



Energy, Minerals and Natural Resources Department

May 23, 2023

Melissa Troutman
Energy & Climate Advocate, WildEarth Guardians
301 N. Guadalupe St.
Ste. 201
Santa Fe, New Mexico 87501

Re: Hydraulic fracturing chemicals and per-and polyfluoroalkyl substances (PFAS)

Dear Ms. Troutman and co-authors,

The undersigned write in response to your letter to Governor Michelle Lujan Grisham, dated April 12, 2023, regarding *Fracking with "forever chemicals"* in New Mexico.

As you know, the widespread use of PFAS and the well-documented scientific literature regarding PFAS toxicity are of significant concern to all states, especially New Mexico. While New Mexicans rely on both groundwater and surface water sources to supply their drinking water, about 87 percent of our public water supply comes from groundwater, which is why this Administration takes the management of threats to precious drinking water sources very seriously, whether from climate change impacts or contaminants, like PFAS.

To that end, on June 23, 2021, the New Mexico Environment Department (NMED) petitioned the U.S. Environmental Protection Agency (EPA) to use its full authority under the Resource Conservation and Recovery Act (RCRA) to address discarded PFAS chemicals by listing these chemicals as a hazardous waste.¹ On October 26, 2021, the U.S. EPA agreed to take actions to include certain discarded PFAS chemicals under RCRA.² According to the U.S. EPA, a formal regulatory proposal is forthcoming later this year. This action is a critical step towards finally addressing PFAS from cradle to grave in New Mexico and across the U.S. NMED and the New Mexico Energy, Minerals and Natural Resources Department (EMNRD) stand ready to work with EPA to implement its proposals consistent with their respective authority.

Further, NMED has worked across the state to periodically conduct PFAS testing at public and private drinking

¹ See <https://www.env.nm.gov/wp-content/uploads/2021/06/2021-06-23-Governor-letter-to-EPA-for-PFAS-petition.pdf>.

² See <https://www.env.nm.gov/wp-content/uploads/2021/10/2021-10-26-Letter-from-EPA-administrator-Michael-Regan-re-PFAS-1.pdf>.

water sources to protect public health while identifying industrial sources of PFAS. To help bolster those efforts, the U.S. EPA announced, on February 13, 2023, the availability of \$2 billion to address emerging contaminants, like PFAS, in drinking water across the country. This investment will be made available to communities as grants through the U.S. EPA's Emerging Contaminants in Small or Disadvantaged Communities Grant Program, and it will promote access to safe and clean water in small, rural, and disadvantaged communities while supporting local economies. New Mexico was allocated \$18.9M for this program for FY23, and we are working with communities to prepare for this funding.

In addition to these proactive measures, the New Mexico Attorney General and NMED are engaged in ongoing litigation against the U.S. Department of Defense to address impacts to public health, the environment, and our economy caused by the U.S. Air Force's long-term PFAS pollution of lands and groundwater in and around Clovis and Alamogordo, New Mexico.

With respect to PFAS and the oil and gas sector, EMNRD's Oil Conservation Division (OCD) regulates the development and construction of oil and gas exploration, production, and disposal wells. Among its many duties under the New Mexico Oil and Gas Act, OCD is required:

- 1) "to prevent crude petroleum oil, natural gas, or water from escaping from strata in which it is found into other strata;" and
- 2) "to regulate the disposition, handling, transport, storage, recycling, treatment and disposal of produced water during, or for reuse in, the exploration, drilling, production, treatment or refinement of oil or gas, including disposal by injection pursuant to authority delegated under the federal Safe Drinking Water Act, in a manner that protects public health, the environment and freshwater resources."

Consistent with this and other statutory direction, OCD's rules, whether for production or disposal wells, are structured to require strata isolation and prevent communication between strata by constituents that are injected into or extracted from those wells. This includes robust requirements regarding well integrity testing and construction. These rules help ensure OCD meets its duty to protect public health, the environment, and freshwater resources. See 19.15.16.9 NMAC (SEALING OF STRATA). There are similar rigorous requirements applicable to the construction of Class II underground injection control (UIC) wells used to dispose of produced water and other oil and gas wastes.

In addition to being legally required, these construction requirements are also practically necessary. If oil and gas wells are not constructed in a manner that isolated formations, extraction would not be possible because of the way geological oil and gas traps are created. A failure to isolate would prevent operations from reaching the targeted formation and could lead to formation damage. As a result of these legal and practical considerations, the potential exposure pathways identified in the report you provided are not possible or would themselves be illegal – e.g., "injection of fracking fluid into wells with cracks in the casing or cement," or the "the injection of fracking fluids directly into groundwater."

Regarding the asks in your letter, we offer the following information:

1. Chemical Disclosures Related to Well Drilling and Completion Activities.

OCD's rules govern the disclosure of chemicals for hydraulic fracturing and directs operators to disclose through FracFocus. Those rules do not require identifying or disclosing hazardous substances or constituents beyond those identified in 29 C.F.R 1910.1200, which does not currently list PFAS constituents. Additionally, those same rules authorize operators to utilize the trade secrets exemption found at 29 C.F.R. 1910.1200(h); further limiting

OCD's ability to identify PFAS use in drilling or completion activities with any specificity beyond the data available in FracFocus. That said, OCD is unaware of any PFAS contamination associated with completion or injection activities. This is despite having worked on remediation activities at various sites across the state.

2. RCRA Subtitle C Exemption for Oil Field Wastes.

In 1988, the U.S. EPA issued a regulatory determination stating that control of oil and gas wastes from exploration and production are exempt from RCRA Subtitle C regulations. The U.S. EPA specifically stated that well completion, treatment, and stimulation fluids are exempt from RCRA Subtitle C regulations. To the extent that PFAS chemicals are used as completion, treatment, and stimulation fluids, they are exempt from RCRA Subtitle C regulations. States with final authorization under section 3006(b) of the RCRA, 42 U.S.C. 6926(b), have a continuing obligation to maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal hazardous waste program. Both NMED and OCD are following EPA's potential regulatory actions with respect to PFAS closely and will both be positioned to take appropriate actions once those changes are announced and implemented by the EPA.

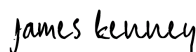
3. Oil and Gas Facilities Siting and Local Engagement & Consultation.

Both NMED and OCD support robust public engagement in operations, including permitting decisions consistent with applicable legal requirements and robust tribal consultation consistent with the State Tribal Collaboration Act (STCA). We would note, however, that neither agency is responsible for the mineral estate as those decisions are subject to the jurisdiction of the mineral owners and it is the decision to lease that ultimately decides where development occurs.

Sincerely,

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Sarah Cottrell Propst
Cabinet Secretary, EMNRD

DocuSigned by:

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James C. Kenney
Cabinet Secretary, NMED