



ARIZONA STATE SENATE
Fifty-Fifth Legislature, First Regular Session

FACT SHEET FOR H.B. 2691

groundwater permits; technical correction
 (NOW: ADEQ; water quality program; WOTUS)

Purpose

Applies current statutory application of *navigable waters* to waters that are classified as *Waters of the United States* (WOTUS) and establishes requirements, prohibitions and processes for water quality standards and permitting of specified protected surface waters.

Background

The federal Clean Water Act provides regulatory framework for entities that discharge pollutants from a *point source*, such as a pipeline or well, into certain waterways, designated as *navigable waters*, which are defined as “waters of the United States, including the territorial seas” ([33 U.S.C. § 1362](#)). On April 21, 2020, the U.S. Environmental Protection Agency (U.S. EPA) and the U.S. Army Corps of Engineers published a [final rule](#) that revised the definition of *WOTUS* under the Navigable Waters Protection Rule. The rule change limits federally regulated waters to four categories: territorial seas and traditional navigable waters; perennial and intermittent streams; lakes, ponds and impoundments, and; wetlands adjacent to jurisdictional waters.

Statute designates the Arizona Department of Environmental Quality (ADEQ) as the state agency responsible for administering and enforcing the federal Clean Water Act, the Resource Conservation and Recovery Act and the Safe Drinking Water Act for Arizona at the statewide level ([A.R.S. § 49-202](#)). To implement its statutory duties, ADEQ is charged with adopting, by rule: 1) water quality standards; 2) permitting programs for point source discharge of any pollutant or combination of pollutants into navigable waters; 3) a program to control nonpoint source discharges of any pollutant or combination of pollutants into navigable waters; 4) an aquifer protection permit (APP) program to control discharges of any pollutant or combination of pollutants that are reaching or may, with a reasonable probability, reach an aquifer; 5) the underground injection control permit program; 6) technical standards for conveyances of reclaimed water and a permit program for the direct use of reclaimed water; and 7) discharge limitations, best management practice standards, new source performance standards, toxic and pretreatment standards and other standards and conditions as reasonable and necessary to carry out water quality control permit programs and regulatory duties ([A.R.S. § 49-203](#)).

There is no anticipated fiscal impact to the state General Fund associated with this legislation.

Provisions

WOTUS

1. Replaces statutory references to *navigable waters* with *WOTUS* and applies previous requirements and prohibitions relating to navigable waters to waters that are classified as WOTUS.

Protected Surface Waters List

2. Requires the Director of ADEQ to maintain and publish a protected surface waters list that includes all WOTUS, any perennial, intermittent and ephemeral reaches and any impoundments of the following rivers based on outlined geographic coordinates, not including tributaries or reaches of waters wholly within tribal jurisdiction or reaches of waters outside of the United States, including any added waters and:
 - a) the Bill Williams River, from its confluence of the Big Sandy River and the Santa Maria River to its confluence with the Colorado River;
 - b) the Colorado River, from the Arizona-Utah border to the Arizona-Mexico border;
 - c) the Gila River, from the Arizona-New Mexico border to its confluence with the Colorado River;
 - d) the Little Colorado River, from the confluence of the east and west forks of the Little Colorado River to its confluence with the Colorado River;
 - e) the Salt River, from the confluence of the Black River and White River to its confluence with the Gila River;
 - f) the Santa Cruz River, from its origins in the Canelo Hills of southeastern Arizona to its confluence with the Gila River; and
 - g) the Verde River, from Sullivan Lake to its confluence with the Salt River.

3. Requires the Director of ADEQ to add the following non-WOTUS surface waters to the protected surface waters list, unless specifically excluded:
 - a) all lakes, ponds and reservoirs that are public waters used as a drinking source, for recreational or commercial fish consumption or for water-based recreation such as swimming, wading and boating and other types of recreation in and on the water;
 - b) perennial waters or intermittent waters of the state that are used as a drinking water source, including ditches and canals;
 - c) perennial or intermittent tributaries to the Bill Williams River, the Colorado River, the Gila River, the Little Colorado River, the Salt River, the San Pedro River, the Santa Cruz River and the Verde River;
 - d) perennial or intermittent public waters used for recreational or commercial fish consumption;
 - e) perennial or intermittent public waters used for water-based recreation such as swimming, wading, boating and other types of recreation in and on the water;
 - f) perennial or intermittent wetlands adjacent to waters on the protected surface waters list; and
 - g) perennial or intermittent waters of the state that cross into another state, the Republic of Mexico or the reservation of a federally recognized tribe.

