



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

Hon. Michelle Lujan Grisham  
Governor of New Mexico  
490 Old Santa Fe Trail, Room 400  
Santa Fe, NM 87501

**JUL 19 2019**

Dear Governor Lujan Grisham,

We write in response to Secretary Kenney's July 2, 2019, letter regarding New Mexico's decision to actively pursue judicial enforcement against the United States Department of Defense ("DOD") under state law for PFAS contamination at Cannon and Holloman Air Force bases. The letter also asks EPA to reconsider its position "regarding collaborative federal/state PFAS enforcement under RCRA." It appears that the State is asking EPA to join the judicial action against DOD. While EPA is unable to accommodate that request, the Agency is working to assist the State in a number of ways described below.

As an initial matter, EPA is not permitted to bring a judicial action against another Executive Branch department or agency. This position is consistent with the Department of Justice's long-held view of the unitary executive theory, which is rooted in the President's constitutional authority to see that all laws are faithfully executed. *See* U.S. Const. Art. II; *Myers v. United States*, 272 U.S. 52 (1926). Under our constitutional scheme, that executive power of the United States is exercised in a unitary and uniform way under the President. A dispute between parties in the same branch of government is not justiciable because it does not satisfy the case or controversy requirement of Article III. Therefore, EPA's direct and confidential participation in judicial litigation against DOD would conflict with the unitary and uniform execution of the law.<sup>1</sup>

Additionally, the State of New Mexico is authorized to implement the state's hazardous waste program in lieu of the federal RCRA program and is empowered to promulgate, implement, and

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<sup>1</sup> Although the Federal Facilities Compliance Act amended the Solid Waste Disposal Act to grant EPA administrative enforcement authority against Federal facilities, it did not authorize civil litigation against Federal government agencies.

enforce its program, including against federal facilities.<sup>2</sup> EPA's participation in related litigation is not required for the State of New Mexico to proceed against DOD.

Finally, consistent with the Administrator's recent Senate testimony, EPA supports New Mexico's role as a co-regulator and in this capacity is providing technical assistance to the extent that it is able to do so. EPA has committed substantial assistance to New Mexico and other states to help address the challenges PFAS presents. EPA Region 6 staff have been in regular contact with NMED to provide technical and other assistance. By way of example, EPA Region 6 has provided the following PFAS-related technical assistance within the past two years:

2018

- Attended, with NMED, public community meetings, and meetings with affected land owners and farmers
- Attended meetings with NM agencies, the NM Governor's Office, and the Air Force
- Shared information on PFAS (e.g., fact sheets from Vermont on PFAS in dairy products, information on PFAS in a Maine dairy)
- Engaged in planning with NMED to provide PFAS groundwater modeling support and data interpretation, if beneficial

2019

- Provided a PFAS presentation at the Region 6 RCRA All States meeting
- Provided PFAS remediation fact sheets
- Provided a webinar for PFAS emerging characterization and remediation technologies
- Invited the state to participate in a series of joint EPA-State national RCRA PFAS cleanup calls, including related to DOD facilities
- Offered assistance with PFAS groundwater modeling support and PFAS data interpretation

More recently we have had several conversations regarding additional technical support EPA can provide to the State upon request. Also, I know that you also discussed this matter with Doug Benevento who reiterated our willingness and ability to provide additional technical assistance. The Region would be willing to meet with the State RCRA team to discuss what additional support can be provided.

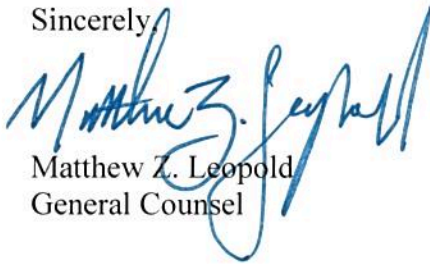
EPA will continue to provide NMED with technical remediation information and other assistance under RCRA and otherwise. While we are not able to assist with the State's litigation against the federal government or with defending litigation brought against the State by DOJ, we will continue to provide NMED with PFAS-related technical assistance, consistent with such

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<sup>2</sup> The assertion in your letter that "NMED is implementing RCRA on behalf of EPA under a primacy agreement" is not fully accurate. Under RCRA section 3006, 42 U.S.C. § 6926(b), a State may be authorized to implement a State's hazardous waste regulatory program "in lieu of" the federal RCRA hazardous waste program. RCRA does not provide for delegation of federal regulatory authority to a State. Therefore, New Mexico is carrying out its hazardous waste program under state law "in lieu of" the federal program; it is not implementing its hazardous waste program "on behalf" of EPA.

assistance to other states. We look forward to continuing our partnership with the State of New Mexico in addressing PFAS.

Sincerely,

A handwritten signature in blue ink, appearing to read "Matthew Z. Leopold".

Matthew Z. Leopold  
General Counsel

A handwritten signature in blue ink, appearing to read "Peter C. Wright".

Peter C. Wright  
Assistant Administrator

CC: James C. Kenney