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LOS ALAMOS COUNTY

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Harry Burgess

June 15, 2015

Via U.S. Mail and Email

Mr. Samuel Coleman, P.E.
Acting Regional Administrator
U.S. Environmental Protection Agency
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202

Ms. Evelyn Rosborough
U.S. Environmental Protection Agency
Water Quality Protection Division (6WQ-NP)
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202
Email: rosborough.evelyn@epa.gov

Re: Incorporated County of Los Alamos Comments to Notice of Availability of Preliminary Designation of Certain Stormwater Discharges in the State of New Mexico under the National Pollutant Discharge Elimination System of the Clean Water Act [FRL-9924-58-REGION-6]

Dear Ms. Rosborough:

The Incorporated County of Los Alamos ("County") appreciates the opportunity to submit the attached public comment to the above referenced action by your agency, the Region 6 of the U.S. Environmental Protection Agency ("EPA"). The attached public comment relates to preliminary designation of the County as a small municipal separate storm sewer system ("MS4"). The County is grateful for the additional time to investigate and comment on the proposed designation and appreciates this opportunity to work collectively with the EPA in protection of the County's, State's, and nation's waters. As demonstrated in the enclosed comment, the County asserts that the preliminary designation is arbitrary and erroneous as at no time has EPA demonstrated that the County conclusively "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States" upon which this preliminary determination is based. *See* 40 C.F.R. 122.26(a)(9)(i)(D).

The County supports the comments of the other potential parties to the proceeding, including, Los Alamos National Laboratory, the U.S. Department of Energy, National Nuclear Security Agency, and

the New Mexico Department of Transportation. In submitting this comment, the County reserves all defenses, arguments, and rights related to further proceedings in this matter.

The County looks forward to discussing the attached comments with you or your staff. Please feel free to contact me at your convenience.

Yours truly,

LOS ALAMOS COUNTY

Harry Burgess
County Manager

Enclosures

cc: Kristin Henderson, Chair, Los Alamos County Council *(email only)*
Brian Bosshardt, Deputy County Manager, Los Alamos County *(email only)*
Philo Shelton, Public Works Director, Los Alamos County *(email only)*
Rebecca Ehler, County Attorney, Los Alamos County *(email only)*
Kevin Powers, Assoc. County Attorney, Los Alamos County *(email only)*
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Incorporated County of Los Alamos Comments to Notice of Availability of Preliminary Designation of Certain Stormwater Discharges in the State of New Mexico under the National Pollutant Discharge Elimination System of the Clean Water Act

[FRL-9924-58-REGION-6]

80 Fed. Reg. 13,852 (March 17, 2015)

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Prepared by the

Incorporated County of Los Alamos, New Mexico

Through the County Manger's Office, Public Works Department, and County Attorney's Office

June 15, 2015

Incorporated County of Los Alamos Comments to Notice of Availability of Preliminary Designation of Certain Stormwater Discharges in the State of New Mexico under the National Pollutant Discharge Elimination System of the Clean Water Act [FRL-9924-58-REGION-6]

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Incorporated County of Los Alamos Comments to Notice of Availability of Preliminary Designation of Certain Stormwater Discharges in the State of New Mexico under the National Pollutant Discharge Elimination System of the Clean Water Act

The Incorporated County of Los Alamos ("County") hereby submits the following public comment as related to the U.S. Environmental Protection Agency's ("EPA"), Region 6, publication of its notice in the Federal Register on March 17, 2015, titled "*Notice of Availability of Preliminary Designation of Certain Stormwater Discharges in the State of New Mexico under the National Pollutant Discharge Elimination System of the Clean Water Act*." Federal Register, Vol. 80, No. 51. The preliminary designation by Acting Region 6 Administrator, Samuel Coleman, P.E. ("Regional Administrator"), suggests that the County, among others, is a small Municipal Separate Storm Sewer System ("MS4") and requires a MS4 permit.[1] The County contends, as will be shown below, that the preliminary designation is erroneous, arbitrary, and is not supported by the facts. As such, the County request that the Regional Administrator withdraw his proposed and preliminary designation of the County as a MS4 and instead focus on the improvement of area water quality improvement through existing regulatory permitting actions, including the renewal of the industrial permit, already issued to parties in the area.

I. U.S. EPA, Region 6 Preliminary Designation of Los Alamos County as a Small MS4.

A. Los Alamos does not meet the designation requirements of 40 C.F.R. § 122.26(a)(9)(i).

Designation of an entity as a MS4, thus requiring a National Pollutant Discharge Elimination System ("NPDES") permit, can occur in several different ways. First, and most commonly, an entity can be designated a MS4 pursuant to the federal Clean Water Act (33 U.S.C. §§ 1251 to 1388), and its ensuing regulations known as the "Phase I" and "Phase II" stormwater rules. The Phase I and II MS4 designations are based strictly on the population of a given area or its designation as an "urban area." *See* 33 U.S.C. § 1342(p)(2)(A)-(E); *see also* 40 C.F.R. § 122.26(a)(9)(i)(A), 40 C.F.R. § 122.32(a)(1). An extremely rare and less common means to designate an entity as a MS4 is by petition to the Regional Administrator for MS4 coverage. *See* 40 C.F.R. § 122.26(a)(9)(i)(D). This second method is commonly called EPA's "residual designation" authority. It through this federal code provision and rule that the Regional Administrator now asserts jurisdiction over the County and surrounding area; it is the exception, not the rule that is being applied.