4. Authorizes the Director of ADEQ to add additional non-WOTUS surface waters to the protected surface waters list if:
 - a) the water is not required to be listed under statutorily outlined included waters;
 - b) the water is not excluded under the statutorily outlined excluded waters; and
 - c) the economic, environmental and social benefits of adding the water outweigh the economic, environmental and social costs of excluding the water from the list.

5. Excludes, from containment on the list of protected surface waters, the following non-WOTUS waters:
 - a) canals in the Yuma Project and ditches, canals, pipes, impoundments and other facilities that are not used to deliver water for human consumption that are operated by a drainage and flood protection district, an irrigation and water conservation district, an irrigation water delivery district, a flood control district or a multi-county water conservation district, unless added by the Director of ADEQ under certain conditions and the owner or operator has submitted a written request for inclusion;
 - b) irrigated areas, including fields flooded for agricultural production;
 - c) ornamental and urban ponds and lakes such as those owned by a homeowners' association or golf course, unless added by the Director of ADEQ under certain conditions and the owner or operator has submitted a written request for inclusion;
 - d) swimming pools and similar, regulated bodies of water;
 - e) livestock and wildlife water tanks and aquaculture tanks that are not constructed within a protected surface water;
 - f) stormwater control features;
 - g) groundwater recharge, water reuse and wastewater recycling structures, including permitted underground storage facilities and groundwater savings facilities and detention and infiltration basins, unless added by the Director of ADEQ under certain conditions and the owner or operator has submitted a written request for inclusion;
 - h) water-filled depressions created as part of mining or construction activities or pits excavated to obtain fill, sand or gravel;
 - i) all waste treatment systems components, including constructed wetlands, lagoons and treatment ponds, such as settling or cooling ponds, designed to either convey or retain, concentrate, settle, reduce or remove pollutants, either actively or passively, from wastewater before discharge or to eliminate discharge;
 - j) groundwater;
 - k) ephemeral waters except for those prescribed on the outlined list of protected surface waters; and
 - l) lakes and ponds owned and managed by the U.S. Department of Defense (U.S. DOD) and other surface waters located on and that do not leave U.S. DOD property, added by the Director of ADEQ under certain conditions and the U.S. DOD has submitted a written request for inclusion.
6. Directs the Director of ADEQ to remove any erroneously listed, non-WOTUS waters from the protected surface waters list when the water is excluded under the statutorily outlined excluded waters and prohibits the Director of ADEQ from regulating discharges to those waters in the interim.
7. Directs the Director of ADEQ to remove non-WOTUS waters from the protected surface waters list when the water is not required to be listed under the statutorily required included waters and the economic, environmental and social benefits of removing the water outweigh the economic, environmental and social costs of retaining the water on the list.
8. Authorizes the Director of ADEQ, on an emergency basis, to add a water to the protected surface waters list if there is an imminent and substantial danger to public health or welfare or to the environment, if the water would otherwise qualify to be added as a non-WOTUS protected surface water and requires the emergency addition to take effect immediately on written determination by the Director of ADEQ.

9. Requires ADEQ to publish, within 30 days after an emergency determination, a notice of the emergency determination in the Arizona Administrative Register and on the ADEQ website.
10. Requires waters added by an emergency declaration to be incorporated into the protected surface waters list during the next rulemaking following the emergency addition.

Water Quality Standards for Non-WOTUS Protected Surface Waters

11. Requires, by December 31, 2022, the Director of ADEQ to adopt new water quality standards, by rule, for non-WOTUS protected surface waters and, in adopting the new water quality standards, requires the Director to consider the unique characteristics of Arizona's surface waters and the economic, social and environmental costs and benefits that would result from the adoption of a water quality standard at a particular level or for a particular water category.
12. Directs the Director of ADEQ to apply surface water quality standards established as of January 1, 2021, to non-WOTUS protected waters until specifically changed by the Director of ADEQ.
13. Prohibits rules regarding the following from being adopted or applied as water quality standards for non-WOTUS protected surface waters:
 - a) antidegradation;
 - b) antidegradation criteria; and
 - c) outstanding Arizona waters.

