



**State of New Mexico
ENVIRONMENT DEPARTMENT
OFFICE OF NATURAL RESOURCES TRUSTEE
DEPARTMENT OF AGRICULTURE**

Michelle Lujan Grisham
Governor

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James C. Kenney
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Cabinet Secretary, NMDA

November 7, 2022

U.S. Environmental Protection Agency
EPA Docket Center, OLEM Docket, Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted electronically to: <https://www.regulations.gov>

RE: Docket ID No. EPA-HQ-OLEM-2019-0341

Dear Administrator Regan,

On behalf of the New Mexico Environment Department (NMED), the New Mexico Office of Natural Resources Trustee, and the New Mexico Department of Agriculture (hereinafter the agencies), attached please find our comments on the September 6, 2022, Notice of Proposed Rulemaking regarding the Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Hazardous Substances.

We strongly support the Environmental Protection Agency's (EPA) proposed designation of PFOA and PFOS as CERCLA hazardous substances. If finalized, the proposed designations represent a significant and tangible step toward addressing contamination that threatens public and environmental health throughout the country, including sites in New Mexico.

New Mexico has demonstrated and documented per- and polyfluoroalkyl substances (PFAS) contamination in several areas; most of these sites are directly related to U.S. Department of Defense (DOD) activities at Cannon and Holloman Air Force Bases. These actions have directly contaminated or threatened dairy farms surrounding Cannon Air Force Base, areas on the bases themselves, and Lake Holloman, thereby causing substantial harm to human health, New Mexico's agricultural industries, recreation, and tourism. For further explanation of the impact of PFAS on New Mexico, see Governor Michelle Lujan Grisham's [June 23, 2021, petition to the EPA](#) requesting the listing of PFAS under the Resource Conservation and Recovery Act (RCRA).


The agencies further support EPA's proposed designation of PFOA and PFOS as CERCLA hazardous substances because that designation is essential to the State's authority to pursue Natural Resource


Damage claims. For sites contaminated with hazardous substances, CERCLA not only mandates cleanup to protect human health and the environment but also gives designated federal and state agencies and tribes the authority to recover, on behalf of the public, all costs to restore or replace injured natural resources to the conditions in which they existed without the hazardous substance release. See [CERCLA §107\(f\)\(1\), CERCLA 107\(a\)\(4\(C\)](#), under “Liability for NRD and Judicial Review”. The designation of PFOA and PFOS as hazardous substances is thus essential to the state’s ability to recover damages under CERCLA to compensate the people of New Mexico for losses resulting from injury to natural resources caused by releases of PFOA and PFOS.


PFAS are of importance to the residents of New Mexico, and strong, consistent federal regulation is essential to ensure continued progress in addressing impacts to human health and the environment from past and future releases. Strong coordination and rigorous public process are imperative in addressing legacy PFAS contamination in New Mexico. The designation of PFOA and PFOS as CERCLA hazardous substances takes EPA and New Mexico in the right direction toward abating the risk from these substances to the people and resources of our state.

We offer important comments on the Designation of PFOA and PFOS as CERCLA hazardous substances in the attachment for you to evaluate. Thank you for providing the opportunity to comment.

Sincerely,

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James C. Kenney
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Attachments (2)

Cc: Tom Nagle, Special Assistant, Office of Governor Michelle Lujan Grisham
Rebecca Roose, Deputy Cabinet Secretary of Administration, NMED
Bruce Baizel, General Counsel, NMED
Chris Catechis, Acting Director, Resource Protection Division, NMED
John Rhoderick, Acting Director, Water Protection Division, NMED

**Attachment 1:
Comments on EPA's Proposed CERCLA Designation of PFOA and PFOS
November 7, 2022**

Introduction

The EPA has published a proposed rule designating PFOA and PFOS as CERCLA hazardous substances and is accepting comments on the proposed rule. PFAS are a group of man-made chemicals that have been used for many purposes since the 1950s. PFAS have been used in food packaging, cleaning products, stain resistant carpet treatments, nonstick cookware and firefighting foam, among other products. Due to the widespread use of PFAS and the fact that they bioaccumulate, they are found in the bodies of people and animals all over the world, as well as ground and surface water and other natural resources.

The health effects of these emerging contaminants are still being studied, but research indicates that some PFAS affect reproductive health, increase the risk of some cancers, affect childhood development, increase cholesterol levels, affect the immune system, and interfere with the body's hormones.

