

Response to Comments on the AZPDES General Permit for Discharge From Construction Activities to Waters of the United States AZG2003-001

Prepared February 25, 2003 to address comments on the draft permit that was noticed in the Arizona Administrative Record on January 10, 2003. The public comment period ended upon close of business February 13, 2003. The comments received, and ADEQ responses, are summarized as follows:

A. Comments on the Fact Sheet

Comment: "Introduction" to Part I of the fact sheet. Modify the section to read: "...where those discharges enter surface waters of the U.S. or a storm drain which discharges to surface waters of the U.S."

Response: The NPDES/AZPDES program does only extend to discharges that reach the waters of the U.S. (including dry ephemeral streams). However, if there is any possibility for discharge in a storm event of **any** size, coverage is required. If unpermitted discharges to a MS4 facility retention basin were released in a large storm event, both the construction operator and the MS4 could have liabilities. No change will be made to the Fact Sheet.

Comment: Fact Sheet (pp. 11-12). ADEQ should revise its language regarding the circumstances under which it will postpone permit coverage because it is currently vague and confusing. For instance, ADEQ should delete aspirational language regarding its obligation to timely notify operators whether permit coverage is going to be postponed (e.g., "ADEQ has a goal" and "in most cases this will be achieved") and make it clear when and why a permit application will be postponed.

Response: This portion has been revised for clarification.

Comment: Fact Sheet (pp.24-25). ADEQ should revise language to correspond to our comment regarding unrestricted public access to SWPPPs. ADEQ should make clear the reasons it does/does not consider SWPPPs to be protected confidential business records.

Response: The SWPPP is a requirement of the permit. If an individual permit were required for the same facility, all the related documents would be available for public review. In this instance it is only a matter of convenience to both the permittee and ADEQ that SWPPPs are not required to be routinely submitted with the NOI, but this does not change its status as a record the public should have a right to access. ADEQ review of SWPPPs suggests that they rarely, if ever, contain information that can be considered business confidential. In the event there is information that is confidential, the operator can mark that portion in accordance with A.R.S. § 49-205(A). ADEQ has elected to obtain and distribute the portions of any SWPPP that do not qualify as business confidential under A.R.S. § 49-205(A), upon request to save the operator time and effort as a result of not having to routinely deal with such issues.

Comment: Regarding "Final Stabilization": In your document "Fact Sheet for the Issuance of a Permit", under the heading "WHAT ARE MY OPTIONS FOR MEETING THE FINAL STABILIZATION CRITERIA?", there is a sentence stating that semi-permanent low or no maintenance erosion control practices combined with seeds that would take hold the next growing season (i.e., properly secured seed erosion control mats, etc.) could also be used as final stabilization. ADOT seeds all construction sites, applies mulch for erosion control until seeded plants have become established. Does that mean that ADOT does not have to wait until the seeds have germinated before submitting the NOT? Our concern is that the contractor and resident engineer could have gone to other projects and will not be in the area when it is time to submit the NOT if they have to wait until growth has taken place.

Response: State and federal rules require that an NOT be submitted only when the operator is no longer responsible for the stormwater discharge or when final stabilization has been achieved. The definition of final stabilization allows less vegetative density in arid areas, but vegetative cover OR equivalent permanent stabilization must occur prior to filing the NOT. ADEQ does not consider seeds and mulch to be equivalent to permanent stabilization. With the type of rainfall typical in Arizona, seeds and

mulch can be easily washed away in the 'first flush.' Further if a revegetated site is supplied with supplemental irrigation water, it is the responsibility of the permittee not to be the cause of resulting erosion and sedimentation problems. Because of these problems it is imperative that permit authorization for the construction site be maintained until final stabilization is achieved- which can be a significant time after dirt moving has been completed.

B. General Comments on the Proposed Permit

Comment: Numerous comments addressed typographical errors or contact information.

Response: ADEQ corrected all the the typographical errors and added additional contact information in response to all comments of that nature.

Comment: The basis for denial of general permit coverage for prospective permittees placed in the 32-day delayed review process needs to be clearly tied to the regulatory standard for denying coverage (which generally focus on concerns for water quality impacts). Existing facilities covered by the federal permit and which transition to the new AZPDES permit should be exempt from the additional review time since they have already met eligibility requirements and, given the status of TMDLs in the state, are unlikely to involve discharges to impaired waters. In addition, the provisions governing discharges to impaired waters should be modified to avoid imposing unnecessary and burdensome requirements. ADEQ should revise the language in Part II.B.2. to make clear what factors ADEQ would consider in a decision to deny or postpone coverage under the general permit. The proper standard is embodied in Part VII.S.

Response: ADEQ clarifies that the process of the routine 32 business-day delay in the effective date of authorization, does **not** constitute denial of coverage. Rather it is time necessary for review of the issues related to the project. ADEQ will only deny coverage on the basis of our regulatory authorities which as noted generally focus on water quality impacts. ADEQ also clarifies that the current permit is terminating and this is a new permit which requires new NOI submittals and compliance with new requirements. However, in consideration of the comments, ADEQ has revised the final permit to "grandfather in" construction projects that had previous authorization under the 1998 permit. ADEQ will not require routine additional screening or submittal of a SWPPP for these existing projects. [ADEQ also notes in response to the comment, that there are many impaired waters that do not yet have TMDLs.]

Comment: ADEQ should establish a formalized submittal and review process with established timelines and forms of notification so that permittees know what to expect. Sections that should specify a review and notification time from ADEQ include but may not be limited to: Part I.D.5.a., Part I.D.6.a., Part I.D.7.a., Part I.E., Part II.B.3., and Part III.B.4.

Response: ADEQ has reworded some of the permit requirements to express that ADEQ will notify operators within 32 business days if there is an issue with the NOI or the SWPPP. Depending on the nature of the problem, it may take additional time to resolve. Also, most construction projects have been in various stages of planning well before dirt-moving begins. ADEQ emphasizes that there is no requirement for an operator to wait until 2 business days before the project to ensure the NOI is received; in fact, submittal can be made well in advance if an operator is concerned about potential delays.

Comment: Our concerns are with the absence of any required consultation with the U.S. Fish and Wildlife Service (U.S. FWS) on permit applications for projects that may affect threatened or endangered species, or their critical habitat. Without section 7 consultation, there is no other adequate federal regulatory mechanisms in place to adequately protect listed species from the loss and fragmentation of habitat resulting from commercial and residential development. The ADEQ process to flag construction projects proposed for the critical areas doesn't appear to do enough. ADEQ should institute a section 7-like consultation process with U.S. FWS to evaluate projects in sensitive areas in order to protect the species.

Response: ADEQ has committed to notifying the U.S. FWS of proposed construction activities that occur within critical areas of the State. In addition, ADEQ will extend the review period to determine whether the project qualifies for coverage under the Construction General Permit for an additional 30-business days. This additional time should facilitate the U.S. FWS review of the project also. ADEQ wishes to stress that the permit only authorizes the run-off of stormwater from the site, it does not give the operator the right to violate any other federal law, such as the Endangered Species Act. As stated in A.A.C. R 18-9-A904(C):

“The issuance of a permit does not authorize any injury to a person or property or invasion of other private rights, or any infringement of federal, state, or local law, or regulations.”

ADEQ will provide the U.S. FWS the information in the shortest time possible to afford U.S. FWS the greatest amount of time for review.

Comment: When a project is on both State and Indian Country, which entity, EPA, ADEQ or both, would have permitting authority?

Response: Because the permitting authority is separate, the operator needs to apply for coverage under both the ADEQ and the EPA permit.

Comment: The general permit requires the permittee to assure compliance with surface water quality standards before eligibility for protection under the general permit can be certified. How does ADEQ recommend a contracting agency verify that the proposed storm water pollution prevention plan (SWPPP) meets this requirement? Will formal training or certification testing be offered by ADEQ to the construction industry to create knowledgeable personnel capable of rendering judgments regarding compliance? Will ADEQ provide any other types of tools to assist the construction industry in meeting the desired goals?

Response: The assumption is that if all provisions of the permit are complied with and an appropriate SWPPP is prepared and implemented, WQ standards will not be violated. In the event however, there is ever evidence of a standards violation, then this general permit is not an effective control measure and an individual permit or other options may be necessary.

ADEQ is not aware of, or requiring, any special certification for those who prepare SWPPPs and inspect sites. Further, these tasks may be effectively done by those with a variety of disciplines and educational background. Rather ADEQ considers experience and expertise to be the important factors in an effective program. ADEQ is open to suggestions concerning effective outreach methods or tools to be developed that may assist the industry in compliance.

Comment: In conformance with the intent of the Clean Water Act, the permit should clarify coverage of pollutant discharges that **have a reasonable potential to cause or contribute to** adverse impacts to receiving waters. The very broad language that is used in several sections (e.g. may contain pollutants, may reach impaired waters etc.) is an aggressively high standard that cannot be proven by the Agency nor complied with by the permittee. Sections that should include the reasonable potential language include but may not be limited to the following:

Part I.D.4. (This permit does not authorize discharges that **the Director has determined will have a reasonable potential** to cause or contribute to non-attainment...).

Part II.B.1. (Operators with a discharge that **have a reasonable potential** to reach impaired or unique...).

Part III.A.8. (The name of and distances to the receiving water **that has a reasonable potential to receive discharges from the project**...)

Part V.D. (At any time...the Department may determine that a permittee's stormwater discharges **may cause**, have reasonable potential to cause or contribute...)

Response: 'Reasonable potential' is a term used in the NPDES program which typically refers to a determination whether the projected concentration of pollutants in a wastewater discharged exceeds any applicable water quality criterion for a specific pollutant. If so, there is said to be reasonable potential. ADEQ does not consider that the use of the term as proposed provides any clarification to the expectations included in the permit, thus the language has not been changed.

Comment: We have concern over the unknown length of delay for the review of projects that will discharge within 1/4 mile of unique or impaired waters. ADEQ should provide guidance on the controls that will be expected for projects in or near a unique or impaired water, thereby potentially reducing the review and revision period.

Response: The general expectation is that operators of projects in areas near unique or impaired waters will expend extra attention to developing and implementing quality SWPPPs that minimize all off-site discharges. Those factors could include such things as total retention of discharges; increased inspection of BMPs and controls, including before all predicted rainfall events; elimination of non-stormwater discharges; or having phased contingency BMPs in the event the planned BMPs are not effective. Depending on the pollutants of concern, however, specific project requirements may vary.

Again, ADEQ notes that if there are concerns about delays, ADEQ encourages an operator to submit the NOI well in advance of the planned commencement date.

Comment: We would like to see the emphasis on the use of best management practices and not numeric limits to satisfy the intent of the Construction General Permit. Wet weather events in arid climates are highly variable. The established sampling techniques do not accurately measure pollutant levels associated with construction activities, but rather measure the variability of the storm events.

Response: ADEQ is unclear about the intent of this comment. The draft permit does not contain numeric limits. Neither does it detail sampling techniques. Routine sampling is not required for most site operators.

Comment: Will the Arizona Department of Environmental Quality (ADEQ's) and the Environmental Protection Agency (EPA's) Notice of Intent (NOI) and Notice of Termination (NOT) be the same or will ADEQ customize them for local conditions.

