to indicate that discharges to impaired waters are acceptable, with the submission and approval of the NOI and PDMP. However, discharges directly to an OAW are prohibited; discharges within ¼ mile upstream of an OAW may be allowed and will be determined when the NOI and PDMP are submitted.

Fact Sheet

Comment FS1: received from the City of Phoenix via letter on July 30, 2021: 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 FS1: ADEQ agrees and has added language to the Fact Sheet to include: ADEQ reissued the 2011 PGP to include non-WOTUS Protected Surface Waters in accordance with A.R.S Title 49 Chapter 2, Article 3.1, and for those permit modifications to be effective on September 29, 2021. This modification was necessary to authorize discharges to non-WOTUS Protected Surface Waters. Certain definitions have been updated or introduced to reflect the change. Notably, the terms Protected Surface Water, WOTUS, and non-WOTUS Protected Surface Waters are used throughout the permit. Protected Surface Waters means waters of the State listed on the protected surface water list under Section A.R.S. §49-221, Subsection G and includes all WOTUS. Waters of the United States (WOTUS) means a protected surface waters that are also navigable waters as defined by Section 502(7) of the Clean Water Act and are federally regulated. Non-WOTUS protected surface water means a protected surface water that is not a WOTUS but included on the Protected Surface Water List under A.R.S. §49-221, Subsection G and is regulated by the State.

Comment FS2: received from the City of Phoenix via letter on July 30, 2021: In the Fact Sheet, Section I. Background, 4. AZPDES Permits, there is a sentence that says, “This Pesticide General Permit (PGP) or any other AZPDES permit does not cover discharges that, by law, are not required to obtain the NPDES permit coverage.” This text does not reflect the new state surface water protection program. This text should be revised to reflect that non-WOTUS PSWs are covered by the PGP but do not need NPDES permit coverage.

Response FS2: ADEQ disagrees. A discharger to a non-WOTUS PSW must have AZPDES coverage.

Comment FS3: received from the City of Phoenix via letter on July 30, 2021: In the Fact sheet, Section I. Background, 5., Scope of Permit, #3, there is a sentence that uses the example of dry washes and ephemeral streams. The City recommends that this be revised to use an example of a water body more likely to be classified as a PSW. The only dry or ephemeral washes ADEQ has designated as protected surface waters are the ephemeral reaches of the eight major rivers.

Response FS3: ADEQ agrees and has revised Fact Sheet section 1.5(3) as follows: *"For example, discharges to control pests in or near areas that are protected surface waters, even when these areas are dry for much of the year, may be covered by this permit, if one is required. This would include discharges on forest or range lands that include intermittent and/or ephemeral washes or streams..."* Note that on August 30, 2021, a District Judge for the District of Arizona issued an order vacating and remanding the Navigable Waters Protection Rule (NWPR). The order has the effect of setting Clean Water Act (CWA) regulations in Arizona to those in place prior to the 2015 WOTUS rule revision, which includes some ephemeral waters.

Comment FS4: received from the City of Phoenix via letter on July 30, 2021: In addition, there are several sections (including Fact Sheet and Permit Section 1.4 and Section 2.9) where discharges to Outstanding Arizona Waters (OAWs) are referenced. These sections should be revised to clarify that OAW only applies to WOTUS PSW. Per ARS 49-221, ADEQ cannot include any OAW designation for a non-WOTUS PSW. Also, in the Fact Sheet Section 2.9, the city recommends adding the phrase “PSW” after “impaired or not-attaining” for clarity.

Response FS4: ADEQ has revised the definition of an outstanding Arizona water (OAW) as follows: "An OAW is a protected surface water that is a WOTUS and has been designated by ADEQ as an outstanding state resource under A.A.C. R18-11-112." In permit part 11 - Definitions, impaired waters are defined as “protected surface waters.” No additional changes have been made to this part of the permit. Fact Sheet part 2.9 has been modified as follows: *"Applicants proposing a pesticide discharge to an impaired or not-attaining protected surface water, or a tributary within ¼ mile of OAW, are not authorized to discharge..."*

Comment FS5: received from the City of Phoenix via letter on July 30, 2021: Fact Sheet Section 4.0 includes a discussion of water quality based effluent limitations (WQBELs) developed pursuant to the Clean Water Act (CWA). The City recommends the term “WOTUS PSW” be used in this section instead of “PSW” because the Fact Sheet states that WQBELs only apply to WOTUS under the CWA. If ADEQ chooses to adopt WQBEL surface water quality standards for the non-WOTUS PSW, this section should be revised to reflect that.

Response FS5: In section 4.0 Water-Quality Based Effluent Limitation of the 2021 PGP Fact Sheet, ADEQ finds no references to the statement made by the commenter. No change was made to the fact sheet.

Comment FS6: received from the City of Phoenix via letter on July 30, 2021: In the Fact Sheet, Section 6.4 Pest Problem Identification, ADEQ has revised “water quality standards” to “PSW quality standards”. It is our understanding that the term “surface water quality standards” should be unchanged because this term is referred to in the Arizona Revised Statutes (ARS) and throughout the remainder of the permit and currently applies to all PSWs. Please retain the original phrase “surface water quality standards” and verify that this phrase is being used consistently throughout the permit and fact sheet.

