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James C. Kenney
Cabinet Secretary

Jennifer J. Pruett
Deputy Secretary

VIA ELECTRONIC MAIL

July 2, 2019

David W. Gray
Regional Administrator
U.S. Environmental Protection Agency Region 6
1201 Elm Street, Suite 500
Dallas, Texas 75270-2102
gray.david@epa.gov

Dear Regional Administrator Gray,

As you are aware, the New Mexico Environment Department ("NMED") is actively pursuing judicial enforcement against the U.S. Department of Defense ("DOD") under the New Mexico Hazardous Waste Act and NMED's Resource Conservation and Recovery Act ("RCRA") primacy powers for PFAS contamination related to activities at Cannon Air Force Base and Holloman Air Force Base. The U.S. Environmental Protection Agency ("EPA") is not a party to the judicial proceedings.

On April 3, 2019, during a U.S. Senate hearing to review EPA's fiscal year 2020 funding request and budget justification, Senator Tom Udall asked if EPA Administrator Wheeler would commit to providing technical or legal assistance to the State of New Mexico regarding its PFAS litigation and remediation. Administrator Wheeler stated it was his understanding that EPA provided NMED with assistance already and further stated "...if we have not, we certainly will." Administrator Wheeler also stated that EPA worked with "...a couple dozen states and local communities on enforcement actions for PFAS/PFOA across the country..." and committed to doing so for New Mexico. After securing the Administrator's commitment to assist NMED in its litigation, Senator Udall asked Administrator Wheeler to ensure that EPA supports NMED on a confidential basis and asked the Administrator if he could do that to which Administrator Wheeler stated: "Yes, we do that with federal facilities all around the country in a number of different statutes."

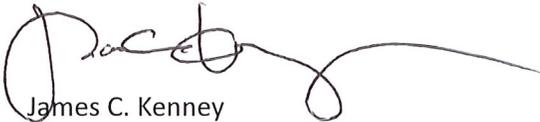
During a May 10, 2019 telephone conference between Matt Leopold, EPA General Counsel, and James Payne, EPA Region 6 General Counsel, Jennifer Hower, NMED General Counsel and myself; EPA informed NMED that it would not join the State's enforcement efforts against a sister executive agency due to the "unitary executive theory" despite the fact that NMED is implementing RCRA on behalf of EPA under a primacy agreement. Aside from holding federal facilities to a lower standard of compliance under RCRA, EPA's lack of engagement on this matter adversely impacts NMED's litigation while leaving communities vulnerable to PFAS pollution.

When asked about opportunities to provide NMED with technical resources related to the litigation, like: risk communication experts, investigation resources, technical experts, contract support, interim control funding, etc.; EPA representatives stated they would look in to doing so but have yet to follow up with NMED.

The State of New Mexico reached the conclusion of the 90-day notice window for pursuing RCRA claims against a federal agency and is proceeding accordingly. NMED encourages EPA to reassess its position regarding collaborative federal/state PFAS enforcement under RCRA. To the extent EPA maintains its current position, this raises serious concerns for NMED regarding EPA's commitment to addressing PFAS contamination and implementation of primacy programs under RCRA.

Both Jennifer Hower and I can be reached at (505) 827-2855 to discuss further.

Sincerely,

A handwritten signature in black ink, appearing to read "James C. Kenney", with a long, sweeping horizontal line extending to the right.

James C. Kenney
Cabinet Secretary

Cc: Andrew Wheeler, Administrator, EPA, wheeler.andrew@epa.gov
Matt Leopold, General Counsel, EPA, leopold.matt@epa.gov
James Payne, Regional Counsel, EPA Region 6, payne.james@epa.gov
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