Response: The published permit included drafts of the proposed NOI and NOT forms that will be used for ADEQ's permit. This is not the same form that EPA uses and does not include exactly the same information.

Comment: Regarding Authorization Number for the Notice of Intent: Does this mean that construction cannot begin until the Authorization Number is received from ADEQ?

Response: Part II.B. of the permit has information about effective date of permit coverage. It is not tied to the date of the operator's receipt of the Authorization number.

Comment: Turbidity has been identified as the stressor in many of Arizona's impaired waters, including those that have total maximum daily loads (TMDLs) established. The language of the general permit implies that no additional discharges (or zero tolerance) containing sediment will be allowed for these waters. Additionally, the permit and summary guidance documents recognize that only approximately 80% of suspended solids can be retained on the construction site through the use of best management practices (BMPs). How does ADEQ anticipate that the zero tolerance requirements can be met under these conditions? How do permittees demonstrate compliance with these requirements, particularly those with discharges to impaired waters without TMDLs? What is the process ADEQ will use to assure compliance with these requirements?

Response: The water quality standards rules in R18-11-107 specifically prohibits any degradation of existing water quality in Tier I waters (where the existing water quality does not meet the applicable water quality standards.) This is based on federal statutes that also address antidegradation. If a permittee's discharge causes or contributes to nonattainment of standards, more effective and/or additional BMPs must be added. If discharges still contribute to nonattainment, the facility is to cease discharging or apply for an individual permit. It is because of these concerns that ADEQ intends to focus attention on sites in this area for quality and comprehensive SWPPPs, and has chosen to make monitoring a provision of permit coverage to determine BMP effectiveness.

Comment: The permit states that ADEQ may allow future permit applicants to use the "Smart NOI" system to submit notices of intent (NOI) for the general permit. How will ADEQ coordinate submittal of NOIs by a public agency and its contractor, since both entities are considered to be operators and both must submit an NOI? When separate NOIs are submitted, when will the project be authorized to proceed?

Response: This permit is no different than the existing permit in this regard. NOI submittals do not necessarily have to be coordinated. On a given project site there may be a number of operators that may be starting and ending their phase of the project at any given time. The critical feature is that each person who meets the definition of 'operator' timely apply before his phase of the project begins. Operators may use a common SWPPP as long as it covers all activities. Each operator will receive his own authorization number relating to his NOI.

Comment: What controls will ADEQ put into place to track and coordinate the submittals of notices of termination (NOTs) when more than one is submitted for the same construction site? After submittal of an NOT, when does coverage, and therefore responsibility for compliance with permit terms and conditions, terminate for the operator submitting the NOT?

Response: As stated above, each operator will receive his own authorization number relating to his

NOI. That number is to be referenced when the NOT is submitted. Part II.C.4. of the permit indicates that authorization to discharge terminates at midnight on the day a complete and accurate NOT is received by the ADEQ. This also means that coverage and responsibility to comply with the permit ends.

Comment: Can ADEQ identify the screening criteria that may be used to review NOIs that may cause a delay on a final decision of coverage for up to 30 days? Will the screening criteria be made available to the public?

Response: At present, the criteria include TMDLs, distance to impaired and unique waters, and endangered species or their critical habitat areas. However, these areas could be expanded in the future due to other needs such as the State Historic Preservation areas or other special areas of concern. The important point is that ADEQ is allowing up front review time for itself or other agencies to review the information and determine what issues exist. If another agency has issues with applicants, it will be up to the agency to resolve those issues. ADEQ will ultimately reject coverage only on the basis of our statutory authority which is now limited to water quality concerns. Although some applicants may see this process as burdensome, ADEQ considers that it is of benefit to an applicant to be aware of and address regulatory commitments prior to startup. Additionally, most construction projects are planned well in advance of the submittal timeline, so although a timing adjustment may be needed, the review time should not result in unnecessary project delays.

Comment: The general permit requires “final stabilization” to be achieved prior to submittal of the NOT. For numerous large construction projects around the State, particularly in desert areas, native seeding is the predominate method for re-vegetation of disturbed areas. Native seeding without supplemental watering, however, does not establish a 70% vegetative cover (as compared to the native background cover) for several years. Supplemental water is costly, depletes limited water supplies, and can be the source of erosion and sedimentation problems depending on the skill with which it is applied. Given this long timeframe for re-establishing vegetation with native seeding, how does ADEQ interpret the final stabilization criteria for this situation? Is there a “finished condition” definition that could be applied to desert and high country conditions?

Response: State and federal rules require that an NOT be submitted only when the operator is no longer responsible for the stormwater discharge or when final stabilization has been achieved. The definition of final stabilization allows less vegetative density in arid areas, but vegetative cover OR equivalent permanent stabilization must occur prior to filing the NOT. The definition of final stabilization does not require native vegetation. Further if the revegetated site is supplied with supplemental irrigation water, it is unequivocally the responsibility of the permittee not to be the cause of the suggested erosion and sedimentation problems. Because of these problems it is imperative that permit authorization for the construction site be maintained until final stabilization is achieved. No other ‘finished condition’ has been defined.

Comment: The proposed permit requires that the SWPPP include a description of the interim and final stabilization practices that will be used at a particular construction site. There are, however, three exceptions to the requirement for stabilization, the most important of which is the exclusion for stabilization in arid and semi-arid areas (i.e. areas that receive between 0 and 20 inches of rain) and areas experiencing drought. Since by this definition the majority of the State is arid or semi-arid, and additionally, the State as a whole has been experiencing drought conditions the last few years, it appears that the entire State can be excluded from this stabilization requirement. Was this the regulatory intent? How does ADEQ interpret the applicability of this language to this State’s desert settings? Who determines the drought period?

Response: The only ‘exception’ from the requirement to stabilize disturbed soil is when construction is temporarily ceased, but will be resumed within 14 days. In areas that receive less than 20 inches of rain, it is ADEQ’s intent that the permittee institute stabilization no later than “as soon as practicable.” It is fully expected that the permittee explain in the SWPPP why it was not practicable to stabilize sooner if the permittee wishes to use this option. Also, “seasonally arid conditions” do not mean conditions existing throughout the year in an arid location. In Arizona, “seasonally arid conditions” would not include those conditions that normally exist in the state during the winter and summer rain seasons. Although large portions of the state may have less than 20 inches of average rainfall, there are still periods of the year where rain may reasonably be expected. Those periods would not be considered “seasonally arid.” Also, a definition of ‘drought’ was included in the draft permit.

Comment: What would constitute stabilized lots in a subdivision so the original developer or contractor could submit his NOT? Would straw on all open disturbed land be adequate?

Response: A NOT can be filed only when final stabilization has been achieved. Straw on the lot does not meet this requirement. The practice of selling the lots and “walking away” is not acceptable and an enforcement action may be taken in such circumstance. A NOT may be filed by the developer in a residential construction situation where a lot is sold, only when the developer has completed temporary stabilization including perimeter controls and the residence has been transferred to the homeowner.

Comment: The general permit appears to extend operator responsibility for control of pollutants beyond the limits of the construction project and outside the control of construction site operators in certain instances. For example, in cases where salvaged native plant nursery sites, blasting caches, and material storage sites are located off-site on private property owned and controlled by others and not within the perimeter of the project (these sites are generally chosen by contractors after contracts have been awarded), the permit requires the use of BMPs at these offsite locations as well as at the project site itself.

Another commenter asked: “How does ADEQ plan to ensure compliance with these requirements on private property where construction site operators may not have control?”

Response: Any off-site material, waste, borrow, or equipment locations are required to be identified in the SWPPP. The operator of the construction site is only obliged to maintain responsibility for and implement BMPs at related operations over which he has control.

Comment: The permit has a requirement for operators to provide sediment basins in addition to the other management practices “where attainable.” Is there a more explicit explanation or clarification of what constitutes attainable and/or non-attainable conditions?

Response: “Attainable” in this context is similar to feasible. If there is room at the site, soils available, and the terrain allows construction, basins are to be installed unless such installation would prove a safety hazard.

Comment: The proposed permit requires the SWPPP to include a description of the post-construction storm water management measures that will be installed to control pollutants in stormwater discharges after construction is complete because, as stated in the fact sheet, “...post-development stormwater discharges will typically contain higher levels of pollutants...” Since all sites with vegetative cover erode over time, for purposes of determining compliance, how does the permit and ADEQ distinguish between pollutants from routine erosion and pollutants from discharges that originate from the site after construction activities have been completed? In the fact sheet, it is noted without specifically stating the requirement that the “evaluation of whether pollutant loadings and hydrologic conditions of flows exceed pre-development levels can be based on hydrologic models that consider conditions such as the natural vegetation endemic to the area.” There are no specific requirements within the permit that state how this requirement will be satisfied, but it is implied that some sort of post-design and/or post-construction analysis of discharge water is needed. What activities are needed to satisfy this requirement? What role do background levels of pollutants play in determining compliance?

Response: The permittee does not have any responsibility for the controls nor is there any requirement for the permittee to maintain those controls after submission of the NOT. Pre- and post-construction flows may be estimated from the pre- and post-construction runoff coefficient estimate required to be provided as part of the SWPPP. Where the post-construction runoff coefficient is greater than the pre-construction runoff coefficient, then it may reasonably be assumed the post-construction flow will be greater than with pre-construction conditions.

Comment: ADEQ has retained the right to request a copy of the SWPPP for public review from the permittee to be made available upon receipt by ADEQ of a written request from any person. The permittee is to provide the SWPPP within 14 calendar days. How will the document be made public? Will the permittee be responsible for bearing the costs for reproduction and delivery to the desired location?

Response: When a SWPPP is requested, a permittee is responsible for the costs for reproduction and delivery of that document to ADEQ. ADEQ will then deal with forwarding the document to the requestor or allowing them to view the document in the same manner other ADEQ documents are obtained by the public. ADEQ emphasizes the SWPPP *is* a part of this permit and could be required with every NOI submittal and the public has a right to see this document if desired. It is only for convenience to

both ADEQ and the permittee that SWPPPs are not required to be routinely submitted

Comments on Part I of the Proposed Permit

Comment: Part I and Part III. The provisions of the general permit circumvent the administrative procedures that are required for the issuance of licenses. There are many instances in the proposed permit that would require the Department's "approval" of plans. Coverage under the general permit would be decided by staff for issuance of these "approvals" without any known criteria for their issuance. We believe the issuance of these approvals would be contrary to Arizona Revised Statutes (A.R.S.) Title 41. A.R.S. 41-1001.10 defines a license as follows: Part I.D.5, Part I.D.5.b, Part I.D.6., Part I.D.6.b, Part I.D.7, Part I.D.7.b., and Part III.D.

Although this list is not all-inclusive, in each of the instances above, the general permit proposes that ADEQ issue a license separate from this general permit. The criteria for issuance are vague. We find nothing in the statute or AZPDES that exempts such agency actions from Title 41, Article 7.1 - Licensing Time Frames or public notice requirements. Furthermore, the Department's decisions must be subject to appeal. We believe that the volume of individual "approvals" required by the proposed general permit would be a substantial demand on the Department's resources, and the ensuing delays would be onerous to the regulated community.