Response FS6: ADEQ agrees and has removed "protected" from the last paragraph of Fact Sheet section 6.4. ADEQ has also reviewed the entire document for similar phrasing and made corrections as necessary.

Comment FS7: received from the City of Phoenix via letter on July 30, 2021: 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. An example location is: · Fact Sheet I. Background, 5. Scope of Permit, #3

Response FS7: ADEQ agrees that consistent terms throughout the Permit and Fact Sheet are important and has made changes throughout those documents, where necessary. In some cases, the word "water" or “receiving water” simply makes the most sense in the context of the permit.

Comment FS8: received from the City of Phoenix via letter on July 30, 2021: At several locations throughout the Fact Sheet and permit, the 303(d) list is referenced. The Fact Sheet and Permit should reference “WOTUS PSWs” in each case when the 303(d) list is referenced because the 303(d) list is specific to the Clean Water Act.

Response FS8: 303(d) listed waters may be WOTUS PSWs or non-WOTUS PSWs. See Response 2B.

Comment FS9: received from the City of Phoenix via letter on July 30, 2021: In the permit, some requirements only apply 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 ARS 49-221(G).

Response FS9: ADEQ is in the process of determining the jurisdictional status of Arizona surface waters since the vacatur of the federal Navigable Waters Protection Rule. Evaluations are ongoing through the application of ADEQ’s Screening Toolkit. More information is available at azdeq.gov/screeningtoolkit.

The Screening Toolkit is limited to known sources of information and data to ADEQ. Additional information and data may be available and should be reviewed to determine if it is credible and can be included in the Screening Toolkit or contribute to a weight of evidence for flow regime assignments.

ADEQ must issue this AZPDES general permit to incorporate State protected surface waters to allow pesticide applicators authorization to discharge to non-WOTUS PSWs by the effective date of the new law, September 29th, 2021. ADEQ cannot defer the effective date of the permits in order to finalize the GIS map or lists. Pursuant to Section 7 of HB2691, ADEQ will publish an initial Protected Surface Water List (PSWL)

within 30 days of the September 29th, effective date of the bill. Section 7 also requires that “[f]or non-wotus protected surface waters, the Director shall apply surface water quality standards established as of January 1, 2021” until specifically modified by that December 31, 2022, rulemaking. A draft version of the PSWL was shared with stakeholders and legislators during the legislative process. The PSWL can be found on ADEQ’s website at: <http://www.azdeq.gov/surface-water-protection-permitting>.

List of Commenters:

City of Glendale

City of Phoenix

Copeland Law

Gila River Indian Community

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

Six General Permits

RESPONSE TO GENERAL COMMENTS

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

Administrative Record

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

Permits that were modified include:

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

Permit that were re-issued include:

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

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

Response to Comments

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

Comment A1

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

Response A1

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

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

Comment B1

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

Response B1

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

Comment B2

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

Response B2

Change made.

Comment B3

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

Response B3

See Response B1.

Comment B4

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

Response B4

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

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

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

Comment B5

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

Response B5

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

Comment B6

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

Response B6

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

Comment B7

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

Response B7

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

The general permits did not change or remove provisions for OAWs that are WOTUS. Some of the general permits (DMGP and CGP) *clarified* that new or expanded point source discharges to OAWs are prohibited, and discharges to upstream segments of an OAW, require further ADEQ review and approval, as that information was lacking from those permits. ADEQ added clarification to be consistent with A.A.C. R18-

11.107.01.C.3 that a person seeking authorization for a regulated discharge to a tributary to, or upstream of, an OAW shall demonstrate in a permit application or in other documentation submitted to the Department that the regulated discharge will not degrade existing water quality in the downstream OAW.

Comment B8

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

Response B8

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

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

Comment B9

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

Response B9

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

Comment B10

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

monitoring and other requirements for discharges that may impact OAWs. We believe ADEQ should ensure that the general permits maintain the protections that apply to OAWs, especially those that are WOTUS.

Response B10

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

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

Comment B11

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

Response B11

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

Comment B12

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

Response B12

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

Comment B13

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

Response B13

A.R.S. § 49-255.04(B)(1) requires that the director shall not adopt or apply rules or requirements specific to new sources or new dischargers under the federal Clean Water Act for dischargers to non-WOTUS

Protected Surface Water (PSW). 40 CFR 122.4(i) prohibits permit coverage of a "new source or a new discharger, if the discharge from its construction or industrial operation will cause or contribute to the violation of water quality standards." This is the federal CWA authority AZPDES permits rely on when requiring SWPPP and SAP review prior to permit coverage, but such requirements are prohibited for permits for discharges to non-WOTUS PSW. Consequently, the SWPPP submittal requirement was removed for those dischargers to non-WOTUS PSW. However, all CGP, Mining MSGP, and MSGP permittees must have SWPPPs, which are reviewed during ADEQ inspections. No change made.

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

Comment C1

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

Response C1

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

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

Comment D1

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

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

Response D1

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

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

Comment E1

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

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

Response E1

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

Comment E2

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

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

Response E2

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

Comment E3

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

Response E3

See Response E2.

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

Comment F1

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

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

Response F1

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