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To the United States Senate

Committee on Environment and Public Works

Regarding a hearing on

"PFAS: The View from Affected Citizens and States"

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Mr. Chairman, Ranking Member Capito, members of the Committee, my name is James Kenney and I currently serve as the Secretary of the New Mexico Environment Department (NMED) in Governor Michelle Lujan Grisham's Cabinet. I appreciate the opportunity to provide testimony today on behalf of the State of New Mexico and its citizens regarding the impacts of PFAS. My testimony draws on my nearly 25 years of experience in implementing public health and environmental regulatory and enforcement programs at the state and federal levels.

The mission of the NMED is to protect and restore the environment and to foster a healthy and prosperous New Mexico for present and future generations. The NMED successfully implements federal and state programs related to air and water quality, drinking water and food safety, solid and hazardous waste, occupational health and safety, and other such programs. We keep New Mexicans healthy and safe, working to prevent acute and chronic exposures to biological, chemical and radiological agents. We even took a leadership role during the COVID-19 pandemic to assist 24,000 individual business owners in navigating workplace outbreaks while organizing free surveillance testing and vaccination events in urban and rural areas of our state. Nevertheless, New Mexico, like other states, cannot adequately protect its citizens from PFAS exposure without Congress providing immediate direction to federal agencies and direct funding to states.

A Patchwork of PFAS Approaches

In recent years, scientists concluded that the large family of synthetic chemicals known as PFAS can pose human health risks. PFAS are synthetic, environmentally persistent chemicals with a wide variety of commercial and industrial applications, including firefighting foams; nonstick cookware; water-repellent fabrics, carpets, and textiles; grease-proof food wrapping, etc. Exposure to certain PFAS has been associated with cancer, diabetes, liver damage, high cholesterol, obesity, thyroid disease, asthma, immune system dysfunction, reduced fertility, low birth weight, and effects on children's cognitive and neurobehavioral development.[1]

In 2016, the U.S. Environmental Protection Agency (EPA) issued a non-regulatory and legally unenforceable lifetime health advisory of 70 parts per trillion for two PFAS compounds known as PFOA and PFOS for finished drinking water. Following the establishment of the U.S. EPA's lifetime health advisory, states responded in different ways. Some states established legally enforceable values for certain PFAS in drinking water, groundwater, surface water, soil, or other environmental media. Some states are spending millions of dollars to develop enforceable PFAS regulatory standards to protect their citizens and environment. Other states are not funded or staffed to develop regulatory and enforceable standards, resulting in less protective public health outcomes for their citizens. The increasingly complex landscape of state activities is making it harder for each state to address its citizens' concerns about PFAS risks.

In New Mexico, our efforts to protect public health from PFAS contamination have been met with a federal lawsuit challenging our legal authority while leaving New Mexicans to pay for studies and remediation.

[1] See: https://www.epw.senate.gov/public/_cache/files/2/2/22ca7c4b-b1dc-4a12-9264-7a4f16608933/BF2D70A4FB747A3F61E584CC30D58D0A.birnbaum-testimony-03.28.2019.pdf

The United States Sues New Mexico to Stop State Action

On my fourth day as Cabinet Secretary in early 2019, the Trump administration's U.S. Department of Justice (DOJ) sued New Mexico on behalf of the U.S. Air Force (USAF) for exercising State authority requiring Cannon Air Force Base to address PFAS contamination under the State's Hazardous Waste Act as it relates to the implementation of the Resource Conservation and Recovery Act (RCRA).

On June 1, 2021, the Biden administration's DOJ filed a memorandum defending its position that the NMED acted arbitrarily and capriciously when it issued a permit requiring the USAF to clean up its PFAS contamination at Cannon Air Force Base that resulted from decades of releases of PFAS containing aqueous firefighting foams (AFFF) under the State's Hazardous Waste Act as it relates to the implementation of RCRA.