Impaired Waters

14. Excludes non-WOTUS protected surface waters from subsection to U.S. EPA review, approval or enforcement and limits the requirement that total maximum daily loads meet Clean Water Act surface water quality standards to waters that are WOTUS.
15. Applies current requirements for the impaired waters list to the list of impaired WOTUS and requires ADEQ to prepare a list of impaired non-WOTUS protected surface waters by December 31, 2022, and at least once every five years thereafter.
16. Requires the Director of ADEQ to apply the current rules of methodology used to identify waters as impaired to non-WOTUS protected surface waters until specifically changed by rule and to amend the impaired waters identification rules within one year after adopting the surface water quality standards for non-WOTUS protected surface waters.
17. Directs ADEQ to:
 - a) provide public notice and opportunity for public comment on a draft list of impaired non-WOTUS protected surface waters;
 - b) prepare written responses to comments received on the draft list of impaired non-WOTUS protected surface waters; and
 - c) publish the list of impaired non-WOTUS protected surface waters and a summary of ADEQ's responses to public comments on the draft list in the Arizona Administrative Register.

18. Provides that publication of the list of impaired non-WOTUS protected surface waters in the Arizona Administrative Register is an appealable agency action and allows any party that submitted written comments on the draft list of impaired waters to appeal the action.
19. Applies the statutory definition of *impaired water* to protected surface water, rather than navigable waters.
20. Includes impaired waters that ADEQ determines are required to be restored and that are not listed as impaired pursuant to the statutory process for listing in the requirement for which ADEQ must develop total maximum daily loads.
21. Applies current requirements for a draft estimate of pollutants to each impaired WOTUS and grants ADEQ permissive authority, for non-WOTUS impaired waters, to prepare a draft estimate of the total amount of each pollutant that causes impairment from all sources and that may be added to the water while still allowing the water to achieve and maintain applicable surface water quality standards.
22. Requires ADEQ, if ADEQ chooses to prepare a draft estimate of pollutants for a non-WOTUS impaired water, to:
 - a) determine draft allocations among contributing sources that are sufficient to achieve total loadings;
 - b) provide public notice and allow for comment on the draft estimates and draft allocations;
 - c) prepare written responses to comments received on the draft estimates and draft allocations; and
 - d) publish the determinations of total pollutant loadings that will not result in impairment and the draft allocations among the contributing sources that are sufficient to achieve the total loading, along with a summary of the responses to comments on the estimated loadings and allocations, in the Arizona Administrative Register.

Permitting for Non-WOTUS Protected Surface Waters

23. Requires the Director of ADEQ to apply the WOTUS permit program and program rules to point source discharges to non-WOTUS protected surface waters consistent with statutory requirements.
24. Exempts the following from the non-WOTUS protected surface waters point source discharge program:
 - a) discharges to a non-WOTUS protected surface water incidental to a recharge project;
 - b) established or ongoing farming, ranching and silviculture activities such as plowing, seeding, cultivating, minor drainage or harvesting for the production of food, fiber or forest products or upland soil and water conservation practices;
 - c) maintenance but not construction of drainage ditches; and
 - d) maintenance of structures such as dams, dikes and levees.
25. Directs the Director of ADEQ to consider evidence gathered by the Arizona Navigable Stream Adjudication Commission when deciding whether an Arizona Pollutant Discharge Elimination System (AZPDES) permit is required for discharge activities.