Response: ADEQ routinely issues general and individual permits that require subsequent submittals for agency review. As the permit itself is the actual document that allows the activity to occur, ADEQ considers that the license subject to timeframes. As an alternative to a general permit written that allows review and subsequent evaluation, ADEQ could have, for example, chosen to exclude facilities discharging to impaired or unique waters from coverage under this permit. ADEQ believes, however, that this permit provides an avenue that will allow the opportunity for review of the documents in a manner that is not overly 'onerous' for the agency or the applicant.

Comment: ADEQ should accept SWPPP summaries in order to expedite its review of BMP effectiveness. In circumstances where ADEQ chooses to review the SWPPP, ADEQ should accept either a summarized version of the SWPPP or that portion of the SWPPP relevant to ADEQ's review. We suggest, for example, that if ADEQ is interested in measuring the effectiveness of the BMPs in relation to a TMDL, the permittee should only have to provide ADEQ with that portion of the SWPPP containing a discussion of BMPs designed to satisfy the TMDL. We do not believe ADEQ intended the language in the proposed permit to require operators to submit their entire SWPPP (which in some cases can be hundreds of pages long) for ADEQ's review.

Response: ADEQ does not wish to collect SWPPP summaries and fully intended the entire SWPPP to be submitted. ADEQ is interested in seeing the quality of the entire SWPPP and how it has been developed to be effective in minimizing all pollutant discharges in targeted areas.

Comment: Part I.C.1. The current language authorizes that "a permittee may discharge pollutants...." ADEQ should be permitting discharges, not pollutants. This seems to be contrary to the purpose of this permit, which is to keep pollutants out of stormwater and non-stormwater discharges from construction sites. The language should read "A permittee may discharge."

Response: The language parallels the federal construction permit, however, ADEQ appreciates the commenter's perspective. The reality is an AZPDES permit is required when there is a discharge of pollutants from a point source to a water of the U.S. If there were no pollutants, there would be no "discharge" and thus, no need for permit coverage. ADEQ notes that the definition of pollutant is very broad and includes sediments, temperature, contaminants, etc.

Comment: Part I.C.1.c.ii. This requirement seems like a loophole for construction permittees. All a permittee has to do is get several projects to use the same support activity and then the activity location is no longer required to be permitted.

Another commenter asked that because this permit does not cover discharges from commercial operations that serve multiple unrelated construction projects, how will stormwater discharges from these facilities be handled?

Response: ADEQ appreciates the commenters' general concern. Permit coverage would still be required if a single permittee is operating the support activity for several of his own projects. However, if the support activity is commercially serving different operators for different projects, it is not required to be

included. This is because this permit is focused to construction operators and activities they control in support of construction. If a commercial activity exists, it may be subject to separate requirements under the stormwater Multi-Sector General Permit for Industrial Activities or other permits; it was not the goal of this permit to specifically address them.

Comment: Part I.C.2. The list of allowable nonstorm discharges is very similar to the lists found in MS4 permits, however, the caveat that these discharges are allowable only if they are not a significant source of pollutants is missing. This is particularly important for fire fighting discharges. How does this list compare to the de minimus permit being developed by ADEQ? Will the discharge of water well flushing where the receiving waters are ephemeral be added to the list of allowable nonstorm discharges for the MS4 permits? Or will it be covered under the de minimus permit? Additionally, it is unclear why Part IV. D.7. refers to this section. Please provide clarification.

Response: The permit has been changed in response to the above comments. The language has been changed to be more consistent with the recently issued MS4 general permit. Additional language has been added in IV.D.7 to clarify that appropriate BMPs need to be in place and the SWPPP needs to specifically address such discharges and design BMPs. Many of these same discharges, including well flushing, are intended to be addressed under the future de minimus permits.

Comment: Part I.C.2.c & f. These should be removed from the list of allowable non-storm water discharges. These wash waters will most likely contain a significant amount of pollutants (particularly sediment.) I do not think that ADEQ is telling construction permittees that it is okay to wash mud off of vehicles into a receiving water or MS4 as long as they do not use detergent.

Response: Part IV.D.7. of the permit has been changed in response to the above comment to clarify that appropriate BMPs need to be in place and the SWPPP needs to specifically address such discharges and design BMPs. ADEQ does not consider it OK to wash mud off vehicles directly into a receiving water or MS4 without BMPs in place to minimize discharge of sediments.

Comment 3: Part I.C.2.d. Under this condition, it is understood that an allowable stormwater discharge can be water used to control dust, provided effluent or other wastewaters are not used. This provision does not address the potential use of reclaimed water as a dust control agent on construction sites. It is understood and anticipated that the use of reclaimed water in relation to stormwater discharges will be addressed in the upcoming Deminimus General permit rules. In lieu of those rules coming out, we would like to propose that Class B or higher quality reclaimed water may be allowed to be applied to a construction site for dust control.

Response: The reuse rules do allow reclaimed water to be used for dust control. However A.A.C 18-9-704(G)(3) prohibits allowing runoff of reclaimed water or mixing with stormwater. As such, there should be no discharge from this activity and the permit has not been changed to reflect this comment.

Comment: Part I.C.2.e. PDEQ assumes that this does not pertain to the discharge of super-chlorinated water from potable water lines, as part of the standard potable water line construction protocol required pursuant to the Safe Drinking Water Rules and Engineering Bulletins 8 and 10. PDEQ suggests that these are specifically excluded and that discharge permits are needed for those particular types of discharges.

Response: Part IV.D.7. of the permit has been changed in response to the above comment to clarify that appropriate BMPs need to be in place and the SWPPP needs to specifically address such discharges and design BMPs. There are to be BMPs in place to minimize the chlorine in wastewater prior to discharge of superchlorinated waters.

Comment: Part I.C.2.g. This provision should be modified to say that residual pollutants (sediment) may be washed off streets. However, as it is currently worded, it would allow for the wash down or discharge of heavy construction site trackout.

Response: Part IV.D.7. of the permit has been changed in response to the above comments to clarify that appropriate BMPs need to be in place and the SWPPP needs to specifically address such discharges and design appropriate BMPs. ADEQ does not intend to allow sediment-laden washdown or discharge of heavy construction site trackout to be discharged from the site.

Comment: Part I.C.2.k. Under this condition, it is understood that water well flushing where the

receiving waters are ephemeral are allowable non-stormwater discharges. The comment we have is 'what is the definition of ephemeral?' If the ephemeral waterway is a tributary of an effluent-dependent waterway, is it then determined to be effluent dependent? How many miles have to separate an ephemeral waterway from an effluent dependent water for the ephemeral waterway to be defined as ephemeral? If the discharge does not reach the effluent dependent waters, can the discharge remain allowable under the ephemeral definition?

Depending on the type of well, and it's location, well flushing has the potential to discharge significant pollutants. PDEQ suggests limiting this "allowable non-storm water discharge" to potable water wells.

Response: The permit has been changed in response to the above comments. Ephemeral waters are defined in A.A.C. 18-11-101 as "surface waters that have a channel that is at all times above the water table, and that flows only in direct response to precipitation." That is, these are typically dry washes. There is confusion about the distinction and separation of ephemeral and effluent dependent waters and application of the tributary rule. A comprehensive response on this issue would be lengthy, but to clarify: There are waters that are specifically defined in rules as effluent dependent; discharging well water to one of these segments is not allowable under this permit.

There are also waters defined in the rules as ephemeral. Discharge of well water into these is allowed. [A common point of confusion is that when wastewater, **other than stormwater**, is discharged to an ephemeral wash, ADEQ *applies* the effluent dependent water standards in AZPDES permits per R18-11-113(E).] The simplest way to convey ADEQ's intention is that any well waters discharged under the construction permit should never reach a waterbody other than a dry wash.

Comment: Part I.C.2. Add the following construction related non-stormwater discharges:
"l. Water used for compacting soil, provided effluent or other waste waters are not used;
m. Water used for drilling and coring such as for evaluating foundation materials, where flows are not contaminated with additives; and
n. Water obtained from dewatering operations/foundations in preparation for and during excavation and construction."

Response: ADEQ has changed the permit to include the discharges as requested as they do not vary significantly in nature from other discharges allowed in the permit.

Comment: Part I.D.4. It is unclear what is meant by the phrase "including failure to protect and maintain existing designated uses of receiving waters." This confusing language is unnecessary and should be deleted because the prohibition against causing or contributing to non-attainment of water quality standards more than adequately addresses any water quality concerns without creating unnecessary confusion. Because of these concerns, we request that the language in Part I.D.4 be revised as follows:

"Discharges Threatening Water Quality. This permit does not authorize discharges that will cause or contribute to non-attainment of water quality standards, ~~including failure to protect and maintain existing designated uses of receiving waters.~~"

Another commenter suggested changing the language as follows:

"Discharges Threatening Water Quality. This permit does not authorize discharges that will cause or contribute to non-attainment of water quality standards or to the loss of a designated use of receiving waters; ~~including failure to protect and maintain existing designated uses of receiving waters.~~"

Response: ADEQ does not recognize a substantive distinction in the proposed changes, but has changed the permit to reflect the second comment.

Comment: Part I.D.5. ADEQ received several comments on this section.

This section states that an operator of a construction site "is not automatically eligible to discharge under this permit into receiving waters listed as impaired under 303(d) of the clean water act or to tributaries to impaired waters." It appears that this provision would apply to the impaired waterbody and all of its tributaries, including ephemeral waters. Many projects are planned, or in progress, within a quarter-mile of a dry wash that may be tributary to the listed waters. It is unclear how an operator would determine whether the discharge "may" contain a pollutant for which the waterbody is impaired. The City requests clarification of the Department's intent to require individual approvals for all discharges to impaired waters or only those discharges that are demonstrated to contain pollutants for which the waterbody was listed as

impaired. We also request clarification as to what extent tributaries to impaired waters will be included in this limitation of coverage.

How does ADEQ anticipate assuring compliance with these requirements? Will ADEQ provide training to the construction industry regarding this requirement? It would appear that this requirement is a major change to previous general permits for storm water discharges from construction activities, and will have a very large impact on the industry in the Phoenix metropolitan area, as well as other areas in the future as ADEQ and EPA complete studies that may expand the universe of impaired waters and pollutants of concern. As such, it seems appropriate that a public hearing be held to inform the regulated community of this issue. Failing to do so will most likely result in mass non-compliance with the requirement, and lessen the chances for an effective ADEQ program.

Distance alone should not be relied upon to determine impact, instead, it is suggested that the discharge be 1/4 mile from the impaired water and in an upstream contributing drainage area, before it is determined that the discharge could impact the impaired waters. Under this provision, the SWPPP will undergo a separate review. Will the SWPPP also be subject to public notice?

How does the Arizona Department of Environmental Quality (ADEQ) determine the point from which the 1/4 mile distance begins? Is this 1/4 mile perpendicular to the impaired reach, and upstream from the impaired reach? How does ADEQ determine the limit of the reach of the tributary rule in this context?

Another commenter suggested that the 1/4 mile standard should be replaced with the following: "If the discharge has the reasonable potential to reach..."