The Regional Administrator, in his document titled "Los Alamos County Preliminary Designation Document" ("Designation Document"), dated March 6, 2015, suggests that, based on the criteria in 33 U.S.C. § 1342(p)(2)(E), 40 C.F.R. § 122.2(a)(9)(i), 40 C.F.R. § 122.32(a), and two reports prepared by Los Alamos National Laboratory ("LANL"), the County is causing and contributing to water quality exceedances and thus must be regulated as a small MS4. The County requests that the Regional Administrator reconsider this preliminary determination because the facts and underlying data, to be discussed below, do not support any rational finding or conclusion that the County "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States" as required by 40 C.F.R. § 122.26(a)(9)(i). The County asserts this position because:

[1] 40 C.F.R. § 122.26(b)(16), (17), and (19).

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- The County's stormwater drainage system is not located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census;
- The Regional Administrator has not shown or adequately demonstrated that stormwater controls are needed for County stormwater discharges to waters of the United States with a validly issued state total maximum daily loads ("TMDL"); *and most importantly*
- The Regional Administrator has not factually or conclusively shown or demonstrated that discharges from the County "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States."[2] Such is a predicate to assertion of regulatory authority.

Without a rational and supportive basis that clearly identifies and finds that the County is the cause or is "significantly" contributing to the exceedances of the areas receiving water quality standards and waters of the United States, the Regional Administrator's proposed designation is in error. The County requests that the Regional Administrator specify and provide to the County the specific facts, evidence, or publicly adopted documents he used in reaching his designation decision including what standard of proof he applied in review of such data that lead to his decision to regulate the County under the residual designation rule of 33 U.S.C. § 1342(p)(2)(E) and 40 C.F.R. § 122.26(a)(9)(i).

B. Los Alamos County is not an "Urbanized Area."

Title 40, Chapter 1, Part 122.26 of the code of federal regulations provides that discharges composed of entirely stormwater, that are not regulated by the Phase I stormwater regulations, would be required to obtain a NPDES Stormwater permit if: (1) the discharge is from a small MS4 required to be regulated by 40 C.F.R. § 123.32[3]; (2) were a small construction activity; (3) is found that stormwater controls were needed to meet wasteload allocations of total maximum daily loads; or (4) the entity is found to be contributing to a violation of a water quality standard or is a "significant contributor of pollutants to waters of the United States. 40 C.F.R. § 122.26(a)(9)(i). Under 40 C.F.R. § 122.32(a), an entity is subject to regulation as a small MS4 if it is found that its system is "located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census." 40 C.F.R. § 122.32(a)(1)*(emphasis added)*. If only a portion of your system is in the urbanized area, *only that part is or will be regulated*. *Id. (emphasis added)*. Note however that 40 C.F.R. § 122.32(a)(1) does not include the term "urbanized cluster" to establish jurisdiction; it mandates that EPA exclusively use "urbanized area". *See* 40 C.F.R. § 122.32(a)(1). Areas not an urbanized area or within the area designated as one, are by the plain meaning excluded. *Id.*

The U.S. Census Bureau defines an "urbanized area" or "UA", as an area with 50,000 or more population.[4] The Census Bureau, in the 2010 listing of urbanized areas, lists "Los Alamos, NM" as

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[2] The County contends these statements and basis of regulation are contrary to the federal requirement that the County's discharges must be shown to contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States, *not simply likely to* contribute to water quality impairments. *See e.g., Los Alamos County Preliminary Designation Document*, page 9 (issued 3/6/2015)("Based on the agency's independent review of all available information, EPA finds that available information indicates the presence of pollutants **associated** with impairment in storm water discharges from MS4s on LANL property and urban portions of Los Alamos County. EPA further concludes these discharges **may be** causing or contributing to the impairments listed by the state."(emphasis added)). This is far from a clear and unequivocal finding.

[3] 40 C.F.R. § 122.32 provides that an entity is a small MS4 requirements where "(1) Your small MS4 is located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census. (If your small MS4 is not located entirely within an urbanized area, only the portion that is within the urbanized area is regulated); or (2) You are designated by the NPDES permitting authority, including where the designation is pursuant to §§ 123.35(b)(3) and (b)(4) of this chapter, or is based upon a petition under § 122.26(f)." 40 C.F.R § 122.32(a)(1)-(4).

