Headquarters
120 Shelton McMurphey Blvd.
Suite 340
Eugene, Oregon 97401
(541) 485-2471
info@westernlaw.org

Offices
Portland, Oregon
Seattle, Washington
Taos, New Mexico
Santa Fe, New Mexico
Helena, Montana

Defending the West westernlaw.org

Western Environmental Law Center

Sent via U.S. Certified Mail, Return Receipt Requested

June 26, 2019

Mr. Andrew Wheeler, Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Mr. David W. Gray, Acting Regional Administrator
Environmental Protection Agency Region 6
1445 Ross Avenue, Suite 1200
Mail Code: ORA
Dallas, Texas 75202-2733

Re: Notice of Intent to Sue for Failure to Perform Mandatory Duties Under the Clean Water Act

Dear Mr. Wheeler and Mr. Gray:

This letter provides notice that Amigos Bravos intends to file suit pursuant to section 505(a)(2) of the Clean Water Act, 33 U.S.C. § 1365(a) (2), against the U.S. Environmental Protection Agency ("EPA"), the EPA Administrator, and the EPA Regional Administrator for Region 6 for violating their mandatory duties to issue a final determination on Amigos Bravos' Petition For a Determination that Storm Water Discharges in Los Alamos County Contribute to Water Quality Standards Violations and Require a Clean Water Act Permit, dated June 30, 2014 (Exhibit A). 40 C.F.R. § 122.26(f)(5).

Factual Background

Los Alamos County, located in north-central New Mexico, is also home to the 36 square mile Los Alamos National Laboratory ("LANL") and has two main population centers, the Los Alamos Townsite and the community of White Rock Canyon. The Los Alamos Townsite and the urbanized areas of LANL sit on the Pajarito Plateau, which consists of a series of finger-like mesas separated by deep east-to-west-oriented canyons cut by streams. The LANL property contains all or parts of seven primary watersheds that drain directly into the Rio Grande,

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including: Los Alamos, Sandia, Mortandad, Pajarito, Water, Ancho, and Chaquehui Canyons. The Los Alamos Townsite and the urbanized areas of LANL drain into five canyons: Los Alamos, Pueblo, Sandia, Bayo, and Mortandad Canyons.

1. The watersheds in Los Alamos County are Polluted

Many of the watersheds in the county are highly polluted. For example, Los Alamos Canyon within LANL property is impaired for gross alpha (a measurement of overall radioactivity), PCBs, aluminum, radium, cyanide, mercury, and selenium. New Mexico Environment Department ("NMED") data show levels of PCBs in Los Alamos Canyon downgradient from most of the urbanized areas at LANL to be over 11,000 times greater than the New Mexico Human Health water quality criteria and 51 times greater than the New Mexico Wildlife Habitat water quality criteria.

The same is true of several other areas throughout the county, including but not limited to:

- Sandia Canyon. Impaired for PCBs, aluminum, copper, gross alpha, and mercury. There, NMED data show levels of PCBs to be over 14,000 times greater than the New Mexico Human Health water quality criteria and 66 times greater than the New Mexico Wildlife Habitat water quality criteria.

- Pueblo Canyon. Impaired for gross alpha, PCBs, aluminum, copper, and temperature and mercury. NMED data show levels of PCBs in Pueblo Canyon right in the middle of the Los Alamos urbanized areas to be over 3,500 times greater than the New Mexico Human Health water quality criteria and 16 times greater than the New Mexico Wildlife Habitat water quality criteria.

- Mortandad Canyon. Impaired for PCBs, mercury, copper, and gross alpha.

- Pajarito Canyon. Impaired for gross alpha, aluminum, PCBs, silver, mercury, cyanide, and copper.

- Acid Canyon. Impaired for aluminum, copper, gross alpha and PCBs

- DP Canyon. Impaired for aluminum, copper, gross alpha and PCBs.

- Arroyo de la Delfe. Impaired for aluminum, copper, gross alpha and PCBs.

- Three Mile Canyon. Impaired for gross alpha

- Canada del Buey. Impaired for gross alpha and PCBs.

- Canon de Valle. Impaired for gross alpha and PCBs.

- Chaquehul Canyon. Impaired for PCBs.

