

NOTICE OF PROPOSED RULEMAKING
TITLE 18. ENVIRONMENTAL QUALITY

CHAPTER 9. DEPARTMENT OF ENVIRONMENTAL QUALITY - WATER POLLUTION CONTROL

PREAMBLE

- 1. Article, Part, or Section Affected (as applicable) Rulemaking Action**
- | | |
|-----------------------|-------|
| Article 9, R18-9-A903 | Amend |
|-----------------------|-------|
- 2. Citations to the agency’s statutory rulemaking authority to include the authorizing statute (general) and the implementing statute (specific):**

Authorizing statute: A.R.S. §§49-202(A), 49-203(A)(1)

Implementing statute: A.R.S. §§ 49-221, 49-222

- 3. Citations to all related notices published in the *Register* as specified in R1-1-409(A) that pertain to the record of the proposed rule:**

Notice of Rulemaking Docket Opening: 28 A.A.R. 124, January 7, 2022

- 4. The agency’s contact person who can answer questions about the rulemaking:**

Name: Jonathan Quinsey
Address: Department of Environmental Quality
1110 W. Washington St.
Phoenix, AZ 85007
Telephone: (602) 771-8193
Email: Quinsey.Jonathan@azdeq.gov or PSWL@azdeq.gov
Website: <http://www.azdeq.gov/swpp>

- 5. An agency’s justification and reason why a rule should be made, amended, repealed or renumbered, to include an explanation about the rulemaking:**

Background

Historically, a broad spectrum of Arizona’s lakes, ponds, streams and wetlands have been protected under the Federal Clean Water Act (CWA). This protection includes the regulation of discharges of pollutants to surface waters via the Arizona Pollution Discharge Elimination System (AZPDES). This regulatory program has only been implemented to regulate discharges into “waters of the United States” (WOTUS).

The CWA does not define WOTUS, instead, it provides discretion for the U.S. Environmental Protection Agency (EPA) and the US Army Corps of Engineers (USACE) to define WOTUS in their rules. Courts have heard a number of cases and issued rulings that effectively modify the extent of federal jurisdiction and different Federal administrations have attempted to change the definition as well. The Arizona Department of Environmental Quality (ADEQ) created the Surface Water Protection Program (SWPP) to provide clear and consistent regulation for stakeholders despite these changes to the jurisdictional reach of the Federal CWA. The SWPP is the result of a rigorous public process that has resulted in this effort to create a radically simple but effective approach to protect important state waters that are not WOTUS and therefore would not receive the protections of a WOTUS.

HB2691 (2021) directs ADEQ to develop the SWPP and establish a variety of regulations by December 31, 2022. ADEQ is meeting that goal in this publication of the register by amending the proposed Title 18, Chapter 11, Article 2 titled “Water Quality Standards for Non-WOTUS Protected Surface Waters.” This specific rulemaking modifies Title 18, Chapter 9, Article 9 which contains the regulations for the permitting program.

Permitting

This proposed rulemaking includes modifications to A.A.C. Title 18, Chapter 9, Article 9. Large portions of the permitting provisions in HB2691 are intentionally self-executing. ADEQ does not intend to meaningfully modify the AZPDES permitting program in this initial SWPP rulemaking, although the need to do so may arise in later rulemakings.

There are currently no permitted discharges to non-WOTUS protected surface waters. The cost of building a separate permitting program will issue no permits in this initial adoption is prohibitive as ADEQ would not see environmental benefits from adopting entirely separate provisions nor would the agency reduce permitting costs.

6. A reference to any study relevant to the rule that the agency reviewed and proposes either to rely on or not to rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

None.

7. A showing of good cause why the rulemaking is necessary to promote a statewide interest if the rulemaking will diminish a previous grant of authority of a political subdivision of this state:

Not applicable.

8. The preliminary summary of the economic, small business, and consumer impact:

This action conforms with the economic, small business, and consumer impact analysis in ADEQ's water quality standards rulemaking, also published in this version of the register.