Response: With respect to impaired (& unique) waters, ADEQ intends to screen projects in the proximity of impaired reaches, not the entire length of an impaired waterbody. ADEQ has developed GIS system covers that effectively designate a 1/4 mile "zone" around these reaches and will flag projects that are inside this area. This zone will extend to projects discharging to ephemeral reaches at a point within 1/4 mile of impaired segments. The screening will also flag projects around impaired segments regardless of the pollutant for which it is impaired. If in the zone, the permit requires submittal of the NOI and SWPPP. ADEQ considers that those in proximity to these waterways are a priority for review, and that the requirement a SWPPP be submitted to the Agency should increase the attention put into SWPPP development and implementation. The extent of our review will vary and may be dependent on staff time, size of project, and the exact location and details of the project. Again ADEQ notes that operators have the option to submit this information to ADEQ well in advance of their actual construction date if they are concerned about delays. The permit has also been revised such that ADEQ will notify operators within 32 business days of receipt of the NOI and SWPPP whether there will be additional delay. If that notification is not received, authorization will begin on the 32nd day.

Comment: Part I.D.5.a. Please provide specifics on what a monitoring proposal would entail. Another commenter assumed that this means a requirement to monitor the effectiveness of the selected BMPs or other controls, but it is not clear if this mandates chemical monitoring or if some other monitoring is allowable. It also is unclear what it means to determine that controls are "effective." Effective for what? Effective for minimizing the pollutant of concern with respect to the impairment determination, or effective for ensuring that the discharge complies with all surface water quality standards?

Response: "Effective" in this context means effective for ensuring the BMPs are doing an acceptable job minimizing all pollutants that could cause or contribute to a water quality problem. A monitoring program could be either chemical monitoring or physical monitoring, or a combination thereof. Chemical monitoring includes a sampling plan describing what will be monitored, where it will be monitored, how samples will be collected and analyzed and the frequency. Chemical monitoring would be for the constituents of concern at a specific construction site. If a waterbody is impaired for pesticides, for example and the construction is at a site that has always been desert, it is not expected that pesticide monitoring would occur. Conversely if the site was historically agriculture, it may have some of the pesticides of concern in the soils that are being disturbed. In this instance, the operator should determine the presence or absence of those chemicals, and if present, tailor BMPs if appropriate and monitor those discharges. Sediments/ turbidity would obviously always be of concern at a construction site. Physical monitoring, for example, could include frequent inspections and review of BMP effectiveness in a rainfall event with contingencies in place to enhance BMPs or site controls if they are not proven effective.

Comment: Parts I.D.5 & 6. Open-ended review process: As drafted, the proposed CGP does not authorize coverage until written approval is received from ADEQ. However, there is no limit on how long ADEQ can take to complete this review. See Part II.B.1 of the proposed CGP. As a result, projects may

be delayed indefinitely while this review is ongoing. In the context of construction projects, this could result in potentially significant delays to projects, which can in turn have significant financial impacts.

Response: Again ADEQ notes that operators have the option to submit this information to ADEQ well in advance of their actual construction date if they are concerned about delays. The permit has also been revised such that ADEQ will notify operators within 32 business days of receipt of the NOI and SWPPP whether there will be additional delay. If that notification is not received, authorization will begin on the 32nd day.

Comment: Part I.D.5.a. The standards for ADEQ's review of SWPPPs submitted under these provisions are inappropriate and over-broad. For example, the SWPPP for discharges into impaired waters without a TMDL "must specifically identify BMPs and/or other controls that ensure the discharges comply with surface water quality standards." This approach is flawed because there is no legal requirement that the *discharge* meet standards; rather, the emphasis should be on the effect of the discharge on standards in the receiving water. (For example, both Part I.D.4 of the proposed CGP and Part 1.3(C)(4) of the December 2002 proposed EPA CGP limit coverage if the discharge "will cause or contribute to non-attainment of water quality standards," not because the discharges themselves do not meet standards.) In addition, the requirement to "ensure" that discharges meet standards is fundamentally inconsistent with the concept of an iterative, BMP-based approach to controlling storm water – short of containing all potential discharges (a virtual impossibility in many cases), it will be almost impossible to "ensure" that the quality of the discharge meets certain objectives.

The approach is also overbroad in that it requires a focus on all water quality standards, not just those that form the basis for impairment. This is unnecessary and may impose a virtually impossible burden.

Response: ADEQ disagrees that our approach is inappropriate and overbroad. Discharges under any AZPDES permit will focus on all water quality standards, not just those that form the basis for an impairment. It is difficult to say affirmatively that a discharge does not cause or contribute to a water quality problem if it is in relative proximity to the waterbody and discharges above a standard. Notwithstanding that, however, ADEQ appreciates the difficulties posed by stormwater discharges and events. It is the goal of this permit to minimize any discharges from construction sites and ADEQ is particularly focused on those near sensitive waters in Arizona. ADEQ has revised language in this section and the permit to refer to discharges that may cause or contribute to non-attainment of Water Quality Standards.

Comment: Interface Between Parts I.D and VII; Basis for Making Eligibility Determinations: We also are concerned that the language in Part I.D.5 and 6 allows ADEQ to make decisions regarding permit termination or eligibility outside of the already established process for making such determinations as set forth in Part VII.S of the proposed CGP. As ADEQ appeared to have agreed in earlier discussions on this issue, there should be a clear reference to the process set forth in Part VII.S for requiring coverage under alternative permits for concerns related to potential impacts of stormwater discharges on the water quality status of impaired waters.

Response: Part VII.S addresses conditions for requiring individual/alternative permits after persons are already authorized to discharge under this permit. However, there are other conditions that may reflect eligibility for coverage, including compliance with the permit, preparation of a SWPPP, inclusion of nonqualifying discharges, etc. The language in Part I.D. speaks to permit eligibility.

Comment: Part I.D.5. ADEQ's proposal to eliminate general permit coverage for discharges subject to a specific WLA should be deleted. A more flexible approach is suggested by EPA in its December 2002 draft permit (Part 1.3(C)(5)), which requires that discharges must be consistent with the assumptions and requirements of a TMDL, even if not expressed specifically as part of a WLA. This approach also would allow greater overall flexibility in both permitting and TMDL development, and also reduce the burden on dischargers and ADEQ by reducing the mandatory issuance of individual permits even if they are not necessary.

Response: ADEQ generally agrees with the commenter's position and has modified the permit language.

Comment: Part I.D.5.c. The commenter disagrees with the language that authorizes the Department to "require" that specific controls or monitoring be implemented or that specific BMP design

criteria be followed. This language removes the operator's flexibility to select appropriate BMPs to effectively minimize loadings of the pollutant of concern and instead authorizes ADEQ to mandate the appropriate BMPs or other controls.

It is important to recognize that the proposed CGP is dealing with highly variable stormwater discharges at high flow conditions, not continuous wastewater discharges at low flow conditions. ADEQ therefore should maintain the maximum amount of flexibility in terms of addressing such discharges and should focus on requirements to adopt appropriate (not mandated) BMPs that will effectively minimize loadings of the pollutant of concern.

Response: ADEQ disagrees with the comment. The operator has the flexibility to propose whatever controls or BMPs desired and ADEQ hopes that the proposal is of quality and no additional controls need to be mandated. However, in our experience it is not infrequent that SWPPPs are not well prepared or fully comprehensive. In such cases, ADEQ retains the right to require specific modifications that will be more protective as a condition for coverage under this permit. ADEQ would also note that EPA's November 22, 2002 memo regarding NPDES permit requirements and TMDLs, indicates that monitoring should be included in such permits, for a variety of purposes, including to indicate if it is necessary to modify BMPs.

Comment: Part I.D.5. For purposes of limiting coverage due to proximity to impaired waters, the state CGP, like the recently proposed federal permit (Part 1.3(C)(5)), should address only pollutants associated with construction activities, such as sediment, TSS, turbidity, and siltation. The provisions on limiting coverage near impaired waters should focus only on waters impaired by those pollutants.

ADEQ should only limit the availability of this permit to dischargers in cases where the receiving waters are impaired for a construction-related pollutant, i.e., sediment or a parameter that addresses sediment (such as total suspended solids, turbidity, or siltation). Permittees should not otherwise have to develop BMPs and tailor their SWPPPs to meet water quality standards unrelated to construction activity, e.g., metals or pathogens. Thus, ADEQ should clarify in Parts I.D.5 (as it appears in the Appendix to this letter) that its discussion of impaired waters relates only to waters that are impaired for a construction-related pollutant, i.e., sediment or a parameter that addresses sediment.

Response: ADEQ disagrees with the comment. Discharges under any AZPDES permit will focus on all water quality standards, not just those that form the basis for an impairment. In response, ADEQ also notes that depending on the site and the other allowable discharges, there is a potential for other pollutants to be on-site other than those listed, including metals, chlorine, oil, gasoline, pesticides, etc. There is no expectation, however, that BMPs would be developed for any pollutant known not to be at the site.

Comment: A commenter suggested that instead of automatically withholding the authorization to discharge, ADEQ should automatically require dischargers to submit those portions of the SWPPP addressing the pollutants of concern and show that the BMPs will be effective to minimize those pollutants. ADEQ always has the right to ask for the entire SWPPP (Part IV.K), to mandate changes if needed (Parts IV.L and V.D), and to revoke coverage in appropriate situations (Part VII.S). This approach better balances the unique challenges of controlling storm water via a BMP program with protecting Arizona's waters, and at the same time minimizes the administrative burden on both permittees and the Department.

In order to address the concerns mentioned above, and consistent with ADEQ's stated intentions to revise its impaired water, we request that ADEQ incorporate the following replacement language in lieu of the existing language in Parts I.D.5 and 6:

- “5. Discharges into Impaired Receiving Waters. Any operator who intends to obtain authorization under this permit for storm water discharges into a receiving water listed as impaired under Section 303(d) of the Clean Water Act for sediment or a parameter that addresses sediment (such as total suspended solids, turbidity, or siltation) or into tributaries to the impaired water within 1/4 mile of the impaired water, must satisfy either (b) or (c) below as applicable. For the purposes of this section, “discharging to an impaired waterbody” shall mean either directly discharging from a construction site to a waterbody listed as impaired for sediment or a parameter that addresses sediment (such as total suspended solids, turbidity, or siltation) or discharging to a tributary of the impaired waterbody within 1/4 mile of the point where the tributary joins the impaired waterbody.
 - a. Operators should contact the Department prior to submitting the NOI and determine

whether the construction site will discharge to a waterbody listed as impaired for sediment or a parameter that addresses sediment (such as total suspended solids, turbidity, or siltation). Information regarding the location of such impaired waters is available from the Department at the address indicated elsewhere in this permit and electronically at the following web site address: [INSERT APPROPRIATE LINK TO 303(D) INFORMATION].