EPA and others have presented extensive documentation on PFOA and PFOS toxicity, mobility, persistence, and widespread presence in the environment, which result in substantial danger to public health and welfare and to the environment, including animals. The agencies support EPA's science-based proposal to designate PFOA and PFOS, including their salts and structural isomers, as hazardous substances under CERCLA.

EPA needs to continue to move quickly in order to protect communities from these toxic chemicals. This rulemaking and the many other actions underway by EPA are necessary to ensure federal, state, tribal and local governments have the regulatory tools and resources needed to protect human health and the environment. Throughout development and implementation of the final rule for the CERCLA designation, EPA must lead the way for states, tribes and local governments with strong risk communication resources and tools. Federal support for effective risk communication about PFAS contamination and cleanup must address the needs of minority and disadvantaged communities and support environmental justice and equity across all communities impacted by PFAS.

1. EPA should designate additional PFAS as CERCLA hazardous substances.

A number of states, including New Mexico, are using various state authorities to regulate PFAS in the environment. New Mexico has listed three PFAS (PFHxS, PFOS, and PFOA) as toxic pollutants pursuant to its Water Quality Act. See 20.6.2.7(T)(2)(s) and 20.6.2.3103(A)(2) NMAC. Sufficient toxicity data are published, and peer reviewed, to qualify PFBS, PFHxS, and PFNA as hazardous substances under CERCLA. The State of New Mexico recommends EPA concurrently work on a separate rulemaking effort to designate those additional PFAS chemicals as CERCLA hazardous substances.

2. Address and prepare for cost implications for state programs.

When PFOA and PFOS are designated as hazardous substances under CERCLA, grants to States across EPA's portfolio should include additional funding to address known and unknown PFOA and PFOS impacts and associated costs. EPA must meet the potential widespread prevalence of these compounds with appropriate funding increases and not pass these costs down to the states. EPA should revise Superfund

Cooperative Agreements to include PFOA and PFOS in the initial steps of the Superfund process, as well as reassessment of listed Superfund sites (see Comment 5 below). Likewise, EPA should seek increased appropriations for state Brownfields program grants.

When PFOA and PFOS are designated as hazardous substances under CERCLA, these chemicals would meet the definition of regulated substances for underground storage tanks in New Mexico. Any tanks in New Mexico that meet the definition of a regulated underground storage tank that contain PFOA and PFOS would then be covered under New Mexico's Petroleum Storage Tank regulations. This will increase the scope of regulatory activities, which will require additional funding to properly ensure protection of human health and the environment.

3. EPA must retake the lead agency role on CERCLA implementation at DOD facilities.

Pursuant to [Executive Order 12580](#) (EO 12580), as amended, CERCLA abatement and settlement authorities associated with DOD properties are delegated to the Secretary of Defense and must be exercised in concurrence with EPA. 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 DOD in cleaning up its own pollution, including PFAS, under CERCLA, the federal government has effectively side-stepped the historic role of the states in protecting public health and the environment. Without revoking or overturning EO 12580, the proposed listing of PFOA and PFOS as CERCLA hazardous substances will further leave communities unprotected as DOD uses the Executive Order to avoid transparency and coordination with state regulators. This is currently being done in New Mexico by the DOD at Cannon and Holloman Air Force Bases and results in public confusion, ineffective risk communication and wasted taxpayer dollars on mitigation and remedial measures. In conjunction with EPA's efforts to develop the final action on this proposed rule, the agencies urge EPA to engage the White House Council on Environmental Quality and other appropriate officials to rescind or substantively revise EO 12580.

4. EPA should clarify the scope of responsible parties.

Given the ubiquitous nature of PFAS in the environment, including in solid waste and wastewater, the number and nature of responsible parties could be significant depending on implementation of the CERCLA designation. In particular, New Mexico agencies are concerned with how the designation may impact municipalities and agricultural operations.

Wastewater treatment plants (WWTPs) may receive wastewater that contains PFOA, PFOS, or their precursors, from various sources. Traditional WWTPs are not designed to treat and/or remove PFOA or PFOS, and effluent discharged to receiving surface water bodies may contain PFOA and PFOS that poses a threat to human health and aquatic life. PFOA and PFOS also may concentrate in biosolids, which are typically sent to landfills or applied to land as fertilizers or soil amendments. Depending on the final rule provisions and EPA implementation plan, the designation of PFAS as a CERCLA hazardous substance may shift the clean-up and liability costs to municipalities and away from the chemical and manufacturing companies who profited by placing PFAS chemicals into commerce. EPA should use this rulemaking to hold polluters accountable for the release of these chemicals, and not the public through mechanisms such as increased water rates to cover the costs of PFAS treatment for drinking water.