States have played and should continue to play a vital role in environmental protection, often in partnership with the EPA. However, because an Executive Order replaced the EPA with the U.S. Department of Defense in cleaning up its own pollutants, including PFAS, the federal government has sought to reshape the historic role of the states in playing a role in protecting public health and the environment. Pursuant to Executive Order 12580 as amended, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) abatement and settlement authorities are delegated to the Secretary of Defense and must be exercised in concurrence with EPA.[2]

For the past 30 months, the federal government has been more interested in rewriting the RCRA statute as passed by Congress and preventing New Mexico – a state with RCRA primacy – from meaningfully protecting the approximately 50,000 nearby residents of Curry and Roosevelt Counties from the further migration of PFAS from Cannon Air Force Base through groundwater. This, despite the fact that groundwater serves as the primary source of drinking water for these communities.

On July 30, 2020, the USAF announced it began investigative field work around the former Reese Air Force Base, near Lubbock, Texas, related to PFAS contamination. The USAF stated: "These investigations are part of the PFAS Affected Property Assessment investigation, required by the Resource Conservation and Recovery Act (RCRA) Permit and Compliance Plan issued to the Air Force by the Texas Commission on Environmental Quality."[3] Clearly, the USAF agrees PFAS contamination is subject to RCRA corrective action in Texas.

Congress enacted RCRA in 1976 in response to "a rising tide of scrap, discarded, and waste materials" that had become a matter of national concern. In enacting RCRA, Congress declared it a national policy "that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." Congress recognized, however, that "the collection of and disposal of solid wastes

[2] https://www.archives.gov/federal-register/codification/executive-order/12580.html
[3] https://www.af.mil/News/Article-Display/Article/2295836/air-force-begins-field-work-to-investigate-pfas-at-former-reese-afb/

should continue to be primarily the function of State, regional, and local agencies. …" Thus, RCRA allows any state to administer and enforce a hazardous waste program subject to authorization from the EPA.[4] The USAF lawsuit against New Mexico is attempting to reshape congressional intent and authority given to the EPA and states.

Similar to New Mexico's science-based recognition of PFAS meeting the congressional language of RCRA and its definition as waste that presents a current and future threat to human health and the environment, the EPA received a petition on January 15, 2020, to regulate PFAS under RCRA.[5] The petition was filed by the Environmental Law Clinic at UC Berkeley and asks the EPA to promulgate regulations designating wastes containing three classes of PFAS as hazardous wastes. The EPA has yet to act on this and another such petition received on September 19, 2019, filed by the Public Employees for Environmental Responsibility.[6]

Congress could take action to list discarded PFAS as a RCRA hazardous waste, thus rendering the petitions EPA received in 2019 and 2020 moot. In doing so, the national RCRA framework, which consists of "cradle-to-grave management" of hazardous wastes, would serve as the uniform approach across states to address PFAS contamination. Moreover, states could incorporate PFAS clean-up into RCRA corrective action permits, similar to the approach New Mexico is taking at Cannon Air Force Base under applicable state law. Such bold action by Congress would incent businesses that use PFAS to find replacements to avoid RCRA regulation all together.

In the event the USAF is successful in their judicial lawsuit in redefining RCRA as written by Congress, as well as preempting the EPA's authority to act on the RCRA petitions and limit state primacy under RCRA, the State of New Mexico will lose a critical regulatory tool for protecting its citizens and environment from PFAS.

Impacts to our Health, Environment and Economy

PFAS threaten our health, our environment and our economy. While the EPA's focus on a national drinking water standard is paramount, these chemicals continue to find their way into our lives through a variety of pathways.

From a consumer standpoint, water or stain resistant sprays containing PFAS are offered to customers by some retailers who sell furniture, rugs and textiles. When these household goods are purchased, retailers offer and apply water- or stain-resistant sprays containing PFAS. Often, the water- or stain-resistant application takes place at a retail store or local warehouse prior to the consumer picking up their purchase. The retailer applies the spray to the household product, cleans up any waste, and disposes of any waste generated from the process. The use of these

[4] The EPA authorized New Mexico's state program pursuant to RCRA in 1985, 40 C.F.R. § 272.1601(a), and delegated to New Mexico "primary responsibility for enforcing its hazardous waste management program." 40 C.F.R. § 272.1601(b). New Mexico's Hazardous Waste Act and regulations promulgated pursuant to it are incorporated by reference into RCRA.