- b. Discharging to an Impaired Waterbody, Absent a TMDL. The operator is eligible under this permit for authorization to discharge to an impaired waterbody if the operator maintains with the storm water pollution prevention plan a certification that the best management practices selected in the storm water pollution prevention plan are appropriate for the reduction of the pollutants present in the discharge for which the water is listed as impaired (i.e., "pollutants of concern"), that the best management practices are designed to effectively minimize contribution of the pollutants of concern, and that the best management practices will be implemented. The operator must submit a summary of the best management practices addressing the pollutants of concern as well as a copy of the certification that will be included in the storm water pollution prevention plan with the NOI.
- c. Discharging to an Impaired Waterbody, With a TMDL. The operator is eligible under this permit for authorization to discharge to an impaired waterbody if the operator maintains with the storm water pollution prevention plan a certification that the storm water pollution prevention plan is consistent with the assumptions and requirements of any available waste load allocations in the TMDL. The storm water pollution prevention plan must identify the best management practices that will allow the discharges to meet the waste load allocations. If the TMDL does not specify waste load allocations for storm water discharges, the operator must maintain a certification with the storm water pollution prevention plan consistent with Part I, Section D.5.a. If the TMDL includes a finding that waste load allocations for storm water discharges are unnecessary or otherwise are not required, then discharges of storm water into such waters are authorized by this permit. The operator must submit a summary of how the operator's discharges are consistent with the requirements of this subsection with the NOI."

Response: ADEQ generally disagrees with the comments for reasons specified in previous responses.

Comment: Part I.D.7.a. As mentioned above, distance alone is not a good criteria for use in determining impact. The paragraph refers to discharges to tributaries to Unique Waters as well, but does not provide any distance criteria. Does this mean that if you discharge to a tributary that is more than 1/4 mile from the unique water body, that written approval is not required?

Another commenter suggested that the 1/4 mile standard should be replaced with the following: "If the discharge has the reasonable potential to reach..."

Response: ADEQ has generally addressed this issue in prior responses. ADEQ would note that Part I.D.6 in the final permit (proposed as Part I.D.7) does have a distance criteria of 1/4 mile. ADEQ realizes the potential for discharges >1/4 mile to be problematic in some unique instances, however, as a general approach under this permit if the discharge is more than 1/4 mile, review and written approval is not required by the permit. The operator is still held to the other requirements of the permit. In the event a discharge were problematic in a specific scenario, individual permit coverage could be required per VII.S. ADEQ would also note that in some cases (e.g., Oak Creek), the tributaries are also named as unique waters and the 1/4 mile distance would also apply in this case.

Comments on PART II of the Proposed Permit

Comment: We suggest that ADEQ allow all NOIs, not just SmartNOIs, to be received electronically. This would require a revision to the definition of "receive" in Part IX ("Definitions"). Currently, the definition of "receive" does not include "electronic" receipt.

Response: ADEQ is not in a position to accept other electronic submission at this time. As the SmartNOI system is currently envisioned, ADEQ would hope that it will provide a user friendly experience and become the method of choice for NOI submittal.

Comment: Part II.A.2. The SWPPP must be implemented **prior to the start of construction**. Additionally, since the SWPPP is a phased document, not all the provisions of the SWPPP are applicable to the early stages of construction. It is suggested that the wording be modified to read: "The appropriate components of a SWPPP must be implemented prior to the start of construction."

Response: ADEQ disagrees. A critical component of this permit is the SWPPP. Unless it is completed, there is no way to certify that it meets the condition of this permit. Additionally, since the NOI only has to be submitted to ADEQ just prior to the start of construction. The SWPPP must be ready before that time to ensure that appropriate controls are in place. However, the SWPPP can be amended as needed for long-term phased construction to address changes per Part IV.J.

Comment: Part II.A.3. Although the provision to provide the NOI to the operator of the MS4 is included under Part III.F., the provision to send a copy of the NOI to the MS4 should be included here as well.

Response: ADEQ agrees this language also belongs in Part II.A.3 and ADEQ has added language to this section.

Comment: Part II.B. The basis for denial of general permit coverage for prospective permittees placed in the 32-day delayed review process needs to be clearly tied to the regulatory standard for denying coverage (which generally focus on concerns for water quality impacts). Existing facilities covered by the federal permit and which transition to the new AZPDES permit should be exempt from the additional review time since they have already met eligibility requirements and, given the status of TMDLs in the state, are unlikely to involve discharges to impaired waters. In addition, the provisions governing discharges to impaired waters should be modified to avoid imposing unnecessary and burdensome requirements. ADEQ should revise the language in Part II.B.2 to make clear what factors ADEQ would consider in a decision to deny or postpone coverage under the general permit.

The timeframes for processing NOIs requiring additional review time must be certain and the standards for processing those NOIs must be clear and based on ADEQ's authority. Therefore, ambiguous language regarding when ADEQ will contact a prospective permittee must be deleted and references to "other agencies with jurisdiction" must likewise be deleted.

ADEQ wants a full opportunity to review new facilities and be sure that existing authority to protect water quality is fully utilized. This is primarily a prospective function since existing facilities have already gone through more stringent federal eligibility requirements for endangered species and historic properties, for example. This is also a workload issue for ADEQ – hundreds of NOIs will be submitted in the first month of operation of the program and it cannot possibly process all of these NOIs efficiently if it must also review existing facilities. ADEQ always retains the authority to revoke general permit coverage in accordance with the AZPDES rules and so the risk that some facility would "slip through the cracks" is very limited.

Response: ADEQ has revised the permit to 'grandfather in' existing facilities, as suggested. We have also deleted references to other agencies, as suggested, because the commenter is correct in the assumption that ADEQ is the only agency to make a final decision concerning coverage under this permit. However, ADEQ emphasizes that we intend to at times include other agencies in the review of the NOI submittal information and may consider their comments in our decision. Again, ADEQ's decision to deny coverage will be based upon our statutory authority, which principally relates to water quality issues.

Comment: Part II.B. Consistent with the requested changes to Parts I.D.5 and 6, and based on other concerns, we request that ADEQ amend Part II.B as follows:

B. Effective Date of Permit Coverage.

1. Operators with a discharge that may reach ~~impaired or~~ unique waters are not authorized under this permit until specific approval has been granted by the Department as specified in ~~Parts I.D.5 and I.D.6 and~~ I.D.7 of this permit.
2. Unless notified to the contrary in accordance with Part II.B.4, all other operators are authorized to discharge stormwater from construction activities under the terms and conditions of this permit two business days after the date that the NOI is received (see definitions) by ADEQ's Water Quality Division. Submission of the NOI demonstrates the discharger's intent to be covered by this permit; it is not a determination by the Department that the discharger has met the eligibility requirements for the permit. Discharges are not authorized after two business days if an NOI is incomplete or

incorrect, ADEQ notifies the operator in writing that further evaluation is necessary pursuant to Part II.B.4 of this permit, or the discharges are not eligible for coverage under this permit.

3. If ADEQ notifies the operator that an NOI is incomplete or incorrect, the operator must resubmit an amended NOI if the operator still intends to obtain permit coverage under this permit.
4. ADEQ may inform an operator that authorization to discharge will not occur for up to 30 business days in the event that screening of the NOI provides information that requires further evaluation by ADEQ ~~or other agencies which may have regulatory jurisdiction~~. This notification may be made either electronically, by fax or phone contact. The notification ~~typically~~ will be made within 2 business days after receipt of the NOI; ~~however, the Department may notify an operator at any time that the eligibility requirements have not been met~~. Except as provided in Part II.B.1, operators which receive notice of a delay in coverage may discharge 32 business days after the date the NOI is received unless further notice is received from the Department during this timeframe. This section does not apply to owners or operators of facilities which obtained coverage under the NPDES General Permit for Storm Water Discharges from Construction Activities effective February 17, 1998 (63 Fed. Reg. 7858 (Feb. 17, 1998)).
5. Based on a review of the NOI or other information, the Department may deny coverage under this permit for the reasons listed in Part VII.S and require submission of an application for an individual AZPDES permit or for coverage under an alternative general permit based on a review of the NOI or other information (see Part VII.S)."

The requested change to Part II.B.1(as noted in last comment) is necessary to reflect the requested changes to Parts I.D.5 and 6. The requested change to Part II.B.2 is necessary to reflect that the potential need for further evaluation is based on the language in Part II.B.4. If this clarification is not added, then the ability of ADEQ to conduct further evaluation of a submitted NOI is unspecified and vague. The requested change to Part II.B.3 is necessary to ensure that an operator is not required to submit an amended NOI if a decision has been made that permit coverage is no longer necessary under the general permit (for example, the operator may have decided to delay or no longer pursue the construction activity).

Response: ADEQ has changed much of this section of the permit language in response to the above comments. ADEQ has noted in previous responses, why we have not included some of the proposed changes.

Comment: The first requested deletion from Part II.B.4 is necessary to clarify that the ability to conduct further evaluation is only applicable to ADEQ and does not apply to other regulatory agencies. In addition, ADEQ agreed in a prior meeting to delete this language because the language could be interpreted to give other agencies and interested parties the ability to deny permit coverage on the grounds that the NOI should have been subject to further evaluation by a particular agency. The ability to conduct further evaluation of NOIs should be limited to ADEQ.

Response: ADEQ agrees to the language change as ADEQ is the only party who is authorized to deny coverage under this permit. ADEQ notes again, however, our commitment to allow other agencies an opportunity to review this information and deal with related issues.

Comment: The second requested deletion from Part II.B.4 is essential to remove potential confusing and unnecessary language because the ability to deny coverage under the permit based on an evaluation of the NOI is already addressed in Part II.B.5. The added language to Part II.B.4 is to clarify that the "whoa nelly" bucket concept will not apply to existing facilities covered by the 1998 federal CGP that will transition to coverage under the new AZPDES CGP.

The requested changes to Part II.B.5 are suggested to clarify that denial of coverage under the general permit pursuant to Part VII.S could require submittal of an individual permit application or submittal of an NOI for coverage under an alternative general permit.

Response: ADEQ has made some changes to the language as indicated in prior responses. ADEQ has added the language to II.B.5. to indicate an alternative general permit is potentially an option.

Comment: Part II.B.2. Suggested revision for clarification: "ADEQ will notify the operator that

discharges are not authorized if the NOI is incomplete or incorrect, further evaluation is necessary or the discharges are not eligible for coverage under this permit. The notification typically will be made within 2 business days after the date that the NOI is received by ADEQ's Water Quality Division." There are a number of concerns that are raised by the NOI approval process as described. This process could create conflicts between the State approval process and the MS4's review process. The City of Tucson will not hold up a grading permit pending ADEQ approval of a NOI, as ADEQ approval is not a legal requirement for a City issued grading permit. It is ADEQ's responsibility to notify the operator that their NOI has not been approved.

If an operator submits a NOI to ADEQ, and a NOI and a SWPPP to the MS4 for review, the MS4 may review the submittal for completeness, and issue a grading permit within two working days (it is common for SWPPPs to be reviewed for completeness within 24 hours of submittal). The operator, after waiting the required two business days following ADEQ receipt of the NOI, could begin construction, only to be notified that he is not covered. In this circumstance, is the operator in violation? Must the operator halt all work at the site until the NOI is approved? The typical first phase of a construction process is clearing and grubbing. If the delay in NOI approval is the result of a potential impact to endangered species or to State historical properties, will this process afford adequate protection? If after receiving word that the site is not covered, and all work stops while the operator waits 32 days for the NOI to be processed, will the operator have to install temporary stabilization measures?

