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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGIONAL HEARING CLERK
REGION 6 EPA REGION VI

In the Matter of
1772

DOCKET NO. CWA-06-2022-

Double M Properties

Respondent

Proceeding to Assess a Class II
Civil Penalty under Section 309(g)
Of the Clean Water Act

NPDES ID No. NMR1002AG

ANSWER TO ADMINISTRATIVE COMPLAINT

COMES NOW Respondent Double M Properties (Respondent), by and through undersigned counsel of record, and, pursuant to 40 C.F.R. §22.15, hereby submits its Answer to the Administrative Complaint.

I. Statutory Authority

The first paragraph of Section I of the Administrative Complaint (Complaint) sets forth the statutory and regulatory authority of EPA Region 6 to issue the Complaint and identifies the procedural rules that are applicable to this matter. The first paragraph of Section I does not include allegations against the Respondent and does not require a response by the Respondent.

In response to the second paragraph of Section I, Double M Properties, based on its response to the Complaint, denies that it should be ordered to pay the civil penalty set forth in the Complaint.

II. Findings of Fact and Conclusions of Law

1. Respondent admits the allegations contained in Paragraph 1 of the Complaint.
2. Respondent admits the allegations contained in Paragraph 2 of the Complaint.

3. Respondent denies the allegations contained in Paragraph 3 of the Complaint which state that the receiving waters include Hubble Channel or the Rio Grande. There is insufficient information to demonstrate that any discharge reaches the Rio Grande, as it is preceded by numerous stormwater detention ponds that do not have outlet structures.

4. Respondent admits the allegations contained in Paragraph 4 of the Complaint.

5. Paragraph 5 of the Complaint contains a recitation of the requirements of 33 U.S.C. §1311 and does not require a response by the Respondent. Respondent affirmatively states that §1311 speaks for itself and, to the extent that Paragraph 5 is inconsistent with the language of the statute, Respondent denies the allegations therein.

6. Paragraph 6 of the Complaint contains a recitation of the requirements of 33 U.S.C. §1342(a) and does not require a response by the Respondent. Respondent affirmatively states that §1342(a) speaks for itself and, to the extent that Paragraph 6 is inconsistent with the language of the statute, Respondent denies the allegations therein.

7. Paragraph 7 of the Complaint contains a recitation of the requirements of 33 U.S.C. §1342(p) and does not require a response by the Respondent. Respondent affirmatively states that §1342(p) speaks for itself and, to the extent that Paragraph 7 is inconsistent with the language of the statute, Respondent denies the allegations therein.

8. Paragraph 8 of the Complaint contains a recitation of the requirements of 40 C.F.R. §122.26(b)(14)(x) and does not require a response by the Respondent. Respondent affirmatively states that 40 C.F.R. §122.26(b)(14)(x) speaks for itself and, to the extent that Paragraph 8 is inconsistent with the language of the regulation, Respondent denies the allegations therein.

9. Respondent admits the allegations contained in Paragraph 9 of the Complaint.

10. In response to Paragraph 10 of the Complaint, Respondent admits that it applied for and was issued coverage under the EPA Construction General Permit and was assigned NPDES Permit No. NMR1002AG by the EPA electronic Notice of Intent (NOI) Center on August 1, 2019 for the site known as Legacy at Sierra Vista under Section 402 of the Act, 33 U.S.C. §1342. Once the Permit was issued, the Respondent was required to maintain and contain storm water runoff for the entire facility. The Respondent executed the requirements of the Permit to the entire facility. The application of the Permit requirements was not limited to the 57 acres listed in the initial NOI. Respondent affirmatively states that the permit speaks for itself and to the extent that the allegations in Paragraph 10 are inconsistent with the permit and its intended coverage, Respondent denies those allegations.