[4] *See* http://www.census.gov/geo/reference/ua/urban-rural-2010.html.

having a population of only 10,893 people.[5] In several parts of the Designation Document, the Regional Administrator states the Los Alamos townsite is an "urbanized area" and although the Regional Administrator later posits that population and density were not entirely considered in his proposed designation, the County would nonetheless request that the Regional Administrator correct the inaccurate assessment that the County is an "urbanized area" pursuant to the U.S. Census Bureau definition.[6]

The County would additionally request that the Regional Administrator discuss in response to this comment his inclusion and consideration of "urban clusters" in reaching his decision to regulate and proposed areas of regulation under 40 C.F.R. § 122.26(a)(9)(i)(A) and 40 C.F.R. § 122.32(a)(1). The regulations clearly require that the Regional Administrator only consider whether the "MS4 [or portion thereof] is *located in an urbanized area as determined by the latest Decennial Census by the Bureau of the Census*." 40 C.F.R. § 122.32(a)(1). The County was unable to find any rule, regulation, case, or part of the Clean Water Act that allows regulation of the County as a MS4 based on an "urbanized cluster," by general land area, or by population density. As provided in the Designation Document and by the Regional Administrator's map showing the areas proposed for regulation, it appears that the Regional Administrator uses and considers urban clusters and population density to draw the proposed border of the County's MS4. The County would appreciate clarification on how the Regional Administrator applied these matters consistently to federal laws and regulations.

Additionally, attached hereto as **Exhibit A** is a listing of the top 25 most populated New Mexico cities as found by the 2010 U.S. Census Bureau. The County is generally concerned that we are being included as a municipal type entity with certain discrete stormwater conveyances *and borders*, whereas the County has only a two small areas of municipal type of impervious area. The vast majority and remainder of land area is generally pervious, and includes in vast majority DOE/LANL areas, U.S. Forest Service/National Park Service areas, and general wild and open space. The County would appreciate the Regional Administrator's identification of those cities that are currently covered by an existing MS4 permit, those that are currently being reviewed for coverage under a MS4 permit, those that have a draft permit, those that have sought coverage via a Notice of Intent or application, and those without a MS4 permit but that meets the Phase I or Phase II MS4 size requirements of 40 C.F.R. § 123.32 or 40 C.F.R. § 122.26(a)(9)(i). The County would appreciate the Regional Administrator's listing and discussion of those cities that have, in their jurisdictional area, an issued and effective New Mexico Environment Department ("NMED") TMDL. The County would appreciate the Regional Administrator's explanation on why the County is or may be regulated before other entities that either meet the MS4 Phase II size requirements and/or which may have existing NMED TMDLs. Here the County believes that the Regional Administrator has selectively enforced the stormwater regulations against the County by skipping over cities and areas that more appropriately meet the specific stormwater statutes and regulations.

C. No Total Maximum Daily Loads (TMDLs) apply or are effective within Los Alamos County.

Another means to which the Regional Administrator can assert MS4 jurisdiction is where stormwater controls are necessary to meet wasteload allocations that are part of TMDLs that address the pollutant(s) of concern. 40 C.F.R. § 122.26(a)(9)(i)(C). The Regional Administrator, in his Designation Document, does not cite, list, or provide any local area TMDLs that would necessitate the installation of stormwater

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[5] *See* footnote 6, infra.

[6] The County initially provided it had a population of only 17,798, however using the most recent U.S. Census Bureau published data (2010), the County's regulatory population is 10,893. Note however that different U.S. Census Bureau data shows the Los Alamos townsite with 12,019 total population and the White Rock townsite with 5,725 total population. *See* [HYPERLINK "http://quickfacts.census.gov/qfd/states/35/3542320.html"] and [HYPERLINK "http://quickfacts.census.gov/qfd/states/35/3584740.html"]. Last visited May 12, 1015.

controls within the County. Thus it would appear that the Regional Administrator cannot designate the County as a MS4 pursuant to this part of the code (40 C.F.R. § 122.26(a)(9)(i)(C)). The County would appreciate clarification that the Regional Administrator did not consider likely or future TMDLs in his consideration and proposed designation.

D. Los Alamos County does not Cause or Contribute to Exceedances of Water Quality Standards.

The Regional Administrator's main basis and assertion of jurisdiction, as discussed in the Designation Document, seems to rest entirely on 40 C.F.R. § 122.26(a)(9)(i)(D). This code section, part, and clause requires the Regional Administrator find that the County "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States."[7] Therefore, for the Regional Administrator to find that the County should be designated as a small MS4, he would must show that the County is causing or contributing to receiving water quality impairments. Attached hereto as **Exhibit B** is a summary of NMED's 2014-2016 303d/305b Integrated Water Quality Impairment listing.[8]

1. The EPA Regional Administrator Fails to Use the NMED 303d/305b Reports to Establish Cause of Water Quality Exceedances.

In his Designation Document, the EPA Regional Administrator finds that,

> "[a]fter analysis of the Petition, the additional information provided by LANL and Los Alamos County and of the State of New Mexico's assessment of water quality in the area, EPA Region 6 has determined the available data *indicates* that storm water discharges from MS4s on LANL property and urban portions of Los Alamos County contribute to violations of water quality standards *or have the potential to* result in exceedances of water quality standards, including impairment of designated uses, or other significant water quality impacts, including habitat and biological impacts. As a result, Region 6 has made a preliminary Designation to designate these storm water discharges as needing NPDES permit coverage pursuant to 40 CFR § 122.26(a)(9)(i)(A), 40 CFR 122.26(a)(9)(i)(D), and 122.32(a)(2)."