26. Limits the Director of ADEQ's authorization to issue an individual permit to discharges that the Director of ADEQ determines, using reasonably current credible and scientifically defensible data, that a particular discharge is a significant contributor of pollutants to a non-WOTUS protected surface water that causes the water to exceed one or more applicable water quality standards.
27. Requires the Director of ADEQ to issue general permits or authorize coverage under existing general permits, subject to the non-WOTUS protected surface water rulemaking stipulations, for:
 - a) point source discharges of storm water from industrial or construction activity to non-WOTUS protected surface waters; and
 - b) other categories of potential point source discharges, including de minimis discharges, to non-WOTUS protected surface waters that involve the same or substantially similar types of operations, contain the same or substantially similar types of pollutants and are more appropriately controlled under a general permit than under an individual permit.
28. Authorizes the Director of ADEQ to adopt rules for point source discharges to non-WOTUS protected surface waters.
29. Precludes the rules adopted by the Director of ADEQ for point source discharges to non-WOTUS protected surface waters from including any requirement that is more stringent than requirements of the Clean Water Act and requires the rules to provide for issuing, authorizing, denying, modifying, suspending or revoking individual or general permits and to establish permit conditions to carry out the permitting program.
30. Precludes the Director of ADEQ from delegating the authority to require permits for point source discharges from construction activity to non-WOTUS protected surface waters to a city, town or county.
31. Includes a county that is required to obtain coverage under an AZPDES permit to requirements and permissions prescribed to a county for county stormwater quality programs.
32. Prohibits a city, town or county from regulating any stormwater discharge activity that does not discharge to a protected surface water.
33. Directs a county to apply the requirements for a county-operated regulated small municipal separate storm sewer system in an urbanized area that discharges into a non-WOTUS protected surface as if the system discharged into a WOTUS protected surface water.
34. Applies requirements for an APP permittee previously required for discharge into a navigable water to discharge into a protected surface water.
35. Limits the AZPDES program rules to discharges to WOTUS.
36. Prohibits the implementation of the federal Clean Water Act through AZPDES permits and permit conditions for discharges to non-WOTUS protected surface waters and precludes subjection to review, approval or enforcement by the U.S. EPA for non-WOTUS protected surface waters.

37. Directs the Director of ADEQ to apply the AZPDES, Pretreatment Program and Sewage Sludge Program rules to non-WOTUS protected surface waters until the adoption of rules for discharges to non-WOTUS protected surface waters and provides an exception from current requirements related to the U.S. EPA review, approval or involvement in permit review or approval.
38. Precludes the Director of ADEQ from adopting or applying rules for the following discharges to non-WOTUS protected surface waters:
 - a) requirements specific to new sources or new dischargers under the Clean Water Act, except as applied to discharges from publicly owned treatment works;
 - b) technology-based effluent limitations, standards or controls under outlined sections of the Clean Water Act, including new source performance standards, except as applied to discharges from publicly owned treatment works;
 - c) requirements to express all permit limitations, standards or prohibitions for a metal solely in terms of total recoverable metal; and
 - d) requirements for permit review and approval by the U.S. EPA before permit issuance.
39. Directs the Director of ADEQ, when making the determination for an individual permit, to consider the location of the discharge with respect to the non-WOTUS protected surface water, the size of the discharge and the quantity and nature of the discharged pollutants, and requires, if the Director of ADEQ determines that the discharge requires an individual permit, the discharger to be notified in writing and informed of the reasons for the determination and the discharger's right to appeal the determination that the discharge requires an individual permit.
40. Prohibits the Director of ADEQ from adopting AZPDES or sewage sludge program requirements that conflict with the federal Clean Water Act.
41. Includes activities regulated by an AZPDES permit in the issuance of an APP storm water general permit.
42. Applies the current Clean Water Act application of the definition *AZPDES* to WOTUS and defines *AZPDES*, for non-WOTUS protected surface water, as the Arizona Pollutant Discharge Elimination System Program adopted under the state statutory requirements for discharges to non-WOTUS protected surface waters.
43. Applies the requirement for an APP general permit for certain discharges associated with man-made bodies of water to point source discharges to protected surface waters, rather than to WOTUS, and includes discharges subject to an AZPDES permit in qualifications for a point source discharge to meet the conditions for the general permit.
44. Specifies that the exception for the requirement for an APP does not apply to surface impoundments regulated by an AZPDES permit.
45. Specifies that the exemption from the requirement for an APP applies to:
 - a) discharges to an exempt facility that is regulated by an AZPDES permit; and
 - b) a point source discharge caused by a storm event that is issued a AZPDES permit.

46. Adds, as a qualification for discharging under the AZPDES program, conforming with rules adopted by the Director of ADEQ for discharges to non-WOTUS protected surface waters to the requirements for an issued permit.
47. Requires the Director of ADEQ to apply the AZPDES pretreatment program to publicly owned treatment works that discharge to a non-WOTUS protected surface water.
48. Prohibits the Director of ADEQ from imposing duplicative permit requirements for permits to discharges to WOTUS and non-WOTUS protected surface requirements.