11. In response to Paragraph 11 of the Complaint, Respondent admits that 180 acres were cleared and graded. The work was completed in compliance with the masterplan approved by the Village of Los Lunas and in compliance with the issued NPDES Permit. (See Exhibit I, attached hereto, Isaacson & Arfman, Inc. Engineer's Report). The Change NOI approved on December 24, 2020, did not reflect 200 acres. It reflected 180 acres. The EPA directed Double M. to revise the NOI again to reflect 200 acres on August 21, 2020, based on the plat measurement and its preference. This direction is in conflict with the Permit, which asks for disturbed acreage only. Disturbed acreage and total plat size are not equal.

12. In response to Paragraph 12 of the Complaint, Respondent had permit coverage for 57 acres from April 3, 2020 to December 23, 2020. Once the initial Permit was issued, the Respondent was required to maintain and contain storm water runoff for the entire 180 acres, which the Respondent did. The Respondent admits that the Permit was updated on December 10, 2020 and the Change NOI was authorized on December 24, 2020. The Change NOI approved

on December 24, 2020, reflected 180 acres, not 200 acres. The EPA directed the Respondent to revise the NOI again to reflect 200 acres in August 2021, based on the plat measurement and the EPA's preference. Disturbed acreage and total plat size are not equal. Respondent denies the remaining allegations in Paragraph 12. Exhibit 1, attached hereto.

13. In response to Paragraph 13 of the Complaint, Respondent denies that there were five rain events for the area. Furthermore, the EPA Enforcement Officer confirmed on July 13, 2022, that only triggering rain events should be looked at. The Respondent rejects the EPA's use of any rain event as a source of violation as the Permit specifies a minimum 0.25" rain event within a 24 – hour period as a triggering event with the potential to cause discharge. Information from the Valle de Oro USGS Rain Gauge, which was utilized by the EPA Enforcement Officer as a data source, is the incorrect gauge based on its proximity to the site. The Valle de Oro USGS Rain Gauge is approximately 13.1 miles north of the facility and is not a viable proxy for rain data. The Valle de Oro USGS Rain Gauge data indicates that during the relevant time period there were only two triggering storm events which exceeded 0.25". The additional three events were based upon Kirtland Air Force Base station data that was obtained from historical weather data published on the Weather Underground website and are not applicable to the facility based on lack of proximity to the site.

Additionally, one of the events identified by the Valle de Oro USGS Rain Gauge did not have a corresponding storm event in the Los Lunas area, demonstrating the Valle de Oro USGS Rain Gauge is an invalid proxy data source to support the allegations in the Complaint. The data collected at the facility through an effectively operating rain gauge indicates only two triggering rain events occurred at the facility, on July 25, 2020 and the other on September 9, 2020. The two triggering rain events did not produce any substantial amounts of storm water runoff and/or

standing water in any of the onsite retention ponds. The triggering rain events did not produce any off site discharge of storm water. The Permit details required actions to be taken if discharge occurs. The Respondent implemented the requirements as applicable. The Permit does not have any language regarding a violation for a "potential to discharge." A violation cannot be issued if the Permit is followed. Respondent affirmatively states that, during the relevant time period, there were no storm water discharges from the site. Exhibit 1, attached hereto.

14. Respondent denies the allegations contained in Paragraph 14 of the Complaint.

15. Respondent is without sufficient information to admit or deny the allegations contained in Paragraph 15 of the Complaint.

16. Respondent is without sufficient information to admit or deny the allegations contained in Paragraph 16 of the Complaint.

III. Proposed Penalty

17. In response to Paragraph 17 of the Complaint, Respondent denies that it should be assessed the proposed penalty.

18. In response to Paragraph 18 of the Complaint, Respondent denies that it should be assessed the proposed penalty based on the statutory factors specified in 33 U.S.C. §1319(g)(3). This paragraph does not demonstrate how the identified factors were applied nor does it provide notice for the basis of the proposed penalties. Therefore, the assessed proposed penalty is illegal, invalid and violates due process. Pursuant to the "Revised Expedited Settlement Agreement Program Pilot for Construction Stormwater," EPA, September 4, 2019, the penalty for failure to obtain a permit is \$600.00 per event. Respondent acknowledges that the administrative procedures specified in 40 C.F.R. Part 22, Subpart I, shall apply to this matter.