Designation Document, Section IV., page 10 *(emphasis added)*. From this statement, it is clear that the EPA Regional Administrator only finds that there is some indication of cause as well as the finding that the County may have the potential to result in exceedances of water quality standards. The Regional Administrator then reviews and asserts that water quality in Los Alamos Canyon, Sandia Canyon, Mortandad Canyon, Pajarito Canyon, Canada del Buey, Pueblo Canyon, and a segment of the Rio Grande River between the Cochiti Reservoir to San Ildefonso Pueblo boundary has levels of pollutants far exceeding the State's water quality standards. *Id.* Of these he notes, only the area in and around Pueblo Canyon was noted as being within the jurisdiction of the County. *See Designation Document*, pages 6-7. The Regional Administrator then states that the remainder of the impairments seemed to occur from discharges in and around LANL property. *Id.* In both instances, the County is greatly concerned that neither statement is a conclusive determination or a factual finding of causation/contribution, as required by the Code of Federal Regulations; specifically that it is in fact the County that is contributing to violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.[9]

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[7] 40 C.F.R. § 122.26(a)(9)(i)(D).

[8] Available from the NMED website at [HYPERLINK "http://www.nmenv.state.nm.us/swqb/303d-305b/"]. Last visited May 12, 2015.

[9] *See e.g.*, 63 Fed. Reg. 1536, 1589 (January 9, 1998)("The standard for designation would be the same as under the existing NPDES regulations for storm water. Individual sources would be subject to regulation *if EPA... determines* that the

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The County is also concerned that the Regional Administrator improperly uses, in his Designation Document, and his subsequent assessment and determination, information from the 2012-2014 NMED 303d/305b Integrated report ("2012-2014 report") verses that information contained in the most recently EPA approved 303d/305 Integrated report, the NMED 2014-2016 303d/305b Report ("2014-2016 report").[10] It is important to note however that in both the 2012-2014 and 2014-2016 reports, and contrary to the Regional Administrator's later findings, the NMED Surface Water Quality Division *does not indicate that the County is the source or even potential source of the contaminants or pollutants*. *Designation Document*, Section III. B., page 7 ("Atmospheric deposition - toxics, inappropriate waste disposal, natural sources, watershed runoff following forest fire, post-development erosion and sedimentation and source unknown were listed as sources of impairment in the 2012-2014 303d/305b Report. However, in the 2014-2016 NMED 303d/305b Report, the NMED Surface Water Quality Bureau ("SWQB") removed previously reported probable source lists from the 2014-2016 NMED 303d/305b report and they are replaced with 'Source Unknown'").

The County would appreciate clarification on why the Regional Administrator fails to use the most recently EPA approved and publicly adopted NMED 303d/305b Report, or at least the prior EPA approved 303d report, both of which have been publicly issued, received public comment and input, and was adopted at a public hearing, instead of the two third-party (LANL) non-publicly adopted documents. It is only from such public processes of comment and hearing that such documents can be assured of fairness and a provision of procedural due process in their application. Facially, it appears that the EPA Regional Administrator disliked the NMED identification of the potential sources of water quality problems as "unknown" and then seeks out the secondary and unverified data sources to support his conclusion that it is the County that is the cause or contributor to exceedances of area water quality standards. Further, the Regional Administrator seems to ignore the clear and causal linkage between the NMED reported downstream water quality impairments (*e.g.*, polychlorinated biphenyls ("PCBs"), gross-alpha, zinc, aluminum, mercury, nickel, copper, *etc.*) to the numerous and reported LANL Industrial Site ("IP") Technical Action Levels ("TALs") runoff samples and test results. See for example site monitoring area "R-SMA-1" which shows that stormwater discharges on July 2, 2011 and August 9, 2011 that the site had TAL exceedances of 2010 ug/L of aluminum, 45.3 ug/L of zinc, and gross-alpha results of 21.1 and 51.1 pCi/L-all which are above the state water quality standards. Armed with such uncontroverted evidence that LANL's legacy waste is the most likely source and is contributing to exceedances of water quality standards, blame assessed to County operations and areas is misplaced and unfounded.

In the absence of evidence that the County is contributing to the violation of water quality standards or is significantly contributing to discharge of pollutants to waters of the United States, what is the basis of the Regional Administrator's decision? The County recommends that the EPA Regional Administrator re-evaluate the relevant data sources and use the most recently approved NMED 303d/305b impairment documents, or in the alternative conduct his own environmental receiving water study (using publicly adopted procedures and methods) to determine if the County is the actual cause or contributing to receiving water quality exceedances. The County would additionally appreciate and welcome a clear and concise explanation of the relation of downstream water quality violations/impairments to the runoff from various LANL IP and other legacy waste sites, including whether such impairments of water quality exceedances are in fact be due to pre-LANL IP site runoff control installations.

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storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." (*emphasis added*))

[10] *See Designation Document*, Section III. B., page 7.