[5] https://www.epa.gov/sites/production/files/2020-04/documents/pfas_petition_for_haz_waste_jan_2020_metadata_added.pdf

[6] https://www.epa.gov/sites/production/files/2020-04/documents/peer_pfas_rulemaking_petition_metadata_added.pdf

chemicals by retailers is largely unregulated and may present a risk to consumers, employees, municipal wastewater treatment facilities, and solid waste management facilities. Ultimately, the consumer may not be aware that their stain- or water-resistant furniture, rug or textile may contain PFAS chemicals. This area needs greater study, disclosure and possibly regulation to prevent human and wildlife exposure to PFAS.

From an economic standpoint, agriculture is part of New Mexico's cultural and economic identity. We are the top state in the country in chile production, second in pecans, in the top 10 in milk production and have the largest dairy herd size in the nation. According to the most recent U.S. Census of Agriculture, there are 24,800 farms in the state and agriculture and food products are among the state's top five exports. The agricultural industry employs over 23,000 people in the state with cash receipts approaching $3 billion annually. In October of 2018, a Curry County, New Mexico dairy farmer that neighbors Cannon Air Force Base learned his water was contaminated with PFAS. The milk was tested and the New Mexico Department of Agriculture worked with the U.S. Food and Drug Administration (FDA) to obtain an advisory level of contamination. The milk was immediately pulled off sale. Since then, the dairy farmer dumped tens of millions of gallons of milk, losing millions of dollars in revenue that otherwise would have recirculated in our state and national economy. New Mexico's agricultural reputation is essential to the nation's milk supply and our state economy. Other farms near Cannon Air Force Base could face a similar fate. Given that Curry County is one of the nation's top milk producers, New Mexico continues to safeguard its agricultural products from PFAS contamination through prevention and analytical testing in the absence of clear national standards from the FDA.

Also essential to New Mexico's economy is tourism. The New Mexico Tourism Department reports that the state has a high percentage of out-of-state visitors who come to New Mexico for outdoor recreation activities, such as river rafting, fly fishing, camping, boating and wildlife viewing along the State's scenic waters. Visitors spent $846 million on recreation in the state in 2017, supporting 13,000 direct jobs.

As an example of how PFAS contamination could impact tourism, exceedingly high levels of PFAS were detected in Lake Holloman in Otero County, New Mexico, home of Holloman Air Force Base, where PFAS was released into the environment through decades of the USAF's use of AFFF. Lake Holloman is considered an important habitat for birds, including migrating ducks, shorebirds, and a number of federally listed endangered species and state-listed species of concern. Lake Holloman also serves as a valuable recreational resource to the community surrounding the base, as it is used for boating, bird watching, and camping. In 2019, the New Mexico Attorney General requested the USAF close Lake Holloman and the New Mexico Department of Health directed the public to avoid all contact with the water in Lake Holloman, including drinking or swimming.[7,8] Lake Holloman is adjacent to White Sands National Park, which is the most visited National Park in New Mexico, welcoming about 600,000 visitors a year.

Impacts to tourism hurt yet another New Mexico economic sector: outdoor recreation. Outdoor recreation is among New Mexico's largest economic sectors, representing the lifeblood of communities across the state and providing livelihoods for tens of thousands of New Mexicans.

[7] https://www.env.nm.gov/wp-content/uploads/sites/21/2019/10/PI-Motion.pdf
[8] https://www.nmhealth.org/news/information/2019/5/?view=764

More than twice as many jobs in New Mexico depend on outdoor recreation than on the energy and mining sectors combined. The New Mexico Department of Game and Fish reports there are 160,000 anglers who fish in New Mexico, spending $268 million on these activities annually. The nationally leading New Mexico Outdoor Recreation Division, created through legislation in 2019, is tasked with increasing outdoor recreation-based economic development, tourism and ecotourism; recruiting new outdoor recreation business to New Mexico; and promoting education about outdoor recreation's benefits to public health.

We have already seen how environmental contamination can devastate livelihoods: New Mexico's agriculture, tourism and outdoor recreation economies suffered greatly after the 2015 Gold King Mine blowout. As a result of the blowout in southwest Colorado, more than three million gallons of bright yellow mine water contaminated with heavy metals flowed into Cement Creek, a tributary of the Animas River. The toxic plume flowed into New Mexico and the San Juan River, which also runs through the Navajo Nation and Utah.