Response: There are a number of issues raised in the comment. First, the suggested language is not appropriate because if the NOI is incorrect or incomplete the operator does not have coverage under this permit regardless if ADEQ advises them of that issue or not. A complete and correct NOI is a basic requirement for coverage. If an operator begins after submission of such a document, he is operating without permit coverage. Therefore, it is critical that all blanks on the NOI are properly completed even if the appropriate answer is 'Not applicable.' ADEQ does not have any requirement that Tucson or any other MS4 hold up their approval processes based on the state permit. However, if an operator is not covered by the state permit and construction begins, he is in violation regardless of the status of the local approval. If work has to stop, then it is suggested that temporary stabilization measures be installed as mitigation.

Comment: Part II.B.2. This does not appear to be enough time for adequate response, if necessary. The small amount of response time will inevitably create a scenario whereby ADEQ decides more information is necessary and that construction activity should not commence, and by the time that the applicant is contacted, construction activity will have indeed commenced. Furthermore, when planning construction activities, the timing of equipment arrival and use is critical. Again, ADEQ will invariably be in the position of telling applicant not to proceed leaving all equipment idle. A longer review time may reduce the number of these instances.

Comment: Part II.B.3. This language invariably will create scenarios where either 1) construction activity is all ready underway, or 2) equipment is on-site and will remain idle, at great expense, until the outstanding issue, which required delay, is resolved. With additional review time, these scenarios may be avoided.

Response: ADEQ appreciates the comments and the challenges. The timelines in the permit are a compromise in minimizing delay to operators while focusing on areas of most concern. ADEQ would recommend earlier submission by the operator to minimize on-site delays, but the final permit language has not been changed.

Comment: Part II.C.1. Insert language that will require the applicant to send a copy of the Notice of Termination (NOT) of Discharge of Storm Water to the local authority as well as to facilitate the local authority's oversight and tracking of the respective project.

Response: ADEQ added Part II.C.3. to reflect the comment.

Comment: Part II.C.2. Add Section, Township and Range to the list of items that the NOT shall include. These items are included on the NOT form, and the permit should match.

Comment: Part III.A.4. Include Section, Township and Range to the list of items that shall be included on the NOI form. These items are included on the NOI form and the permit provisions should match.

Response: The permit has been changed to delete Township, Section, and Range from the language in the permit and the NOI. ADEQ's systems have been developed to automatically generate this

information based on the latitude/longitude so the operator is no longer required to supply this.

Comments on PART III on the Proposed Permit

Comment: We disagree that SWPPPs should automatically be made available to third parties upon their request, as appears to be the case under Part IV.K.5 of the proposed permit. There may be cases where confidential business information is included in the SWPPP and where the public's inspection of the SWPPP might lead to substantial and irreparable harm to the operator. In such cases, the Arizona Supreme Court has recognized an exception to public disclosure that gives an officer or custodian of public records a discretionary right to refuse inspection of public records. See *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984); see also Attorney General, Arizona Agency Handbook § 6.4.3 (2001 ed.). In addition, it is possible that information in a SWPPP might contain information that involves a privacy interest that would prevent disclosure of some portion of the SWPPP. See Attorney General, Arizona Agency Handbook § 6.4.2. It is also conceivable that a SWPPP, or appendices to a SWPPP, may contain records confidential by statute. See A.R.S. § 49.111 ("Permit application; plan approval; notice to counties, cities, or towns"); and A.R.S. § 49.205.A. (which protects trade secrets as confidential upon a showing satisfactory to the Department).

ADEQ's proposal to make the SWPPPs available to third parties is also inconsistent with the approach taken by EPA in its NPDES construction general permit. In the draft permit issued by EPA on December 20, 2002, there is no requirement that EPA make SWPPPs available to third parties upon request. See Proposed NPDES Permit § 3.13. Neither does the current NPDES construction general permit require disclosure of the SWPPP to the public. Rather, the permittee is only required to make the SWPPPs available upon request to EPA, and to State, Tribal or local agencies, or MS4s, under certain circumstances. As to the public at large, EPA merely "encourages permittees to make their SWPPPs available to the public for viewing during normal business hours." 63 Fed. Reg. at 7906 (Feb. 17, 1998).

Response: ADEQ disagrees with the comment and has offered explanation in prior responses.

Comment: Part III.A.8. The name of the receiving water should be reported on the NOI but not the distance to the receiving water. The distance may be very misleading.

What is the difference between the "Municipal Operator of the storm sewer and the name of the MS4"? We recommend using the language from the proposed Federal General Permit.

Response: The language has been changed to reflect the comments. Information on distance to receiving waters will be automatically calculated by ADEQ's data systems.

Comment: Part III.A.10. Should this be referring to "allowable" non-stormwater discharges? This requirement should be removed as it will be impossible for permittees to predict. Other non-stormwater discharge information is already required to be in the SWPPP.

Response: This language was deliberately written in this manner. It is envisioned that some discharges reported will not be allowable under this permit. In this instance, ADEQ may contact operators to advise them those are not authorized. Further, in response to the comment, ADEQ considers it a fundamental requirement that a permittee to be able to predict their discharges.

Comment: Part III.A.11. This requirement is vague and should either be clarified with check boxes for the permits that ADEQ is interested in knowing about or simply be removed altogether.

Response: ADEQ disagrees the requirement to provide the name and number of other environmental permits related to the project is vague.

Comment: Part III. B.1. As the operator of a large MS4, the City of Tucson is concerned regarding the waiver for small construction. If a small construction site is granted a waiver, and the site discharges sediments and other pollutants into the MS4 during a storm event, there is no provision to then require the operator to seek permit coverage or conduct clean up. Will the MS4 be held liable if the discharge contributes to a water quality violation? Or will the State, who granted the waiver, be held liable for the violation as well as any associated cleanup costs?

Response: New language has been added to the permit in Part I.E.3 to partially address the commenter's concern.

Comment: Part III.B.4. The placement of the TMDL exemption under Part III.B. Permit Waivers,

may lead an operator to erroneously conclude that he has a permit waiver and is not required to prepare a SWPPP and submit a NOI.

Response: ADEQ is unclear about the nature of this comment. The TMDL exemption is a permit waiver, however, the language in Part III.B.4. clearly specifies that, to utilize this waiver, the operator must receive specific approval from ADEQ.

Comment: Part III.B.4. ADEQ should send a copy of the written notice of determination to the local authority so that the MS4 permit holders, who are responsible for the inspection of construction activities which have received NOIs, will know when exemptions have been obtained.

Response: ADEQ realizes the MS4s need to receive routine information regarding the status of NOIs, NOTs, and waivers. ADEQ is currently working to develop data systems that will provide this information to MS4s in an efficient and routine manner.

Comment: Part III.C.1. There is an inconsistency between this paragraph and Part II.B.2. Part II.B.2. states that authorization to discharge occurs two business days **after receipt** of the NOI, and this paragraph states that the NOI must be **submitted** two business prior to the start of construction. This inconsistency needs to be resolved.

Response: ADEQ understands that this may cause some confusion. The permit language in new Part III.B.4 and Part III.C.1. have been changed to clarify this issue.

Comment: Part III.D. There is an apparent discrepancy between this paragraph and Part II.B.2. Part II.B.2 states "all operators are authorized to discharge ... two business days after the date that the NOI is received." Part III.D. states "the permittee is authorized only for discharges that occur after permit coverage is granted." In the event that the operator does not receive notification (in writing) that further evaluation is needed within two business days, the operator may commence construction assuming that he was authorized. Please clarify and resolve the discrepancy. Is this only to apply in the case of a late application?

Response: The language in III.D was intended to indicate that if an operator submits a late NOI, he is not receiving 'retroactive' authorization back to the time he should have filed. In other words, late filing will not be a defense in the case of an enforcement action to cover prior unpermitted discharges. The permit language has been reworked for clarification.

Comment: Part III.E. Require the applicant to send a copy of the Notice of Intent (NOI) to Discharge of Storm Water to the local authority as well as to facilitate the local authority's oversight and tracking of the respective project. With copies of NOIs, PDEQ will be able to perform AZPDES mandated oversight and inspection duties.

To be consistent with the language that appears in Part IV, Section K of the draft General Construction Permit, please add the following text to Part III, Section E:

Additional Notification.

Permittees that are operating under approved local sediment and erosion plans, grading plans, or storm water management plans shall submit signed copies of the Notice of Intent to the local agency approving such plans in accordance with the deadlines in Part III, Section C [Deadlines for Notification] of this permit (or sooner where required by local rules), in addition to submitting the Notice of Intent to ADEQ in accordance with Part III, Section E [Where to Submit].

Response: Part III.F. of the permit requires the operator to submit a copy of the NOI to the MS4. The language in Part IV.K.3. states that the operator will supply a copy of the SWPPP to the Department, or another regulatory body, including local authority, upon request. Part III.F. requires that the operator submit a copy of the NOI to the MS4. ADEQ will add a statement to Part III.F. stating that "an operator who is operating under an approved local sediment and erosion plan, grading plan or stormwater management plan, shall submit a signed copy of the NOI to the local authority upon request."

Comment: Part III.F. Suggested change in wording from "If the facility will discharge" to "If the facility **has the potential to discharge.**" The original language implies that it is a certainty that a site will discharge, and in an arid environment, stormwater discharge is rarely certain.

Response: The permit has been changed to reflect the comment.

Comments on PART IV on the Proposed Permit

Comment: Part IV.A. Permittees should not be required to prepare a SWPPP prior to submitting an NOI for permit coverage. Rather, as required by the Federal draft General Permit for Discharges from Large and Small Construction Projects, the SWPPP should “be prepared prior to the commencement of construction activity.” Some projects may not disturb soils until later in the project schedule. With these two documents tied together (NOI and SWPPP) permittees may be unreasonably asked to develop a SWPPP months in advance of the activities that require its use.

Response: ADEQ disagrees and has addressed this issue in a prior response.

Comment: Part IV.B.2.c. and Part IV.C.1. The SWPPP is prepared prior to receipt of the permit authorization number, and may have to be added to the SWPPP at a later date. For NPDES permits, construction is frequently completed before the permit authorization number is received. In addition, this requirement is more restrictive than the federal permit, which does not require the SWPPP to include the authorization number. Because this requirement exceeds the federal requirements, it should be removed.

Response: ADEQ disagrees with the reasoning of the comment, and also intends for authorization numbers to timely reach operators under the state program. ADEQ does appreciate, however, that this information will not be available on initial SWPPP preparation and has amended the language.

Comment: Part IV.C.2.d. This is a requirement of the existing Federal Construction General Permit that has rightly been removed from the draft Federal General Permit for Discharges from Large and Small Construction Projects. This requested information provides no useful information in protecting the quality of discharges from the construction site. Existing data will not be relevant once soil-disturbing activities begin and Final Stabilization requirements are in place to address post construction conditions. This Section should be deleted.