IV. Failure to File an Answer

19. Paragraphs 19 to 24 set forth procedural requirements for answering the Complaint and do not require a response from the Respondent.

V. Notice of Opportunity to Request a Hearing

20. In response to Paragraphs 25 to 27, Respondent requests that a hearing be held pursuant to 33 U.S.C. §1319(g) and 40 C.F.R. Part 22.

VI. Settlement

21. Paragraphs 28 to 30 do not require a response from the Respondent.

VII. Response in Opposition to Proposed Penalty

1. The controls required by NPDES Permit No. NMR1002AG were in place and provided protection for the entire facility from April 3, 2020 to December 4, 2020.

2. The only alleged violations are unpermitted stormwater discharges from April 3, 2020 to December 23, 2020. There were no stormwater discharges from the facility between April 3, 2020 and December 23, 2020.

3. There is no evidence of sediment discharge or storm water discharges from the facility during the relevant time period. In addition to the storm water discharge requirements set forth in the Permit, the masterplan for the subdivision approved by the Village of Los Lunas required the Respondent to retain 100% of the developed storm water volumes for all rainfall events up to an including the 100-year, 24-hour storm. The Village of Los Lunas performance standard exceeds the Permit requirements. As shown in the Engineer's Report, the required protections were put in place as part of the grading and development of the property. (Exhibit 1).

4. The distance from the facility to the Rio Grande, which the Complaint identifies as a “water of the United States,” is significant and the path to the Rio Grande includes, as stated in Paragraph 3 of the Complaint, “an unnamed ephemeral stream, thence to an unnamed stream river, thence to the Hubbell Channel, thence to the Rio Grande.” The potential impact to the Rio Grande is low and there are no allegations or evidence that there were any unpermitted storm water discharges from the facility that impacted the Rio Grande during the relevant time period.

5. There are no allegations or evidence of significant harm to human health or the environment during the relevant time period. The EPA Enforcement Officer confirmed on July 13, 2022 that no harm to human health or the environment was identified or charged in developing the Compliant.

6. The facility did not benefit economically from the alleged violation.

7. There is no history of prior violations by the Respondent at the facility.

8. There are no allegations or evidence of non-allowable, non-stormwater discharges from the facility.

9. During the relevant time period, the requirements of the Permit and the masterplan approved by the Village of Los Lunas were in place for the entire site. (See Exhibit 1).

10. The proxy weather stations or rain gauges that the EPA relied on to find the alleged five triggering events are too far away to be used as proxy for the on-site data. They are not representative of the facility’s location. The USGS Valle de Oro Rain Gauge is over 13 miles north of the facility. The Kirtland Air Force Base weather station is over 20 miles north of the facility.

11. The allegation in the Complaint that there were five triggering events is not factually supported. The Permit has a provision that allows the Operator to select an on-site rain gauge for determining rain fall amounts, which the Operator chose to do. EPA never challenged the use of the on-site rain gauge. Based on both the facility rain gauges and the nearest off-site gauge, there were, at most, two triggering events. The assertion of five triggering events and five penalty calculations is arbitrary and capricious, not supported by factual evidence, violates EPA's own regulations and on its face is illegal.

12. The Complaint does not provide a factual or legal basis for assessing a Class II Penalty pursuant to 33 U.S.C. §1319(g)(2)(B). The Complaint also does not provide the basis or justification for the amount of the proposed penalty. The Complaint should be dismissed because it is arbitrary and capricious, not supported by the facts in this matter, is illegal and violates due process.

WHEREFORE, the Respondent requests a hearing on this matter and requests that the Administrative Complaint be dismissed in its entirety.