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2. Urban Runoff is the Cause of these Pollution Problems

NMED has concluded that in many of these areas urban runoff is the cause of these water pollution problems. NMED has repeatedly noted that impervious surface/parking lot runoff, post-development erosion and sedimentation, and industrial/commercial site stormwater discharge, are causing, or at least contributing to these issues. For example, in its 2012-2014 report on water quality issues in the state, the State of New Mexico found that water quality in Sandia, Mortandad, Pajarito, and Pueblo Canyons is impaired because of urban-related causes such as impervious surfaces, parking lots, construction, and development. NMED data also shows substantial water quality impairment in Los Alamos Canyon downgradient from most of the urbanized areas at LANL.

In addition, LANL has published two detailed studies of stormwater runoff from the Pajarito Plateau, focusing respectively on PCB contamination and metals contamination. Los Alamos National Laboratory, *Polychlorinated Biphenyls in Precipitation and Stormwater within the Upper Rio Grande Watershed* 2 (May 2012) (LA-UR-12-1081) ("PCB Report") and Los Alamos National Laboratory, *Background Metals Concentrations and Radioactivity in Storm Water on the Pajarito Plateau Northern New Mexico* 2 (April 2013) (LA-UR-13-22841) ("Metals Report"). These studies show a significant contribution of both PCBs and metals from urban runoff on the Pajarito Plateau.

Specifically, the LANL PCB study found 40 of the 41 Los Alamos urban stormwater samples were above the New Mexico Human Health water quality criteria for PCBs and 19 of the 41 Los Alamos urban stormwater samples were above the New Mexico Wildlife Habitat water quality criteria for PCBs. PCB Report at 62. The LANL report concluded that suspended PCBs carried by urban runoff from the Los Alamos Townsite were 10 to 200 times more enriched with PCBs than at non-urban influenced Pajarito Plateau sites. *Id.*

These findings are consistent with information gathered by NMED in 2006 and 2007. There, NMED collected stormwater samples from urban sites containing PCBs as high as 255 times the state's PCB Human Health water quality criteria. NMED sampling data in 2006 and 2007 show levels of PCBs in stormwater draining off of urban areas in Los Alamos Townsite to be more than 34,000 times greater than the New Mexico Human Health water quality criteria.

With respect to metals, LANL's Metal Report, which studied metal contamination in stormwater runoff from urban areas at LANL and the Los Alamos Townsite, found exceedances of New Mexico water quality criteria for cadmium, copper, and zinc. *See generally* Metal Report, 1-50. In addition, the LANL Metals Report demonstrated that values for copper, zinc, and nickel in urban stormwater runoff in Los Alamos County substantially exceeded non-urban influenced Pajarito Plateau stormwater concentrations. *Id.* at 17, 37.

The LANL studies of PCB and metal contaminated runoff tie these contaminants to the urban areas of the Pajarito Plateau. In LANL's 2013 request to EPA for alternative compliance with its Clean Water Act discharge permit, the Laboratory argues that the cause of its exceedances of New Mexico water quality criteria for zinc and copper is urban runoff from

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sources such as motor oil accumulation on parking lots, brake pad and tire material released on pavement, galvanized fencing, culverts and other building materials.

Legal Background

The Clean Water Act is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To these ends, EPA and states' delegated authority to administer the Act must establish minimum water quality standards. 33 U.S.C. § 1313; 40 C.F.R. § 131.2. These standards define "the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R. § 131.2. New Mexico has established, and EPA has approved, water quality standards pursuant to this requirement.

In order to ensure that such water quality standards will be achieved, no person may discharge any pollutant into waters of the United States from a point source without a National Pollutant Discharge Elimination System ("NPDES") permit. 33 U.S.C. §§ 1311(a), 1362(12)(A). NPDES permits must impose water quality-based effluent limitations, in addition to any applicable technology-based effluent limitations, when necessary to meet water quality standards. 33 U.S.C. § 1311(b).

With respect to stormwater discharges, the Clean Water Act expressly requires NPDES permits for discharges of industrial and municipal stormwater. 33 U.S.C. § 1342(p)(2). In addition, Congress also created a catchall provision directing EPA to require NPDES permits for any stormwater discharge that the Administrator or the State director determines "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2)(E); 40 C.F.R. § 122.26(a)(1)(v). This authority—known as EPA's "residual designation authority" (RDA)—is a critical tool to ensure that problematic discharges of stormwater do not go unregulated.