2. *Use of 3rd Party Unproved Data over NMED and EPA Approved and Accepted Data.*

The County is gravely concerned over the Regional Administrator's use of the two LANL reports in reaching and making his Designation that it is the County that is the cause of PCB and water quality impairments. In review of the two LANL documents used by the Regional Administrator, the County has several important concerns that it anticipates that the Regional Administrator will address in his response to this comment. The first issue centers on the Regional Administrator's use of LANL's PCB report as his basis for finding that it is the County that is the source of PCB water quality exceedances. Secondly, the County is concerned that the Regional Administrator inaccurately uses LANL's metals baseline report to find that the County is the cause of metal (aluminum, copper, gross alpha, mercury, nickel, etc.) water quality exceedances.

a. *EPA Regional Administrator uses the LANL PCB Report to Find the County as the Cause of PCB Exceedances.*

The County is concerned that the Regional Administrator incorrectly uses LANL's PCB report titled "*Polychlorinated Biphenyls in Precipitation and Stormwater within the Upper Rio Grande Watershed*" ("PCB Report") to assess, assign, and determine the cause of receiving water quality impairments. Contrary to the EPA Regional Administrator's findings, the stated purpose of this report was not to determine the sources of PCB discharges, but was to only set a baseline value for local area PCB levels. Nevertheless, the County believes that the PCB water quality exceedances are in fact legacy contaminants that are not due to County operations or existence. In LANL's PCB Report even the author notes that the EPA itself finds that *the major source of PCB contamination worldwide is the environmental cycling of past releases of PCBs*.[11] The LANL PCB Report also provides that,

> "[w]et and dry atmospheric deposition provides a continual, but diffuse, source of PCBs to the landscape. Some fraction of these deposited PCBs will be transported directly by stormwater runoff or snowmelt into watercourses. Yet other PCB fractions will volatilize and return to the atmosphere. Meanwhile, a fraction of the PCBs binds to surface soils and is present long-term, forming a reservoir. The surface soil compartment can contain a relatively large mass of atmospheric PCBs because intact soil can collect and integrate decades' worth of PCB deposition."

LANL's PCB Report, page 25. From these findings, it is entirely unclear how the EPA Regional Administrator can reasonably or rationally conclude that the County contributes to a violation of PCB water quality standards. To the extent that the County once had PCB concerns, *i.e.*, County maintenance yard, it has been removed and remediated. In fact this site is now a central part of the community. Understanding the worldwide volatilization of PCB material, the County is concerned over how it will, if ever, meet stormwater quality criteria requirements for PCB impairments. Further, the County is deeply concerned it will enter into a cycle where it will forever be required to clean up worldwide legacy PCB wastes including the nonstop precipitation of PCBs onto County jurisdictional areas.[12] The County, with less than 18,000 people, simply cannot bear such enormous and never-ending costs.

The County would appreciate the Regional Administrators guidance on the specific data used to determine that the County was the genuine cause or contributor to area PCB impairments. Additionally, the County would request clarification on what the Regional Administrator envisions as related to how MS4 activities and best management practices could ever remove or treat PCB pollutants to the NMED

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[11] *See* LANL PCB Report, Introduction, page 1 (emphasis added); *see also* "*Technical Factsheet on: POLYCHLORINATED BIPHENYLS (PCBs)*." Available at [HYPERLINK "http://www.epa.gov/ogwdw/pdfs/factsheets/soc/tech/pcbs.pdf"].

[12] *See* LANL PCB Report, Section 4.1.1., page 18 ("The precipitation total PCB concentrations ranged from 0.0 ng/l to 0.60 ng/l (Bandelier median: 0.12 ng/l; Los Alamos County Airport median: 0.14 ng/l)."(emphasis added)).

State water quality standard of ≤0.64 ng/L for total PCBs, when, as reported in the LANL PCB Report, the median or average rain event at the Los Alamos Airport shows an average value of 0.14 ng/L of PCBs. With a general average of 84 rain events per year, over 11.76 ng/L of PCB's would be deposited throughout the County.[13] These levels of PCBs would likely be from areas outside and unknown to the County and to which the County would be required to address through some form of best management controls. Simply stated again, the County of less than 18,000 would be unendingly charged with the cleanup of worldwide PCB legacy waste. The County would also appreciate an explanation of why PCB wastes are not resolved through other EPA environmental programs such as the Resource Conservation and Recovery Act ("RCRA") or Toxic Substance Control Act ("TSCA") requirements.

b. EPA Regional Administrator's use of LANL's "Background Metals Concentrations and Radioactivity in Storm Water on the Pajarito Plateau, Northern New Mexico" Report to find Cause.

In review of the LANL report titled "*Background Metals Concentrations and Radioactivity in Storm Water on the Pajarito Plateau, Northern New Mexico*"[14] ("Metals Report"), the purpose of that report and study was to, "...(1) determine background concentrations in reference watersheds and western boundary locations and baseline concentrations in urban runoff for metals and radioactivity, and (2) determine the baseline concentrations of metals and radioactivity in urban runoff from the Los Alamos County townsite and developed landscapes within the Laboratory." LANL's Metals Report, Sect. 1.0, page 1.