Respectfully submitted,

DOMENICI LAW FIRM

/s/ Pete Domenici

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ENGINEER'S REPORT

June 28, 2022

Project: Sierra Vista Masterplan and Subdivisions

Subject: Grading & Drainage History and Improvements

This report was prepared to state the required drainage criteria, temporary and permanent improvements, and their corresponding timelines and to document that storm waters were not allowed and did not discharge from the subject property between April 2020 and December 2020. Isaacson & Arfman, Inc. is the engineer-of-record for all of the subdivisions being developed within the Area Plan and conducted bi-weekly meetings with the owner, contractors and other consultants and the testing lab.

Sierra Vista Area Plan: The Area Plan (masterplan) was processed through the Village of Los Lunas and received approval from the Village Council on September 6, 2018, as Village of Los Lunas Resolution 18-14. The Village storm water drainage regulations required that all developments west of I-25 would be required to retain 100% of the developed storm water volumes for all rainfall events up to and including the 100-yr./24-hr. storm.

Mass Grading:

March - October, 2020: A mass grading plan was developed and submitted to the Village of Los Lunas as part of the Sierra Vista Preliminary Plat creating the bulk tracts comprising the entire development. The limits of the plan are identified on the attached Exhibit A entitled, "EXISTING CONDITIONS, PRE 2020". The exhibit shows the pre grading site topography as provide by the grading contractor. Grading operations were delayed and started March 2, 2020. The exhibit indicates the existence of several onsite retention ponds and the Village owned and maintained retention ponds along the south boundary of the development. The Village ponds were constructed to intercept a vast majority of the offsite storm waters that historically entered onto the site. Storm water runoff from the undeveloped site were conveyed overland as sheet flows where they eventually were accepted into the NMDOT right-of-way of NM-6. The existing drainage swales along the NM-6 released the storm waters via storm water culverts under NM-6 and to the north at the historical drainage courses.

Grading operations were at 95% in October and the contractor, Franklin's Earthmoving, Inc. (FEI) had a smaller crew onsite for the next 6 week to perform minor grading and touch -up operations.

Legacy, Unit 1 – 3 Subdivision Development:

April, 2020: Exhibit B shows the limits of the first subdivision, Legacy Unit 1 (Tract B). A Pre-Con meeting was held at the office of the Public Works Director on December 19, 2019, for the three phases. The grading contractor, FEI focused on the Legacy grading in concert with their mass grading operations. Legacy 1-3 was constructed and had a drainage solution of three permanent ponds that accepted the storm water volume from the 100-yr. storm event.

Tracts A, C, D, E, & F:

Tract C situated adjacent to the northeast boundary of Legacy, Unit 1 is a 1.5 ac. undeveloped commercial tract that has the overland storm waters captured by an interim pond along the NM-6 frontage. Tracts A & D along NM-6 were stabilized and interim retention ponds constructed to accept the 100-yr storm water volumes. All undeveloped and developed storm waters are being held on site and are allowed to percolate into the ground. The sandy material has been observed to have a percolation rate of approximately 6" per hour. The ponds are a maximum of 3' deep and will hold surface storm water for approximately 6 hours during the percolation process.