Once EPA has made a finding or determination that a category of discharges meets the statutory criterion of "contribut[ing] to a violation of a water quality standard," it must designate that category for regulation, and those "operators shall be required to obtain a NPDES permit." 40 C.F.R. § 122.26(a)(9)(i)(D). Thus, "the Agency's residual designation authority is not optional." *In re Storm water NPDES Petition*, 910 A.2d 824, 835-36 (Vt. 2006). As EPA has explained, "designation is appropriate as soon as the adverse impacts from storm water are recognized." Letter from G. Tracy Mehan III, EPA Assistant Administrator, to Elizabeth McLain, Secretary, Vermont Agency of Natural Resources 2 (Sept. 16, 2003). EPA has not defined a threshold level of contribution to water quality standards violations that would suffice to make such a determination. However, the agency has advised delegated states that "it would be reasonable to require permits for discharges that contribute more than *de minimis* amounts of pollutants identified as the cause of impairment to a water body." *Id.*

Citizens may petition EPA for designation of stormwater sources for regulation under this authority. 40 C.F.R. § 122.26(f)(2) and (f)(4). EPA must make a final decision on any such petition within 90 days. 40 C.F.R. § 122.26(f)(5). In New Mexico, EPA Region VI is the permitting agency. Thus, the Region would determine under 40 C.F.R. § 122.26(a)(9) whether a

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stormwater discharge is contributing to a water quality standards violation or is a significant contributor of pollutants.

EPA's Failure to Perform its Nondiscretionary Duty

On June 30, 2014, Amigos Bravos' petitioned EPA for a determination that stormwater discharges in Los Alamos County contribute to water quality standards violations and require a Clean Water Act permit. Exhibit A. EPA has not issued a final determination on this petition.

In December 2014, EPA acknowledged the looming deadline and claimed that the "the complex nature of this issue and the volume of information to be considered" would require another 60 days of review. Letter, W. Honker, EPA to R. Conn, Projects Director, Amigos Bravos (December 16, 2014). On March 17, 2015, EPA made a "preliminary determination" that discharges of stormwater on LANL property and urban portions of Los Alamos County are causing or contributing to "exceedances of state water quality standards, including impairment of designated uses, or other significant water quality impacts such as habitat and biological impacts." Letter, R. Curry, Regional Administrator, EPA Region 6 to R. Conn, Projects Director, Amigos Bravos (March 6, 2015) (Exhibit B). EPA subsequently held a public comment period on the preliminary designation. 80 Fed. Reg. 13,852 (Mar. 17, 2015). The comment period closed on June 15, 2015. [1]

Since that time, EPA has made no apparent progress on issuing a final determination to designate these discharges as requiring NPDES permit coverage.

Persons Giving Notice and Representing Attorneys

The name, address, and telephone number of the parties giving notice are:

Amigos Bravos
P.O. Box 238
Taos, NM 87571
(575) 758-3874

However, you are requested to contact Amigos Bravos through its undersigned attorneys as follows:

Andrew M. Hawley
Staff Attorney

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[1] Amigos Bravos provided comments on this preliminary determination, generally supporting EPA's proposed coverage area, but noting that the available information demonstrates that the developed area south of the area proposed for coverage in the community of White Rock should also be included in the designation. Amigos Bravos, Comments Re: EPA's Preliminary Determination to Designate MS4s on Los Alamos National Laboratory Property and Urban Portions of Los Alamos County as Storm Water Discharges Requiring Clean Water Act Permit Coverage Pursuant to 40 C.F.R. §§ 122.26(a)(9)(i)(A), 122.26(a)(9)(i)(D), and 122.32(a)(2) (June 11, 2015).

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Western Environmental Law Center
1402 3rd Ave., Suite 1022
Seattle, WA 98101
(206) 487-7250
hawley@westernlaw.org

Kelly E. Nokes
Shared Earth Wildlife Attorney
Western Environmental Law Center
208 Paseo del Pueblo Sur, No. 602
Taos, NM 87571
(575) 613-8051
nokes@westernlaw.org

Conclusion

Amigos Bravos would prefer to resolve this dispute short of litigation and is willing to discuss a settlement framework that would resolve the claims alleged herein to the mutual benefit of all parties. If EPA is interested in discussing settlement, we encourage EPA to contact the undersigned counsel immediately. Unless EPA has taken final action that, in Amigos Bravos' view, avoids the need for litigation on the claims alleged herein, on or about the 60th day following the date of this Notice Letter, Amigos Bravos intends to file suit against EPA pursuant to the CWA's citizen suit provision. 33 U.S.C. § 1365(a)(2).

Sincerely,

Kelly E. Nokes

Kelly E. Nokes
Shared Earth Wildlife Attorney

Andrew M. Hawley
Staff Attorney

Copies Sent via U.S. Mail To:

William Barr, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

James C. Kenney
Cabinet Secretary
1190 St. Francis Drive, Suite N4050
Santa Fe, New Mexico 87505

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