The spill led to costs incurred by the state, local municipalities and tribal nations to clean up the contamination. The spill also caused pollution in agricultural areas and adversely impacted New Mexicans in the agricultural, tourism and outdoor recreation industries in the northwest corner of the state. Although extensive testing indicates that water used to irrigate crops in the Animas Valley is now safe and well within irrigation standards, farmers continue to see lower sales due to the stigma left behind by the catastrophic release.

The absence of federal PFAS standards and definitive action under RCRA and other federal environmental laws threatens our communities, consumers, workforce, tourists and economy and shifts a huge burden to states and tribes from coast to coast. New Mexico will continue to push for a whole-of-government approach from the federal government, in close coordination with states and tribes, with the requisite sense of urgency that these pervasive and persistent contaminants demand.

An Imminent and Substantial Endangerment to Public Health

In March of 2019 and after the failure of the USAF to take responsibility for the improper disposal of PFAS-containing firefighting foam and address subsequent PFAS contamination at Cannon and Holloman Air Force Bases, the State of New Mexico filed an imminent and substantial endangerment complaint against the United States and the USAF under the state's Hazardous Waste Act (HWA).

In July of 2019, the State of New Mexico filed an amended complaint to include RCRA authority and sought a preliminary injunction requiring the United States and the U.S. Air Force to immediately begin delineating the groundwater plumes caused by decades of use of PFAS-based firefighting foams at Cannon and Holloman Air Force Bases. The State of New Mexico sought emergency relief that would include groundwater and surface water sampling, alternative water sources and water treatment options be provided to New Mexicans affected by the contamination, voluntary blood tests for residents who may have been exposed to PFAS, and additional documentation on the extent of contamination around the bases.

In June of 2020, the State of New Mexico's imminent and substantial endangerment complaint

filed under the HWA and RCRA was transferred to the District of South Carolina as part of multidistrict litigation initiated for products liability claims.

In January of 2020, the New Mexico Legislature approved $1 million for the NMED to begin investigating the PFAS groundwater contamination caused by the USAF at Cannon Air Force Base in Clovis, New Mexico, and Holloman Air Force Base in Alamogordo, New Mexico. The investigation will provide greater insight into the size of the plumes, identify public and private water sources that may be affected, investigate how local wildlife may be impacted, and establish regular groundwater monitoring programs. Work at both bases is anticipated to finish by the summer of 2022. Once the investigation concludes, NMED will evaluate next steps based on the risk to public health, available funding and any mitigating actions taken by the USAF.

In addition to New Mexicans taking the initiative and picking up the tab for this overdue investigation, New Mexico is spending limited state resources on lawsuits with the federal government as opposed to spending time and resources on mitigating the harm to New Mexicans and our economy.

Conclusion

New Mexico and other states have not yet been able to adequately protect their citizens or their environments from PFAS. States are spending millions of dollars to develop and establish legally enforceable standards for PFAS chemicals in drinking water, groundwater, surface water, soil, or other environmental media. In New Mexico, addressing PFAS contamination at USAF bases is unfortunately revolving around litigation – through both a federal lawsuit to prevent clean-up or the State lawsuit against the USAF to compel clean-up.

To protect public health and the environment, Congress should take the following steps:

1. Take immediate action to list discarded PFAS as a RCRA hazardous waste, thus rendering the petitions EPA received in 2019 and 2020 moot, and substantially resolving issues in the pending state and federal lawsuits.

2. Direct the EPA to develop any necessary regulations related to listing discarded PFAS as a RCRA hazardous waste (e.g., land disposal restrictions, corrective action, etc.), but not preventing appropriate state action in the meantime.

3. Increase and direct funding to EPA-authorized state RCRA programs to manage increased responsibilities related to PFAS.

4. Congress should affirm the EPA's authority in all CERCLA matters. One issue here of immediate importance is the USAF's contention that any state action necessarily interferes with USAF remedial action plans. In New Mexico, no such plans exist or are aspirational in nature. Moreover, the Congressional intent of CERCLA was to preserve the state's enforcement authorities.

I appreciate the opportunity today to provide my perspective and recommendations as the Cabinet Secretary of the New Mexico Environment Department.