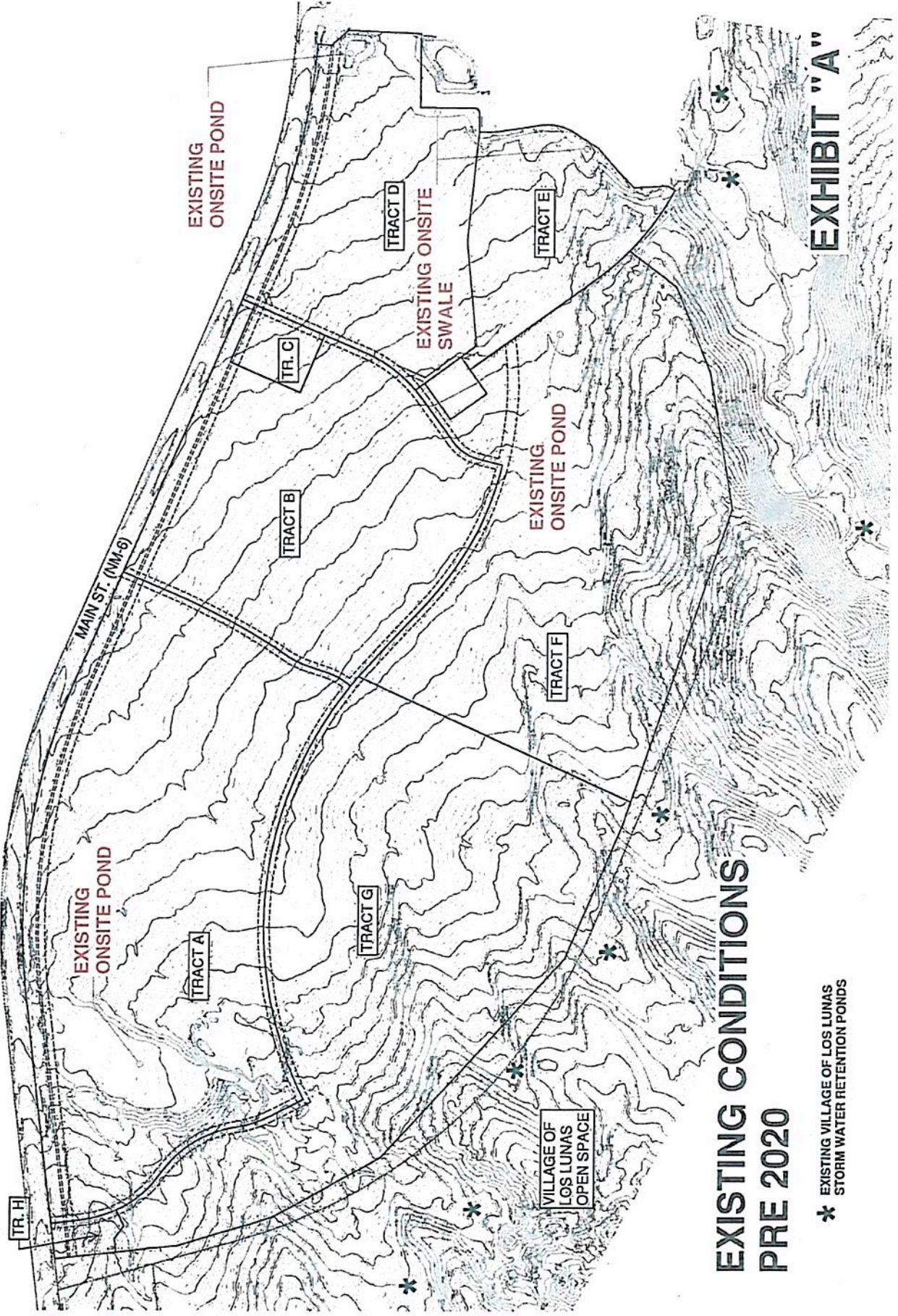
There were two storm events, one on July 25, 2020, and the other on Sept. 9, 2020, as registered on the Via de Oro USGS Rain Gage. These two events did not produce any substantial amounts of storm water runoff and/or standing water in any of the onsite retention ponds.

E2RC SWPPP Maintenance:

E2RC had the maintenance responsibility and maintained the property as shown on their Maintenance Log for Legacy at Sierra Vista. The log started on March 2, 2020 and continued through February 2021. During the period from April, 202 through December 2020, there were twelve (12) log entries describing their efforts in installing and maintaining the silt fencing and construction entrance to Legacy.