EPA should continue to address PFAS compounds under the Clean Water Act (CWA), including industrial (both direct and indirect) and municipal WWTP discharges and biosolids. EPA outlined their proposed

actions and timelines for addressing PFAS in effluent and biosolids in the EPA PFAS Strategic Roadmap (https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf, released October 18, 2021). The PFAS Strategic Roadmap outlines EPA plans to establish national technology-based regulatory limits for PFAS discharges from industrial sources through the Effluent Limitations Guidelines program, issue guidance and propose monitoring requirements for National Pollutant Discharge Elimination System permits, expected in winter 2022, and finalize the risk assessment for PFOA and PFOS in biosolids, expected by winter 2024. EPA should continue these planned activities under their proposed timeline, concurrent with efforts to address PFAS through RCRA as outlined in EPA's response to New Mexico Governor Michelle Lujan Grisham's petition, referenced in the cover letter above.

Agricultural producers and their lands may receive inputs that contain PFOA, PFOS, or their precursors, from various sources, including groundwater, biosolids and pesticides. Those producers who do not generate PFOS, PFOA, or any other PFAS should be exempt and not defined as a responsible party if PFOA and/or PFOS are found on their premises, whether through the application of contaminated biosolids, pesticides, groundwater, or any other contaminated substance used on agricultural operations.

5. EPA should clarify how they will retrospectively view sites that were clean closed.

The proposed rule does not address implementation of the PFOA/PFOS designation at sites and operable units that were clean closed under CERCLA, other than to state EPA may require remedial actions as a result of releases. However, EPA does have a policy, Office of Solid Waste and Emergency Response [Directive 9200.0-57](#) on Conducting Remedial Actions at Sites Deleted from the National Priorities List (NPL), for subsequent actions at sites that have been deleted from the NPL. In those cases, EPA can require remedial action without rescoring or relisting. If it does so, EPA's action will need to be in line with whatever settlement documents were signed. EPA should clarify if this policy will apply to the new hazardous substance designation for PFAS chemicals, or if a new or revised policy will be developed for retrospectively viewing sites that were clean closed. Such a clarification is important for meaningfully implementing Justice40 efforts as well. The final rule must clearly address this substantive implementation issue, including impacts on state Superfund programs and EPA's timeline and plan for evaluating former NPL sites and operable units.

6. We endorse the [Environmental Council of States \(ECOS\) Resolution 21-1](#) and incorporate the ECOS recommendations into these comments by reference.

ECOS Resolution 21-1, Advancing Collaboration and Coordination on Per- and Polyfluoroalkyl Substances, presents a broad scope of specific requested actions for EPA, DOD, other federal agencies, and the President. These actions address science, regulation, communication, coordination, and flexible financial support. NMED, an ECOS member, stands with ECOS in urging the federal government to act quickly and collaboratively with states to better understand the human health and ecological impacts of PFAS, research and identify treatment technologies to destroy PFAS, and direct the DOD to work with and provide funding to states to address PFAS contamination, even if the contamination has migrated off of a DOD site. The resolution is included with these comments as Attachment 2.

7. The following comments refer to specific sections of the draft rule.

a. Section IV. Legal Authority

The agencies understand that EPA is undertaking this action pursuant to CERCLA 102(a) for the first time and that EPA's interpretation of those requirements is out for comment for the first

time. We agree with EPA's interpretation of the designation criteria and agrees that the evaluation should be based on the potential for harm to human health or the environment rather than on the potential costs that may be incurred by the reporting requirements. However, increased costs incurred by state programs should be accounted for. See Comment 2 above.

b. Section VI. Effect of Designation

EPA determined that the effects would be limited to reporting obligations when there is a release of PFOA or PFOS above the reportable quantity, obligations on the United States when it transfers properties, and an obligation on the Department of Transportation to list and regulate CERCLA designated hazardous substances as hazardous materials. While these impacts are fewer than the requirements for proper handling pursuant to RCRA, the impacted universe is larger for the CERCLA designation than those entities covered by a RCRA listing. Indeed, this applies to any person in charge of a vessel or facility pursuant to CERCLA Section 103. Still, the agencies also note that listing PFOA and PFOS under RCRA would necessarily result in the same CERCLA reporting requirements contemplated by this rulemaking pursuant to Section 101(14).

c. Section VII. Regulatory and Advisory Status at EPA, Other Federal, State and International Agencies

The agencies appreciate that EPA recognizes in the preamble to the proposed rule that ongoing efforts to regulate PFAS include corrective action for certain PFAS disposals pursuant to RCRA. Regulation pursuant to RCRA will provide EPA and the states with the necessary tools to quickly address contamination through corrective action. As EPA's notice states, emerging data indicate the potential for harm to human health and the environment at lower levels than previously thought.