The County is again concerned that the Regional Administrator is incorrectly using an un-vetted and unapproved document and data source, one not benefiting from the public process of comment and hearing, to find and assign cause of impairment. In addition to the Metals Report stated purpose (baseline values), the report's authors specifically excludes the influence of "runoff from legacy contamination at Laboratory or surrounding sites" and intentionally avoided areas where possible contamination was known to be present. Nonetheless, using this data the Regional Administrator found,

> "[a] Laboratory study of metals contamination in storm water runoff from urban areas at LANL and the Los Alamos Townsite found exceedances of New Mexico water quality criteria for cadmium, copper, and zinc.... In addition, the LANL metals report demonstrated that values for copper, zinc and nickel in urban storm water runoff in Los Alamos County substantially exceeded non-urban influenced Pajarito Plateau storm water concentrations."

Designation Document, Section II. C., page 8. The County is concerned that the Regional Administrator is extrapolating data intended for one purpose that of setting a regional baseline value, for a contrary purpose, for that of finding the source or cause of the contamination. The County would appreciate the Regional Administrator's methods and values he used or considered in review of this report as related to his final determination that the County's storm drains are causing or significantly contributing to metal water quality impairments.

3. Use of the Factors in 40 C.F.R. § 123.35(b) by the Regional Administrator is Inappropriate.

The County is concerned that the Regional Administrator also improperly considered certain regulatory factors found in 40 C.F.R. § 123.35(b)(1).[15] It is critical to note that this section and subsection of the

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[13] From Weatherunderground.com showing 2013 with 86 rain events and 2014 with 82 rain events per Los Alamos County Public Library Reference Desk. The total of 11.76 ng/L is 0.14 ng/L PCB average deposition per rain per event at 84 average rain events per year.

[14] Report No. ERID-239557/LA-UR-13-22841, Environmental Programs Directorate, Los Alamos National Laboratory, April 2013.

[15] *See Designation Document*, Section IV. B ("Other Considerations"), page 10.

federal code relates to only what *state program authorities should "develop"* in their state run small MS4 designation programs. In New Mexico, the EPA manages the National Pollutant Discharge Elimination System ("NPDES") permitting program; there is no state level NPDES permitting authority. The title of the code part is "*As the NPDES Permitting Authority for regulated small MS4s, what is my role?*" 40 C.F.R. §123.35 (2015).[16] The County would request clarification on why the Regional Administrator used federal rules designed for state implementation programs and submissions in his evaluation and finding that the County was a cause or contributor to water quality impairments.

II. Los Alamos County does not discharge to waters of the United States.

For the Regional Administrator to assert jurisdiction over the County, he must also find that the County contributes or discharges pollutants from its stormwater conveyance system into "waters of the United States." *See generally U.S. v. Riverside Bayview*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006). The County contends that any discharge from its pervious areas do not discharge into waters of the United States, but instead discharges to waters of the State of New Mexico. The U.S. Supreme Court in *Rapanos* found that the first test to determine whether a discharge was to waters of the United States, was to look to the water in question. According to both Justice Kennedy and Justice Scalia, the in question water(s) must first be an *interstate water* that is *navigable* or *reasonably susceptible to navigation* or be directly *"adjacent"* to an interstate waters. *See Rapanos*, 547 U.S. 780; *see also Riverside Bayview*, 474 U.S. 121, 133 (1985)*(emphasis added)*. Next, according to the plurality's opinion, there must be a permanence and direct or visible connection of the jurisdictional water to the adjacent water or wetland. In Justice Kennedy's concurring opinion, he believed that the more appropriate test was, if not directly "adjacent" to or having a visible connection to the navigable water, the adjacent water had to have a "substantial nexus" to the jurisdictional water. *Rapanos*, 547 U.S. at 780, *citing SWANCC*, 531 U.S. 159, 167.

The County would appreciate the EPA Regional Administrator's discussion and clarification of whether the discharges from the County's jurisdictional areas enter or reach navigable, or adjacent tributaries to, waters of the United States. Attached hereto as **Exhibit C**, are Google Earth© maps showing the various discharge paths of stormwater through area canyons. The County asserts that its potential discharges from the five mesa tops at the Los Alamos townsite, as well as the discharges from the developed areas of the White Rock townsite, would be into dry canyons and related arroyos thus not into waters of the U.S. Such dry ephemeral canyons are not federal jurisdictional waters. *See* Exhibits C-1 through C-9. From these photos, as well as knowledge of the local environment, it is more than evident that these waters are not navigable or easily susceptible to navigation and are not "adjacent" to any such waters.

As shown on Exhibits C-1 through C-9, all area waterways are ephemeral waters, that is they flow only through the direct influence of precipitation. The average 24-hour 10-year rain event is only 2.48 inches of precipitation, therefore these canyons and arroyos would unlikely reach the level of having a "substantial nexus" (even if found to be "adjacent") to any downstream jurisdictional receiving water(s). *See* NOAA Atlas 14 Point Precipitation Frequency Estimates: NM.[17] None of this leads to a rational conclusion that such potential discharges are adjacent to or have substantial nexus to a required jurisdictional water.