Response: The referenced portion of the permit requires the SWPPP to contain: an estimate of the pre-construction and post-construction runoff coefficient, any soil data, and any existent data on the quality of any discharge from the construction site. The commenter suggests that the requirement to include such data in the SWPPP should be removed due to its perceived lack of relevancy. The pre- and post-construction runoff coefficients are needed for a reviewer to determine any changes in runoff volume resulting from the project. Soil data is necessary for the reviewer to determine erosion related pollutants associated with the project. For example, smaller clay particles may escape BMPs that are effective in trapping larger sand particles. Also, some pollutants may be associated with certain soil types. For example, aluminum is associated with particular types of clays. Existent discharge quality information is useful because it is suggestive of the pollutants that may be transported by runoff into a MS4 or water of the US. Because most construction projects are on virgin land, in all probability there is no existent discharge information. On the other hand, if there was a prior permitted discharge at the site, then such information should be readily available due to the requirement to have such discharges permitted within the NPDES/AZPDES programs. Additionally, should such information exist for storm water discharges from the site, then the reviewer could have data available for a comparison for water quality purposes.

Comment: Part IV.C.3. Rather than estimating storm water patterns, PDEQ recommends having a topographic map and that the map is to scale. This will aid an inspector’s determination regarding actual drainage patterns, regarding actual construction work performed, and the type of erosion controls that are appropriate.

Response: The permit language has been changed to reflect that the map must be to scale. A topographic map may be used, but has not been required. In some instances a topo may be misleading if operations change the grade.

Comment: Part IV.C.3.h. We object to the requirement to include the locations and registration numbers of on-site drywells in the site map for the SWPPP. This requirement is inconsistent with the decision made by the Unified Permit Steering Committee to keep the APP and NPDES permit programs on a separate track. ADEQ made the same commitment during debate on the AZPDES statute. This requirement should be deleted from the proposed CGP.

Response: ADEQ disagrees and notes that drywells that receive only stormwater are not regulated under APP, but rather have their own statutory provisions in §49-321, *et. seq.* This is a stormwater general permit and the way stormwater is managed on the site is very relevant, therefore, if drywells are

used to manage stormwater they should be included in the site SWPPP.

Comment: Part IV.C.4. This section should be modified as identified in bold. “The SWPPP must identify the nearest **named** receiving water(s), including.....”

Response: ADEQ disagrees as very often the nearest receiving water is an unnamed tributary and there may not be a named water for miles. This information should reflect the receiving water actually or potentially receiving the discharge.

Comment: Part IV.C.4. The requirement that “...wetlands at or near the site...be described is vague. What distance should be used to determine if a wetlands is “near” the construction site?

Response: The language has been revised for clarification. The intent is that any wetland at or near the site that may be disturbed or that will received discharges be identified. If it has no potential to be disturbed or impacted, it need not be described.

Comment: Part IV.C.5. The language does not account for potential pollutant sources as it is currently written. The summary of potential pollutant sources should include a list of materials associated with the construction activity that may result in a non-stormwater discharge from the site. This includes fueling operations, materials stored onsite, asphalt plants, etc.

Response: The language in Part IV.C.5. has been revised for clarification.

Comment: Part IV.D.2.a. This requirement states that controls shall be designed to retain sediment on site to the “extent practicable.” This is not an established standard. It is suggested that this be revised to the “**maximum** extent practicable.”

Response: “To the extent practicable” is terminology commonly used in environmental regulation. “Maximum Extent Practicable” (MEP) is a term with implications in the MS4 stormwater program. ADEQ does not wish to confuse the construction permit with the inclusion of that standard.

Comment: Part IV.D.2.b. The requirement that the permittee must modify controls that have been used inappropriately, or incorrectly within 24 hours, seems to contradict the requirements under Part IV.F.1, Part IV.F.2. and Part IV.I.7 that maintenance for controls that are not operating effectively and needed modifications or additions to controls must be accomplished before the next anticipated storm. This contradiction should be resolved and sufficient time needs to be given to correct a deficiency. We recommend removing the 24-hour requirement.

Response: ADEQ agrees that the language appears conflicting and the language has been modified.

Comment: Part IV.D.2.b. PDEQ recommends the inspection of the site and repair or maintenance of BMPs, if needed, immediately or within 24 hours after a significant rain event. A significant rain event may be defined as a rain event that causes runoff in the streets near the site, or a local rain event of 0.20 inches or more as determined by an on-site rain gauge.

Response: ADEQ appreciates the commenter’s objective, however, the proposal creates conflict with the definition of 0.5 inches as a “legal” storm event. As such, ADEQ is not choosing to incorporate the suggested change at this time.

Comment: Part IV.D.7.e. This requirement is vague and confusing. Is it targeting post-construction stabilization or controls to be implemented during construction? We recommend removing this to be consistent with the proposed federal general permit.

Response: (Now this is provision Part IV.D.8.e.) In inspection of construction sites, ADEQ has observed that operators often install a culvert or other structural drainage feature, but fail to adequately protect the surrounding soil. Frequently, this will result in erosion upslope of the receiving water. The cause of this problem is the enlargement in impervious area created by the development, producing increased concentrated flows at new points of discharge. This requirement is intended to assist in addressing a widely observed runoff problem during the construction phase. Should the developer wish to leave the stabilization in place after a NOT has been filed, then such permanent stabilization practices may be regarded as a post-construction erosion BMP. The permit language has not been changed.

Comment: Part IV.G. The confirmation of coverage letter should also be submitted to MS4 permit

holders to better assist in inspection documenting and report to ADEQ. Also, the word in between “authorization number is” and “the permit” is capitalized “NOT.” While it is understood that this means “not,” to avoid confusion with NOT (Notice of Termination), using a bold, italicized, underlined, lower case “not” provides clarity.

Response: ADEQ does not plan to send the confirmation of coverage letter to MS4s, but does intend to routinely provide information to MS4s as indicated in an earlier response.

Comment: Part IV.H. If local requirements require SWPPPs for construction disturbing areas greater than one acre and do not recognize the erosivity waiver, does this mean that the more stringent local requirement becomes a requirement of the AZPDES permit?

Response: No, ADEQ does not intend to enforce local requirements within our permit. The MS4, has no obligation, however, to accept the waiver as satisfying local requirements.

Comment: Part IV.I.1 & 2. The inspection frequency and schedules are significantly different than the proposed Federal general permit. This section is confusing since “seasonal arid period” is not defined and the term rainfall does not take into consideration other forms of precipitation. We recommend that ADEQ use the proposed Federal general permit language (i.e. monthly inspections required in arid areas with less than 10 inches annual precipitation).

Response: ADEQ is confused by the comment as the language in the draft was almost identical to the latest draft of the proposed Federal permit and seasonal arid IS defined in the draft permit. That section has been reworked for clarity in response to the comments, however.

Comment: Part IV.I. Regarding Inspection Schedule: For the listed 7 or 14 calendar days, what is the criteria for selecting which one is the appropriate one?

Another commenter stated that the permit allows a reduced inspection frequency of once per month if construction occurs during a seasonal arid period in areas that receive less than 20 inches of annual rainfall. Since large areas of this State are arid or semi-arid by definition, it is unclear exactly which inspection frequency is acceptable. It appears inspection frequency can generally be maintained at once per month levels for long periods of time throughout large areas of the State. Can you clarify the inspection frequency?

Response: This section of the permit has been revised to clarify the issue posed by both commenters. In general the permit provides the operator with a choice of inspection schedules. The operator can pick the one that best suits the project. Whatever schedule is picked, it must be indicated in the SWPPP and the operator is expected to comply with that schedule and document the inspections.

Comment: Part IV.I.4. The commenter wanted ADEQ to explicitly state in this section that the point of compliance for storm water inspections and determinations whether the discharges meet applicable water quality standards is the property line.

Response: Discharges must not cause or contribute to exceedances of applicable water quality standards in all applicable receiving waters, including ephemeral washes. The property line may not be the boundary of the receiving water, therefore ADEQ has not revised the permit as suggested. In some cases, the receiving water may be within the property boundary. The permit requires an operator to ensure that the discharge of pollutants from the construction site is minimized to the extent practicable. Because monitoring is not routinely required in most cases, the operator’s efforts to minimize the pollutants in the discharge may or may not achieve the water quality standard at the property line.

Comment: Part IV.I.7. This paragraph contradicts the requirement under Part IV.D.2.b that controls must be modified within 24 hours. We recommend removing the 24-hour requirement.

Response: This has been addressed in response to previous comments. The language in Part IV.D.2.b. has been revised.

Comment: Part IV.J.2. The SWPPP must be modified if it is ineffective in eliminating pollutants in stormwater discharges. If the SWPPP only “significantly minimizes” pollutants then the site is out of compliance. 40 CFR 122.26 requires that discharges from industrial facilities and construction sites must meet water quality standards.

Response: There are two, potentially independent, provisions of concern here. First, the operator must implement the provisions of a SWPPP that significantly minimize pollutants. If the operator does

not, he is out of compliance with the permit. The second is the requirement that discharges do not cause or contribute to a water quality standards violation. An operator could be in violation of the permit in the event of either occurrence. Either event may also describe a situation where the SWPPP needs to be modified. The language in Part IV.J.2. does not prohibit ADEQ from taking enforcement action if inappropriate BMPs are utilized. ADEQ does not consider that any change is needed to the draft language.

Comment: The language in Part IV.K.5 is unnecessary and inappropriate and in any event raises privacy and public record disclosure issues. The provisions in Part IV.K.3. give ADEQ the ability to request SWPPPs (ADEQ presumably could then provide a copy of the SWPPP (subject to public disclosure laws and confidentiality requirements) to any party requesting such information).

Response: ADEQ disagrees as stated in prior comments.

Comments on PART V of the Proposed Permit

Comment: Part V.B. ADEQ should clarify that the "Release in Excess of Reportable Quantities" applies only to stormwater discharges authorized under the permit. Otherwise, ADEQ's reference to "any stormwater discharges" risks confusion over whether this provision encompasses stormwater that does not discharge into jurisdictional waters. ADEQ does not have authority to regulate the release of a hazardous substance or oil into stormwater that does not discharge into navigable waters.

Response: ADEQ considers that if stormwater discharges are not authorized under the permit, there should be no confusion whether this permit condition is applicable. However, clarifying changes have been made to this section.

Comment: Part V.B.2. PDEQ recommends that release reports be included in a separate reporting section in the SWPPP, and that any relevant sampling results be attached to the release report.

Response: ADEQ agrees that including this information in a separate part of the SWPPP may be beneficial. ADEQ does not believe this should be a permit requirement however. No change will be made to the permit based on this comment.

Comment: Part V.D. ADEQ should delete the phrase "reasonable potential to cause." This Part provides no criteria or factors to which ADEQ may refer in its determination that a permittee's stormwater discharge has a "reasonable potential" to cause or contribute to the non-attainment of any applicable water quality standards. This is not a measurable standard and does not track the general prohibition against causing or contributing to a violation of water quality standards. The standard is also unnecessary in light of ADEQ's ability to deny eligibility for general permit coverage if a permittee is found to be a "significant contributor of pollutants." Thus, we suggest the following revision:

"At any time after authorization, the Department may determine that a permittee's stormwater discharges may cause or ~~have reasonable potential to cause~~ or contribute to non-attainment of any applicable water quality standards."