Conclusion:

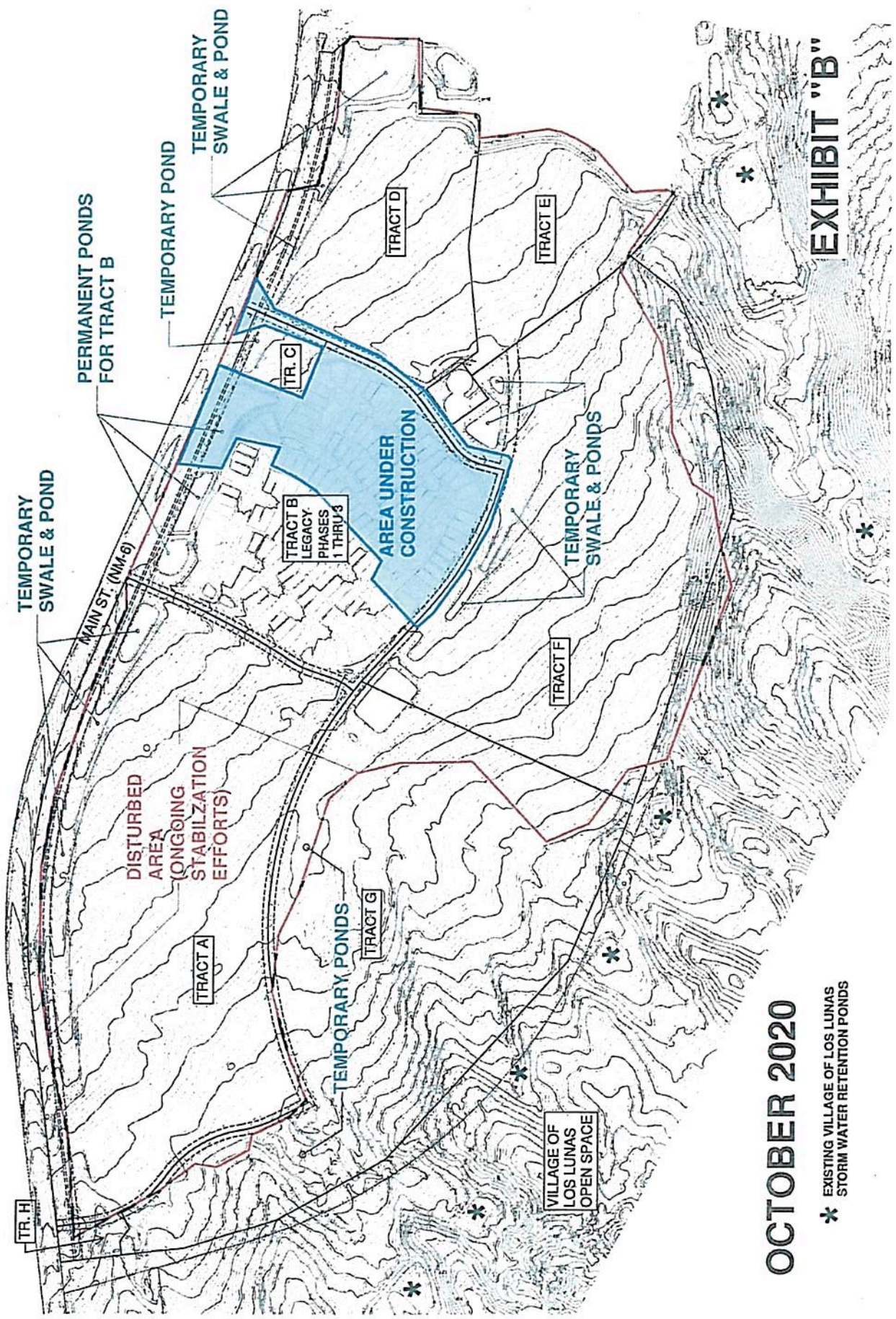
Based on the rainfall data available for the subject plan area and the observations of the site by Isaacson & Arfman, Inc. after the rainfall events, we have concluded that all of the project land area had the storm waters captured by the series of storm water retention ponds with the exception of the small areas at the site entrances where very minor flows were allowed to discharge into the NMDOT south bar ditch along Main St. (NM-6).



**EXISTING CONDITIONS
PRE 2020**

EXHIBIT "A"

* EXISTING VILLAGE OF LOS LUNAS
STORM WATER RETENTION PONDS



OCTOBER 2020

* EXISTING VILLAGE OF LOS LUNAS STORM WATER RETENTION PONDS

EXHIBIT "B"