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[16] *See* Subpart B- State Program Submissions, 40 C.F.R. §§ 123.21 through 123.36.

[17] Available at [HYPERLINK "http://hdsc.nws.noaa.gov/hdsc/pfds/pfds_map_cont.html?bkmrk=nm"]. Last visited May 12, 2015. The County recognizes that the currently proposed rule by U.S. EPA on redefining the extent of waters of the U.S. could potentially alter this analysis if adopted, however current case law supports the presumption that County discharges are not to waters of the U.S., e.g., not an interstate water, or adjacent to interstate waters and does not have a direct observable connection or discharge volumes constituting a substantial nexus.

Additionally, as noted in LANL's Metals Report, and the *Designation Document*,

> "[s]urface water is carried downstream to the Rio Grande through relatively small channels situated in the bottom of canyons that have cut into the plateau surface (erodible Bandelier Tuff). A few canyons contain relatively short segments of "perennial" streams that flow year round because of spring sources, snowmelt, and rainfall, largely from watersheds extending into the mountains. However, most of the canyons originating on the plateau have ephemeral streams with flow limited to periods of short duration in response to intense thunderstorm rainfall events and snowmelt close to the mountain front."

Metals Report, Section 1.0, page 1. This is further supported by NMED's general designation of the area waters as "ephemeral" and "intermittent." *See* 20.6.4.128 NMAC (Rio Grande *Ephemeral and Intermittent*); *see also* 20.6.4.98 NMAC (*Intermittent*) Waters. The County would ask that the EPA Regional Administrator show and demonstrate that County discharges from its two incorporated areas are discharges to "waters of the United States."[18]

III. Conclusions

The County appreciates the Regional Administrator's work in relation to the proposed designation, but believes that numerous issues remain unclear and potentially erroneous regarding how the Regional Administrator based his decision to designate the County as a MS4, specifically how he reached the conclusion that the County is causing or significantly contributing to receiving water quality impairments. The County would appreciate the Regional Administrators response to the above matters to ensure that the there is a clear and unambiguous understanding on what material was used in reaching his decision and the rational and supportable basis of the underlying data. As has been discussed above, the County is concerned that the Regional Administrator used non-publicly reviewed third-party data that did not benefit from the public process of notice and hearing to reach his conclusion of cause and effect; all to which is contrary to the findings of the NMED 2014-2016 303d/305b report that listed the sources of listed impairments as "unknown." The County believes that only that document, the 2014-2016 303d/305b list, or an independent study by EPA, should be considered in reaching the decision to designate the County as a MS4.

Further, the County would petition for a determination, whether conducted by U.S. EPA or the U.S. Army Corps of Engineers, if the County's discharges would be to waters of the United States. As noted above, almost all area waters are ephemeral in nature and are distant from any recognized interstate water. The County contends that including County stormwater discharges as waters of the United States would likely expand federal authority into areas of traditionally held state authority.

In conclusion, the County looks forward to continuing this important dialogue and believes that the parties to the proposed designation will greatly benefit from continued mutual work to address the concerns of EPA.

EXHIBITS:

Exhibit A. Listing of New Mexico's Top 25 Most Populated Cities.
Exhibit B. Combined 2014-2016 Impairments from NMED 303d/305b List.
Exhibit C. Google Earth Maps of Local Ephemeral Drainage Areas.

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[18] *See* Justice Kennedy's opinion in *Rapanos v. U.S.*, 547 U.S. 715, 780 (2006)(The in question water must be: (1) adjacent to a traditionally held navigable water; (2) that there exist a substantial nexus between the waters; and (3) that the *tributary water must be relatively permanent in nature*.(emphasis added)

Exhibit A. Listing of New Mexico's Top 25 Most Populated Cities

From U.S. Census Bureau, Listing of 2010 National Urban Areas.
Available at [HYPERLINK "http://www.census.gov/geo/reference/ua/urban-rural-2010.html"].

	City:	Population:	MS4 Permit?	TMDL?
1.	Albuquerque, NM	741,318	Y	Y
2.	Las Cruces, NM	128,600	Y/DRAFT	
3.	Santa Fe, NM	89,284	Y/DRAFT	Y
4.	Los Lunas, NM	63,758	Y/DRAFT	
5.	Farmington, NM	53,049	Y/DRAFT	
6.	Roswell, NM	49,727		
7.	Clovis, NM	41,570		
8.	Hobbs, NM	36,696		
9.	Alamogordo, NM	31,862		
10.	Carlsbad, NM	29,839		
11.	Espanola, NM	26,418		
12.	Gallup, NM	23,114		
13.	Las Vegas, NM	15,609		
14.	Deming, NM	14,903		
15.	Taos, NM	13,686		
16.	Artesia, NM	12,764		
17.	Silver City, NM	12,705		
18.	Portales, NM	12,610		
19.	Chaparral, NM	12,328		
20.	Grants, NM	12,152		
21.	Lovington, NM	11,592		
22.	Los Alamos, NM[19]	10,893	Proposed	No.
23.	Bloomfield, NM	9,892		
24.	Ruidoso, NM	9,596		
25.	Socorro, NM	8,991		

[19] Of this listing, no other area is a county. Los Alamos County is comprised of the Los Alamos Townsite and the White Rock Townsite but also includes in vast majority DOE/LANL properties, U.S. Forest Service/National Park Service areas, and undeveloped/natural areas.

