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To the United States Senate

Committee on Environment and Public Works

Regarding a hearing on

"Examining PFAS as a Hazardous Substance"

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PFAS and Federal Laws

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 28 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. 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.

As a group of chemicals, the broad family of chemical compounds commonly referred to as PFAS or forever chemicals are unlike any other class of environmental pollutants for the following reasons:

- These chemicals are found in both consumer goods and industrial applications and are entering our homes, businesses, manufacturing facilities, and environment.

- Once in the environment, these chemicals are persistent – meaning they do not naturally decompose into less harmful chemicals.

- Instead, these chemicals remain in our environment and accumulate in people and wildlife, as well as our land and water.

- And we conclusively know that exposure to these chemicals 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]

With PFAS moving through our economy, additional legislation to protect consumers from PFAS where they live, work, and play is warranted. When it comes to protecting human health and the environment from current and future release of PFAS, Congress has already established laws with broad authority to address this pollution. Some of these statutes include the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA).

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

Commonsense Frameworks for the Clean-Up of Hazardous Substances

CERCLA

Congress enacted CERCLA in response to public health and environmental impacts related to industrial pollution in the 1970s. Yet, one of the largest and most recalcitrant PFAS polluters in the United States in the U.S. Department of Defense (U.S. DOD).

Until Congress restores the sole jurisdiction for the implementation of abatement and settlement authorities to the U.S. Environmental Protection Agency (U.S. EPA), CERCLA action to address PFAS pollution is holding the wrong polluter accountable.

In 1987, Executive Order (EO) 12580 was executed to broadly implement CERCLA across multiple federal agencies. In 1996, EO 13016 further modified EO 12580 to delegate abatement and settlement authorities to the Secretary of Defense with the concurrence of the U.S. EPA Administrator.[2] Effectively, EO 12580 and EE 13016 were codified into federal law at 10 U.S. Code §§ 2700-2711, commonly referred to as the Defense Environmental Restoration Program.

Effectively, the U.S. DOD – one of the largest and most prolific PFAS polluters in the United States – is fully in charge of its own PFAS clean-up. This has resulted in inconsistent implementation across the United States.

Related to CERCLA, New Mexico supports the U.S. EPA's proposed rulemaking to require the reporting of certain PFAS released into the environment that meet or exceed reportable quantities to local emergency responders.

Using discretion to hold the primary polluter accountable in New Mexico, the U.S. EPA's proposed designation of certain PFAS as CERCLA hazardous substances will allow states 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.[3] The designation of such chemicals 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 PFAS.

RCRA

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,

[2] https://www.archives.gov/federal-register/codification/executive-order/12580.html

[3] CERCLA §107(f)(1), CERCLA 107(a)(4(C), under "Liability for NRD and Judicial Review."

stored, or disposed of 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 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 U.S. EPA.[4]

In June 2021, the Governor Michelle Lujan Grisham petitioned the U.S. EPA to list PFAS, either individually or as a class, as a hazardous waste under RCRA.[5] In taking this bold step, New Mexico affirmed its legal authority under RCRA to address PFAS pollution. New Mexico's petition incorporated two earlier petitions submitted to U.S. EPA by reference, which also requested the U.S. EPA to regulate PFAS under RCRA. These petitions included a January 15, 2020 request by the Environmental Law Clinic at UC Berkeley and a September 19, 2019 by the Public Employees for Environmental Responsibility.[6,7]

In October 2021, the U.S. EPA acted upon Governor Michelle Lujan Grisham's petition.[8] The U.S. EPA indicated in the letter that it would initiate a rulemaking process to propose adding PFOA, PFOS, PFBS and GenX (Hexafluoropropylene oxide-dimer acid) as RCRA hazardous constituents under RCRA corrective action. The U.S. EPA also stated that listing as a hazardous constituent was a building block for any future work to regulate PFAS as a RCRA listed hazardous waste.[9]

RCRA presents a common-sense approach to managing discarded PFAS in New Mexico and across all states and territories. Currently, 50 states and territories have been granted authority to implement RCRA (in part or in whole) in lieu of the U.S. EPA. The U.S. EPA ensures national consistency while providing flexibility to states to implement rules. State RCRA programs must be at least as stringent as the federal requirements, but states can adopt more stringent requirements as well. Unlike CERCLA, the U.S. EPA and 50 states and territories implement RCRA – not the U.S. DOD or any other federal agency.