Best Management Practices (BMPs)

49. Requires the Director of ADEQ to use a BMPs approach when issuing and implementing general permits for storm water discharges from industrial or construction activity to non-WOTUS protected surface waters and authorizes the Director of ADEQ to include analytical monitoring and discharge limits if BMPs cannot achieve applicable surface water quality standards.
50. Requires the Director of ADEQ, by rule, to adopt BMPs and notification requirements to ensure that prescribed activities do not violate applicable surface water quality standards.
51. Limits the Director of ADEQ's authorization to include BMPs to only practices that extend to:
 - a) activities conducted within the ordinary high watermark of perennial or intermittent non-WOTUS protected surface waters;
 - b) activities conducted within the bed and banks of waters that materially impact downstream non-WOTUS protected surface waters; and
 - c) activities that are not already regulated by environmental quality statutes.
52. Precludes the Director of ADEQ from adopting BMPs for:
 - a) discharges to a non-WOTUS protected surface water incidental to a recharge project;
 - b) established or ongoing farming, ranching or silviculture activities such as plowing, seeding, cultivating, minor drainage or harvesting for the production of food, fiber or forest products or upland soil and water conservation practices;
 - c) maintenance but not construction of drainage ditches;
 - d) construction and maintenance of irrigation ditches; and
 - e) maintenance of structures such as dams, dikes and levees.
53. Requires the Director to determine what constitutes a material impact to downstream non-WOTUS protected surface waters through rulemaking based on factors that include distance and topography.

Definitions

54. Defines *effluent-dependent water* as a surface water or portion of a surface water that consists of a point source discharge without which the surface water would be ephemeral, and specifies that an *effluent-dependent water* may be perennial or intermittent depending on the volume and frequency of the point source discharge of treated wastewater.

55. Defines *ephemeral water* as a surface water or portion of surface water that flows or pools only in direct response to precipitation.
56. Defines *intermittent water* as a surface water or portion of surface water that flows continuously during certain times of the year and more than in direct response to precipitation, such as when it receives water from a spring, elevated groundwater table or another surface source, such as melting snowpack.
57. Defines *non-WOTUS protected surface water* as a protected surface water that is not a WOTUS.
58. Defines *non-WOTUS Waters of the State* as waters of the state that are not WOTUS.
59. Defines *ordinary high water mark* as the line on the shore of an intermittent or perennial protected surface water established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris or other appropriate means that consider the characteristics of the channel, floodplain and riparian area.
60. Defines *perennial water* as a surface water or portion of surface water that flows continuously throughout the year.
61. Adds, to the definition of *permit*, that for purposes of regulating non-WOTUS protected surface waters, a permit shall not include provisions governing the construction, operation or modification of a facility.
62. Defines *protected surface waters* as waters of the state listed on the protected surface waters list under 49-221(G) and all WOTUS.
63. Defines *public waters* as waters of the state open to or managed for use by members of the general public.
64. Defines *recharge project* as a facility necessary or convenient to obtain, divert, withdraw, transport, exchange, deliver, treat or store water to infiltrate or reintroduce that water into the ground.
65. Defines *wetland* as, for the purposes of non-WOTUS protected surface waters, an area that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions.
66. Defines *WOTUS* as waters of the state that are also waters of the United States under the federal Clean Water Act WOTUS definition.
67. Defines *WOTUS protected surface water* as a protected surface water that is a WOTUS.
68. Adds, as a classification for the definition of *indirect discharge* for the AZPDES program, the introduction of pollutants from any nondomestic source, if the source is a publicly owned treatment works that discharges to non-WOTUS protected surface waters, that would be regulated under certain federal regulations for toxic and pretreatment effluent standards under the federal Clean Water Act if the publicly owned treatment works were to discharge to a WOTUS.

Miscellaneous

69. Makes technical and conforming changes.

70. Becomes effective on the general effective date.

House Action

NREW	2/26/21	DPA/SE	6-4-0-0
3 rd Read	3/3/21		31-29-0

Prepared by Senate Research

March 8, 2021

KN/gs