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Exhibit B. Combined 2014-2016 Impairments from NMED 303 List
From: New Mexico Environment Department at
[HYPERLINK "https://www.env.nm.gov/swqb/303d-305b/2014-2016/index.html"].
Last Visited May 12, 2015.

8-digit USGS HUC	AU [Segment] Name	IMPAIRMENT	IR Category (by AU)	CYCLE FIRST LISTED
13020101	Los Alamos Canyon (NM-4 to DP Canyon)	Aluminum	5/5C	2006
13020101	Los Alamos Canyon (NM-4 to DP Canyon)	Gross alpha, adjusted	5/5C	2004
13020101	Los Alamos Canyon (NM-4 to DP Canyon)	PCB in Water Column	5/5C	2006
13020101	Los Alamos Canyon (DP Canyon to upper LANL bnd)	Aluminum	5/5C	2006
13020101	Los Alamos Canyon (DP Canyon to upper LANL bnd)	Gross alpha, adjusted	5/5C	2004
13020101	Los Alamos Canyon (DP Canyon to upper LANL bnd)	Mercury, total	5/5C	2006
13020101	Los Alamos Canyon (DP Canyon to upper LANL bnd)	PCB in Water Column	5/5C	2006
13020101	DP Canyon (Los Alamos Canyon to LANL bnd)	Aluminum	5/5C	2010
13020101	DP Canyon (Los Alamos Canyon to LANL bnd)	Gross alpha, adjusted	5/5C	2010
13020101	DP Canyon (Los Alamos Canyon to LANL bnd)	PCB in Water Column	5/5C	2010
13020101	Acid Canyon (Pueblo to headwaters)	Aluminum	5/5C	2010
13020101	Acid Canyon (Pueblo to headwaters)	COPPER, ACUTE	5/5C	2010
13020101	Acid Canyon (Pueblo to headwaters)	Gross alpha, adjusted	5/5C	2010
13020101	Acid Canyon (Pueblo to headwaters)	PCB in Water Column	5/5C	2010
13020101	Acid Canyon (Pueblo to headwaters)	COPPER, CHRONIC	5/5C	2014
13020101	Pueblo Canyon (Acid Canyon to headwaters)	Aluminum	5/5C	2006
13020101	Pueblo Canyon (Acid Canyon to headwaters)	Gross alpha, adjusted	5/5C	2002
13020101	Pueblo Canyon (Acid Canyon to headwaters)	PCB in Water Column	5/5C	2006
13020101	Pueblo Canyon (Los Alamos WWTP to Acid Canyon)	Gross alpha, adjusted	5/5C	2010
13020101	Pueblo Canyon (Los Alamos WWTP to Acid Canyon)	PCB in Water Column	5/5C	2010
13020101	Pueblo Canyon (Los Alamos Canyon to Los Alamos WWTP)	Aluminum	5/5C	2010
13020101	Pueblo Canyon (Los Alamos Canyon to Los Alamos WWTP)	Gross alpha, adjusted	5/5C	2010
13020101	Pueblo Canyon (Los Alamos Canyon to Los Alamos WWTP)	PCB in Water Column	5/5C	2010
13020101	Walnut Canyon (Pueblo Canyon to headwaters)	COPPER, ACUTE	5/5C	2014
13020101	Walnut Canyon (Pueblo Canyon to headwaters)	PCB in Water Column	5/5C	2010
13020101	Graduation Canyon (Pueblo Canyon to headwaters)	Aluminum	5/5C	2010
13020101	Graduation Canyon (Pueblo Canyon to headwaters)	COPPER, ACUTE	5/5C	2010

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13020101	Graduation Canyon (Pueblo Canyon to headwaters)	PCB in Water Column	5/5C	2010
13020101	South Fork Acid Canyon (Acid Canyon to headwaters)	COPPER, ACUTE	5/5A	2014
13020101	South Fork Acid Canyon (Acid Canyon to headwaters)	ZINC, ACUTE	5/5A	2014
13020101	South Fork Acid Canyon (Acid Canyon to headwaters)	Gross alpha, adjusted	5/5A	2014
13020101	South Fork Acid Canyon (Acid Canyon to headwaters)	PCB in Water Column	5/5A	2014

IR Category:
4A = impaired, TMDLs have been written and approved for all documented impairments in this AU
4B = impaired, but TMDLs have not been written because other pollution control requirements are reasonably expected to result in attainment of the water quality standard in the near future
4C = impaired, but TMDLs have not been written because there are no documented impairments of any pollutants (i.e., the impairment is due to EPA's definition of "pollution", such as low flow alteration)
5A = impaired, TMDL development is underway or scheduled
5B = impaired, WQS review scheduled prior to TMDL development to confirm the WQS is appropriate/applicable
5C = impaired, additional data collection is needed prior to TMDL development

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Exhibit C. Google Earth Maps of Local Drainage Areas.

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