9. The agency's contact person who can answer questions about the economic, small business and consumer impact statement:

Name: Jonathan Quinsey
Address: Department of Environmental Quality
1110 W. Washington St.
Phoenix, AZ 85007
Telephone: (602) 771-8193
Email: Quinsey.Jonathan@azdeq.gov

10. The time, place, and nature of the proceedings to make, amend, repeal, or renumber the rule, or if no proceeding is scheduled, where, when, and how persons may request an oral proceeding on the proposed rule:

An oral proceeding regarding the proposed rules will be held as follows:

Date: October 17, 2022
Time: 1:00 P.M
Location: 1110 W. Washington St., Phoenix, AZ 85007

Interested persons may mail or email written comments on the proposed rulemaking to the contact person or pswl@azdeq.gov until the close of record. The record for this rulemaking will close at 5:00 p.m. on October 17, 2022.

11. All agencies shall list other matters prescribed by statute applicable to the specific agency or to any specific rule or class of rules. Additionally, an agency subject to Council review under A.R.S. §§ 41-1052 and 41-1055 shall respond to the following questions:

None.

a. Whether the rule requires a permit, whether a general permit is used and if not, the reasons why a general permit is not used:

ADEQ's regulations do allow for general permits for many different types of facilities, but not all facilities qualify for general permits. In the case that a general permit does not apply this rule may require that entities that discharge to non-WOTUS protected surface water apply for an individual AZPDES permit. Requirements for discharge vary depending on the facility, so many of these discharges would not be able to receive coverage under a general permit.

b. Whether a federal law is applicable to the subject of the rule, whether the rule is more stringent than federal law and if so, citation to the statutory authority to exceed the requirements of federal law:

The Clean Water Act and implementing regulations adopted by EPA apply to the subject of this rule, as described in Section 5 above. Article 2 of this rulemaking establishes water quality standards that are applicable to surface waters that are not protected under the Clean Water Act. These standards are not more stringent than those the standards implemented by federal law, but they apply to waters that may not be protected under federal law.

ADEQ was given explicit statutory authority to develop a program to protect these surface waters by HB2691(2021). That bill is codified at A.R.S. §§ 49-202.01, 49-221, 49-255.04, and 49-255.05.

c. Whether a person submitted an analysis to the agency that compares the rule's impact of the competitiveness of business in this state to the impact on business in other states:

No such analysis was submitted.

12. A list of any incorporated by reference material as specified in A.R.S. § 41-1028 and its location in the rules:

No such material shall be incorporated by reference.

13. The full text of the rules follows:

**CHAPTER 9. DEPARTMENT OF ENVIRONMENTAL QUALITY – WATER POLLUTION CONTROL
ARTICLE 9. ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM
PART A. GENERAL REQUIREMENTS**

Section
R18-9-A903. Prohibitions

**ARTICLE 9. ARIZONA POLLUTANT DISCHARGE ELIMINATION SYSTEM
PART A. GENERAL REQUIRMENTS**

R18-9-A903. Prohibitions

The Director shall not issue a permit:

1. If the conditions of the permit do not provide for compliance with the applicable requirements of A.R.S. Title 49, Chapter 2, Article 3.1; 18 A.A.C. 9, Articles 9 and 10; and the Clean Water Act;
2. Before resolution of an EPA objection to a draft or proposed permit under R18-9-A908(C);
3. If the imposition of conditions cannot ensure compliance with the applicable water quality requirements from Arizona or an affected state or tribe, or a federally promulgated water quality standard under 40 CFR 131.31;
4. If in the judgment of the Secretary of the U.S. Army, acting through the Chief of Engineers, the discharge will substantially impair anchorage and navigation in or on any navigable water;
5. For the discharge of any radiological, chemical, or biological warfare agent, or high-level radioactive waste;
6. For any discharge inconsistent with a plan or plan amendment approved under section 208(b) of the Clean Water Act (33 U.S.C. 1288); and

7. To a new source or a new discharger if the discharge from its construction or operation will cause or contribute to the violation of a water quality standard. The owner or operator of a new source or new discharger proposing to discharge into a water segment that does not meet water quality standards or is not expected to meet those standards even after the application of the effluent limitations required under R18-9-A905(A)(8), and for which the Department has performed a wasteload allocation for the proposed discharge, shall demonstrate before the close of the public comment period that:
 - a. There are sufficient remaining wasteload allocations to allow for the discharge, and
 - b. The existing dischargers into the segment are subject to schedules of compliance designed to bring the segment into compliance with water quality standards.
8. If the permit or the conditions of the permit for a discharge to a non-WOTUS protected surface water violate the restrictions listed in A.R.S. §49-255.04.