

# MS4/Los Alamos County, New Mexico: U.S. EPA Appeals Board Addresses Whether Stormwater Designation Constitutes a Final Permitting Decision



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The United States Environmental Protection Agency (“EPA”) Environmental Appeals Board (“EAB”) addressed in an April 22nd Order a Petition filed by Los Alamos County, New Mexico (“Los Alamos”). See NPDES Appeal No. 20-02.

The Petition seeks EAB review of a designation decision by EPA Region 6 pursuant to Section 402(p)(2)(E) of the Clean Water Act related to stormwater discharges.

EPA designated stormwater discharges from certain small municipal separate storm sewer systems (“MS4”) located in what is denominated the “Los Alamos Cluster” and on the Los Alamos National Laboratory property as requiring National Pollution Discharge Elimination System (“NPDES”) permits.

Section 402(p) provides the EPA Regional Administrator on a case-by-case basis the authority to designate certain stormwater discharges as requiring NPDES permits. Such designation requires that the EPA region determine that stormwater discharges contribute to a violation of applicable water quality standards. This Clean Water Act authority is designated the “residual designation authority.”

To exercise its residual designation authority, EPA Region 6 determined that certain of Los Alamos’ stormwater discharges were contributing to violations of New Mexico’s Clean Water Act water quality standards.

Los Alamos subsequently sought through its Petition EAB’s review of the EPA Region’s Designation Decision.

EPA responded to the Petition with a motion seeking its dismissal for lack of jurisdiction. It argued that the Designation Decision is not a final NPDES permitting decision as defined in 40 C.F.R. § 124.15. Therefore, it was the EPA Region’s position that the Designation Decision could not be appealed to the EAB under 40 C.F.R. 124.19(a).

This regulatory provision provides that the EAB is only given jurisdiction to review final permit decisions. EPA characterizes the final Designation Decision as a discrete decision subject to challenge in a different forum (i.e., the appropriate federal court).

Los Alamos responded that EPA’s argument was flawed because the Designation Decision constitutes a final permit decision under 40 C.F.R. § 124.15. Consequently, it was argued to meet the applicable

requirements for EAB jurisdiction under 40 C.F.R. § 124.15(a) and .19(a). It further argues that adopting EPA's position would preclude EAB from reviewing and correcting what it describes as:

. . . EPA's course at what the County views to be the beginning and most critical juncture of the permitting process and invites an "unnecessary detour" to the federal judiciary.

EAB sided with the EPA position. It held that the Designation Decision is not a final permit decision under Part 124. Instead it was deemed a decision issued under 40 C.F.R. § 122.26. The absence of a final individual NPDES permit meant EAB lacks jurisdiction under 40 C.F.R. § 124.19 to review the Petition.

EAB dismissed the Petition.

A copy of the Order can be downloaded [here](#).