The agencies also appreciate the recitation of actions by other federal agencies to address PFAS contamination. We take particular note of the activities listed for DOD. The preamble reports that DOD is taking actions to test, investigate, and mitigate elevated levels of PFOA and PFOS at or near installations across the military departments. However, based on previous policy statements, it does not appear that DOD's actions extend to all impacts from its history of unregulated PFAS disposal. In particular, we understand DOD's current position is that it will not mitigate impacts to water used for agricultural purposes except when specific conditions are met. See [DOD Guidance for Implementing Section 343 of the National Defense Authorization Act of Fiscal Year 2020, Provision of Water Uncontaminated with \[PFAS\] for Agricultural Purposes](#), August 4, 2020. Designating PFOA and PFOS as hazardous substances pursuant to CERCLA, combined with executive action on EO 12580 (see Comment 3 above) and EPA listing various PFAS as hazardous constituents pursuant to RCRA, should compel DOD to take full responsibility for its legacy PFAS disposals and their impacts on and off base.

Environmental Council of the States Resolution 21-1



Resolution 21-1
Approved December 1, 2021
Via Email Vote

As certified by
Donald Welsh
Executive Director

**ADVANCING COLLABORATION AND COORDINATION
ON PER- AND POLY-FLUOROALKYL SUBSTANCES**

WHEREAS, per- and polyfluoroalkyl substances (PFAS) are a largely unregulated group of synthetic chemicals that, after decades of research, has emerged as a threat to human health and the environment that needs to be addressed through regulatory programs;

WHEREAS, PFAS are used in a wide array of consumer and industrial products and when released into the environment or discarded, do not break down in the environment, and are very hard to remove or destroy with treatment;

WHEREAS, PFAS contamination is both a public health and environmental emergency that threatens communities and their local economies and requires urgent federal and state action;

WHEREAS, at a federal level, the U.S. Environmental Protection Agency (EPA) in 2021 published the *PFAS Strategic Roadmap*; in 2016 developed a combined, non-enforceable Lifetime Health Advisory of 70 parts per trillion (ppt) for PFOA and PFOS and in February 2021 issued its final regulatory determination to initiate rulemaking to establish a National Primary Drinking Water Regulation (i.e., Maximum Contaminant Level [MCL]) for PFOA and PFOS, but most PFAS are not regulated under the Safe Drinking Water Act or regulatory programs;

WHEREAS, PFAS releases impact a variety of environmental media overseen by more than one federal program, and there is a lack of consistent, clear regulatory authority to respond to their release;

WHEREAS, given the broad range and complex, cross-media nature for PFAS; the absence of final standards or enforceable requirements under existing regulatory programs; and the absence of a process to prioritize which PFAS should be subject to further evaluation or regulatory action states are using their own authorities to regulate a number of PFAS in different environmental media, as well as using their own funding to investigate the presence of and remediate PFAS in the environment;

WHEREAS, new PFAS continue to be registered for use and there are still many unknowns and more research on PFAS toxicities, analytical methods, fate and transport, and treatment, among other aspects, is necessary;

WHEREAS, while there are no enforceable federal standards for PFAS, there are a handful of federal and state legislative enactments, Executive Orders, and policies on PFAS, developed both by Congress - such as the proposed PFAS Action Act of 2021 and provisions in the National Defense Authorization Act (NDAA) – as well as by the federal executive branch and under state legislative and executive authorities, that attempt to address PFAS concerns;

WHEREAS, the White House on October 18, 2021 directed eight federal agencies to coordinate PFAS response activities and develop new policy strategies to support research, remediation, and removal of PFAS in communities;)and

WHEREAS, ECOS is working to bridge gaps in PFAS policies, having in 2018 established a PFAS Caucus to share best practices on PFAS and a PFAS Coordinating Committee of state and federal agency leaders to share updates on PFAS activities; in 2020 published a white paper on state processes and considerations for setting state PFAS standards; and will continue to promote efforts undertaken by states, federal agencies, and the Interstate Technology and Regulatory Council (ITRC) with regard to PFAS.

NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES (ECOS):

On an accelerated basis, requests that federal agencies:

- Develop science to better understand human health and ecological impacts of PFAS for regulatory and remedial purposes,
- With the inclusion of stakeholders, promulgate science-based, enforceable federal standards and expand regulatory authority to respond directly to the release of legacy and current generation PFAS under a broad range of federal laws via diverse actions (e.g., standards development, toxicological research, expanded regulatory authority),
- Research and communicate with stakeholders on various technical and cost-effective approaches to destroying and disposing of PFAS and PFAS-containing wastes,
- Provide flexible financial support including for staffing costs to states and local governments facing the threat of PFAS contamination, including activities associated with hazard communications, site assessments, remediation, and water quality,
- Include states in conversations on all federal initiatives on PFAS, including developing enforceable drinking water standards for PFAS (e.g., PFOA and PFOS),
- Prohibit the use of PFAS-based aqueous film-forming foams (AFFF) for testing and training at Federal Aviation Administration sites where PFAS foams are released into the environment,
- Support the development of fluorine-free firefighting foam including testing and certification, and
- Enhance communications and elevate studies to broaden the understanding of the impacts of PFAS from biosolids applications in farming and other impacted communities through increased communications and initiatives to focus on food and consumption safety.

Requests that the EPA urgently:

- Provide states funding and flexibility to use it to address PFAS,
- Implement provisions of the 2021 EPA PFAS Strategic Roadmap,
- Approve sampling and analytical testing methods for PFAS in multiple media,
- Develop national standards or health advisories for PFAS in various environmental media, including drinking water, surface water, biosolids, and wastes,
- Develop regulations for specific PFAS chemicals per the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA),
- List PFAS as a hazardous air pollutant under Clean Air Act Section 112(b)(1) and develop, as applicable, Maximum Available Control Technology standards,
- Using TSCA risk evaluation and risk management authorities, regulate all essential and non-essential uses of PFAS, as authorized by EPA, and release to states by January 1 of each year all available information on toxicity and health impacts from PFAS manufacturers,

- Develop toxicity characterizations for legacy and in-use PFAS and develop data and methodology to address those that currently cannot be characterized;
- Research and identify effective PFAS treatment technologies for the complete destruction of PFAS,
- Develop chemical alternatives assessments for functional uses of PFAS in products and processes through the EPA Safer Choice Program, or other credible third-party research organizations, to ensure the availability of viable, safer chemical or non-chemical alternatives, and
- Request the agency's Council on PFAS coordinate more closely with existing EPA, state, and association workgroups; and to create a subgroup of the Council dedicated as a state-U.S. Department of Defense (DoD)-EPA working group to identify PFAS challenges and to propose recommendations on enhancing PFAS cleanups across the nation at DoD federal facilities and state national guard bases.

Requests that the President of the United States urgently issue a new Executive Order on PFAS, directing the DoD to:

- Fully implement the NDAA, especially pertaining to sections 332 on state cooperative agreements, 343 on providing water not contaminated with PFAS for agricultural purposes, and 7333 on nationwide sampling for PFAS, including through developing and implementing guidance that provides the broadest coverage and protection allowable under the NDAA provisions,
- Create and timely update a webpage for states and the public that lists DoD action items from the NDAA and DoD's progress on meeting those directives, sampling data for all media and potable and monitoring wells, a listing of sites and DoD's progress on cleaning them up, and a posting of state requests for assistance under section 332 of the 2020 NDAA and DoD's response to each state,
- Provide funding to states that are overseeing assessments, investigations, emergency responses, and cleanups at DoD sites, including those of the U.S. Air Force, Navy, Army, and at federal and state national guard through the Defense and State Memorandum of Agreement or other appropriate funding vehicle,
- Communicate proactively and regularly with states by sharing data, including electronically-accessible open-source data associated with site investigation and cleanup, and progress reports and providing meaningful involvement of the states and tribes,
- Comply with applicable, relevant, and appropriate requirements, including states' promulgated standards, relating to drinking water, surface water, groundwater, solid and hazardous waste, soil, sediment, and air,
- Comply with CERCLA and RCRA requirements, even if the contamination has migrated off DoD sites,
- Prioritize sites for funding based on the risk of PFAS exposure to public health and the environment, including exposure from drinking PFAS-contaminated water or source waters, agriculture and livestock, fish and other wildlife,
- Share with states the prioritization methodology, list of prioritized sites and any changes to the prioritization methodology or list of prioritized sites on a no less than quarterly basis,
- Provide a comprehensive report and regular updates summarizing the hazard characteristics, technical performance, and costs associated with alternatives to AFFF used for fire suppression,
- Provide sufficient funding to prioritize and clean up those sites, and
- Provide sufficient funding to advance fate and transport investigations into potential exposure pathways.