Response: Reasonable potential is a defined term and measurable standard within the AZPDES program that relates to the level of constituents in a discharge. It is derived from federal NPDES regulatory language and has specific meaning. However, ADEQ does not consider the explicit language vital for this provision, as 'reasonable potential' would generally be a factor in a 'may cause or contribute to' determination. As such, modification of this language is acceptable to ADEQ if it minimizes confusion to stakeholders.

Comment: Part V.D. Asking the permittee to "indicate that the receiving water is attaining water quality standards" is unreasonable and likely impossible if the permittee is not solely responsible for the problem. How can this statement be made if the permittee is only contributing to non-attainment? Furthermore, it is the States' responsibility to determine if a water body is attaining water quality standards. We recommend removing the requirement or modifying it to address the problem.

Response: The commenter may not understand the draft permit language. The draft language in Part V.D. indicates that if ADEQ notifies the permittee that their discharges may cause or contribute to a water quality problem, the permittee has 3 options. The permittee may develop a supplemental BMP plan..., or submit valid and verifiable data that indicate the receiving water is meeting standards (thereby refuting the problem), or finally the permittee may submit an individual permit application. The draft

language does not require the permittee to make the determination. However, ADEQ agrees with the commenter that this is not typically a feasible option for most permittees and has removed the second option to minimize confusion.

Comment: Part V.D. The following change (shown in bold) is suggested. "If the Department makes such a determination, ADEQ **shall** notify the permittee in writing."

Response: The permit has been revised to reflect the comment.

Comments on PART VI of the Proposed Permit

Comment: Part VI.A. If the Department extends the record retention period, a notification requirement should be added, so that the Department will notify the permittee in writing, prior to the end of the standard three-year record retention period.

Response: The permit has been revised to reflect the comment.

Comments on PART VII of the Proposed Permit

Comment: Part VII.A. The AZPDES permit grants a general authorization to discharge, restricting only those pollutants expressly limited in the permit. Compliance with the prohibitions and other terms expressly stated in a permit should constitute compliance with not only the permit, but also other state water quality laws and the CWA. Thus, AZPDES permittees should reasonably expect to be shielded from liability for discharging pollutants not otherwise addressed in the permit. ADEQ, however, cites A.R.S. § 49-262 in the Duty to Comply provision. A.R.S. § 49-262 describes ADEQ's ability to seek injunctive relief for violations of water quality standards and for "creating an actual or potential endangerment to the public health or environment because of acts performed in violation of [the entire Water Quality Control statute]." ADEQ should amend the existing language as follows:

"A. Duty to Comply. [R18-9-A905(A)(3)(a) which incorporates 40 CFR 122.41(a)(i) and A.R.S. §§ ~~49-262~~, 263.01, and 263.02]

Response: ADEQ disagrees. A.R.S. § 255.01(F)(2) specifically provides the 'permit as a shield' provision. A.R.S. § 49-262(A)(d) also describes ADEQ's ability to seek relief if a person is in violation of a discharge limitation or any other condition of a permit issued under article 2, 3, or 3.1 of this chapter. A.R.S. § 49-262(C) also describes civil fines for violation of a permit issued under 3.1 of this chapter. This is clearly an appropriate reference for Duty to Comply with the permit. The language is being revised to also reference A.R.S. § 49-261, which has implications for non-compliance with AZPDES permits.

Comment: Part VII.K.1.c. There is no mention of delegation of the authority, but under Part VII.K.2.c, all other documents (NOT, SWPPPs, reports, certifications, or information required by the permit) may be signed by a duly authorized representative of one person defined in Part VII.K.1.c. The EPA has allowed the delegation of the signatory responsibilities for NOIs as well. We would like to see this delegation added for the NOIs.

Response: 40 CFR 122.22 states who is authorized to sign NPDES permit applications. The instructions on EPA's NOI concerning who can sign is consistent with the federal regulations and the ADEQ permit language. The signature on a permit application is one document that cannot be delegated to an authorized representative. The permit language has not been changed.

Comments on PART VIII of the Proposed Permit

Comment: Part VIII.A. In the Code of Federal Regulations, the civil penalty per violation per day not to exceed limit increased from \$25,000 to \$27,500. By law, state requirements must be as stringent, but no more stringent and no less stringent, than federal laws. PDEQ recommends that the state increase the civil penalty per violation per day not to exceed limit from \$25,000 to \$27,500.

Response: EPA did not revise the CFR as mentioned in the comment. If there is a change in the federal provision, a State is allowed up to one year to make a conforming rule change and up to two years if a statutory revision is required.

Comments on PART IX of the Proposed Permit

Comment: The terms “applicant”, “permittee” and “Owner/Operator” are used interchangeably. This causes confusion and possible legal conflict if the terms are not better defined or corrected.

Response: The permit has been reworded to provide clarifications. In most instances, the word “operator” was used for “applicant”, “permittee” or “owner/operator.” ‘Applicant’ refers to a person applying for a permit prior to receipt of coverage.

Comment: The term “receiving water” should be defined.

Response: ADEQ believes that this term is generally understood to be any water of the U.S. that a discharge may reach or impact and that adding formal definition is unnecessary.

Comment: A clear definition of “disturbance” should be provided to help clarify when permit requirements apply.

Response: ADEQ does not consider a definition of ‘disturbance’ is necessary as the permit provides the definition of ‘discharge associated with construction activity.’ Disturbance includes any act by which soil is moved and land changed that may result in erosion or the movement of sediments, and may include tilling, clearing, grading, excavating, stripping, stockpiling, filling and related activities, and the covering of land surfaces with an impermeable materials.

Comment: Add a definition for the term “arid area(s).”

Response: The draft permit included this under the definition of “seasonal arid”, but the definition of “arid areas” has been added for clarity.

Comment: The definition of “discharge” talks about the “addition of any pollutant” but says nothing about clean water or storm water. Does this mean that flows may be placed into a Water of the U.S. without a permit if there are no pollutants in it? It seems that way since they will not longer qualify as a discharge. This definition needs to be modified to include discharges other than pollutants.

Response: ADEQ addressed this issue in prior comments. In the very unlikely scenario that ‘clean water’ or ‘storm water’ contains no pollutants, a permit would not be required.

Comment. The term “navigable waters” should be defined consistent with the applicable statutory definition in A.R.S. § 49-201. Arizona’s statute defines “navigable waters” to mean “the waters of the United States as defined by § 502(7) of the clean water act (33 United States Code § 1362(7)).” A.R.S. § 49-201(21). Our state statutory definition of “navigable waters” focuses properly on the definition of “navigable waters” under the federal statute, and not on the further interpretation of the term by EPA or the Army Corps of Engineers in their respective permitting regulations. The EPA and Corps regulations interpreting the statutory definition of navigable waters have been called into serious question by the United State Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army of Engineers*, 531 U.S. 159 (2001).

Response: ADEQ disagrees. For the purposes of the AZPDES program “navigable water” means waters of the U.S. This was clarified in the Attorney General’s statement provided in the application package for the NPDES program. ADEQ often uses the term ‘waters of the U.S.’, because the term ‘navigable waters’ is often misconstrued by the general public.

Comment: Definition of “Discharge-Related Activities.” This definition should be removed from the proposed CGP permit. It is not used in the text of the permit. In addition, it raises jurisdictional issues that are outside the scope of a state-issued NPDES permit.

Response: The permit language has been revised to reflect the comment.

C. Comments on the NOI Form

Comment: We suggest that NOI and NOT forms be made available on line such that they can be completed on-line, i.e., without the need to print the form out (with the exception of signature and mailing) and then type in the information. In particular, we recommend that the application come in a format that could be saved off-line, thus obviating the need to retype information (e.g., mail address, etc.) each time an NOI or NOT is submitted.

Response: ADEQ appreciates the comment and will consider available options. The SmartNOI system will allow easy access and completion of forms on-line, but the option to save will need to be reviewed.

Comment: Page 1, Part II. The question “Does the project have or need other environmental permits?” needs to either be eliminated or rewritten into check boxes for the type of permits that ADEQ is concerned with. As written, this requirement is vague.

Under Construction Site Information, the form requests site physical location including “finding directions from the nearest city.” If this is going to be retained on the form, a suggested revision is to eliminate the word “finding” and simply request, “directions from the nearest municipality.” Also, the form requests information on other environmental permits needed. To be consistent with the text of the permit at Part III.A.11, the form also needs to request the permit number if applicable. Please add this to the form.

The Township, Range, Section and Quarter data should be deleted to stay consistent with the language in this proposed general permit and the proposed Federal general permit.

Response: As noted previously, ADEQ does not believe the requirement to report other environmental permits is vague and has not accepted the suggested language. The NOI form has been revised to reflect the other comments.

Comment: Page two, Part II. Under Relationship to Waters the name of the closest waters to the construction site is requested. To be consistent with the text of the permit at Part III.A. 8 the form should request the name of the **receiving** waters. Also the form requests the name of these waters, including “unnamed tributaries.” How can the name of an unnamed tributary be provided?

The name of the nearest perennial waters to the construction site is requested. If the site is not in the watershed of the nearest perennial water, why is this information important?

Response: The NOI form was revised for clarification in response to these comments.

Comment: Page 2, Part IV. Please add a yes/no check box to address the requirement that the SWPPP complies with applicable local sediment and erosion control plans. This requirement is stated in the text of the permit under Part III.A.6.

Response: ADEQ has not included a check box as requested and has further revised III.A.6. ADEQ was not intending to “incorporate local requirements by reference” to the permit. Rather our intent was that efforts should be made to advise applicants of local requirements and clarify that a conflicting SWPPP is no authorization or defense for violation of local standards.

Comment: Page 2, Part V. The printed name and the signature of the **authorized representative** is required under Part III.A.I. of the permit text. The form should be amended to indicate that it is the authorized representative that must sign the NOI.

Response: The NOI form was revised to address this comment, and clarify that the signatory on an NOI must be one of those designated in VII.K.1 and can not be delegated.

D. Comments on the NOT Form

Comment: Page 1, Part II. Under site physical location, the form requests “finding directions from the nearest city.” If this requirement is going to be retained on the form, a suggested revision is to eliminate the word “finding” and simply request, “directions from the nearest municipality.” Additionally, as the NOI includes township, section and range to the nearest quarter section, this information should also be included on the NOT.

Comment: Page 1, Part IV. The printed name and the signature of the **authorized representative** is required under Part II.C.2.f. of the permit text. The form should be amended to indicate that it is the authorized representative that must sign the NOT.

Response: The NOT form was revised to conform with the NOI form. The NOT form may be signed by an authorized representative.

E. Comments on the Permit Waiver Certification

Comment: Under site physical location the form requests “finding directions from the nearest

city.” If this requirement is going to be retained on the form, a suggested revision is to eliminate the word “finding” and simply request, “directions from the nearest municipality.” Another commenter added: However, is this information really necessary? The form includes the section, township and range down to the quarter section.

Another commenter said the Township, Range, Section and Quarter data should be deleted to stay consistent with the language in this proposed general permit and the proposed Federal general permit.

Response: The Permit Waiver Form was revised to conform with the NOI form.

Comment: Page one, Part II. Please revise the wording of “Will the discharge enter a municipal storm sewer system...” to “Is there a potential for the discharge to enter a municipal storm sewer system...”

Response: The language has been revised to reflect the comment.