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[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/system/files/documents/2021-10/508compliant_ezd5442262_2021-06-23-governor-letter-to-epa-for-pfas-petition.pdf-incoming-document.pdf

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

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

[8] https://www.epa.gov/system/files/documents/2021-10/oct_2021_response_to_nm_governor_pfas_petition_corrected.pdf

[9] https://www.epa.gov/hw/proposal-list-nine-and-polyfluoroalkyl-compounds-resource-conservation-and-recovery-act#Summary

The United States Sues New Mexico to Stop State Action

In December 2018, the NMED issued a hazardous waste facility permit to Cannon Air Force Base under its RCRA-authorized hazardous waste authorities exercising State authority requiring Cannon Air Force Base to address PFAS contamination. The permit, among other things, imposed RCRA corrective action requirements for PFAS at the facility. Initially, Cannon Air Force Base did not contest the inclusion of PFAS in the permit.

In January 2019 without any warning, the U.S. Department of Justice (U.S. DOJ), on behalf of the U.S. Air Force, challenged the permit in the Federal District Court for the District of New Mexico. In the complaint, the U.S. DOJ took the position that New Mexico's corrective action regulation – which mirrors the federal regulation – does not authorize corrective action for substances that are not listed or characteristic hazardous wastes under the State's regulations, even if they might be hazardous under the broader statutory definition.

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

For the past five years, the U.S. DOJ and the U.S. DOD have appeared more interested in fighting New Mexico than fighting PFAS pollution – attempting to affirm its CERCLA autonomy and conflict of interest as polluter and watchdog. The U.S. DOJ and U.S. DOD are seeking to undermine Congressional intent, the U.S. EPA, and NMED's implementation of RCRA.

Yet the U.S. DOD has been inconsistent in implementing CERCLA and its own Defense Environmental Restoration Program. On July 30, 2020, the U.S. Air Force announced it began investigative field work around the former Reese Air Force Base, near Lubbock, Texas, related to PFAS contamination. The U.S. Air Force 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."[10] Clearly, the U.S. Air Force agrees PFAS contamination is subject to RCRA corrective action in Texas. Contrast this cooperative relationship with Texas to the federal lawsuit that has cost New Mexicans over $8 million in taxpayer dollars spent in defensive litigation and to perform the work that the U.S. DOD has failed to perform in New Mexico. Ironically, the U.S. DOJ has alleged that NMED has acted arbitrarily and capriciously when it issued a permit requiring the U.S. Air Force to clean up its PFAS contamination at Cannon Air Force Base.

[10] https://www.af.mil/News/Article-Display/Article/2295836/air-force-begins-field-work-to-investigate-pfas-at-former-reese-afb/

In June 2021, the Governor Michelle Lujan Grisham petitioned the U.S. EPA to list PFAS, either individually or as a class, as a hazardous waste under RCRA.[11] The Governor's petition illustrated the our commitment to meaningfully protect the 50,000 nearby residents of Curry and Roosevelt Counties from the further migration of PFAS contamination from Cannon Air Force Base through groundwater which serves as the primary source of drinking water for these communities.

New Mexico's petition incorporated two earlier petitions submitted to U.S. EPA by reference, which also requested the U.S. EPA to regulate PFAS under RCRA. The U.S. EPA acted upon the Governor of New Mexico's petition with a letter in October 2021.[12] The U.S. EPA indicated in the letter that it would initiate a rulemaking process to propose adding PFOA, PFOS, PFBS and GenX (Hexafluoropropylene oxide-dimer acid) as RCRA hazardous constituents. A listing as a hazardous constituent is a building block for any future work to regulate PFAS as a RCRA listed hazardous waste.[13]

On February 1, 2024, the U.S. EPA proposed rules related to New Mexico's petition and expect to finalize these rules this year. However, Congress could take decisive action to list PFAS as a hazardous substance or even as hazardous waste. In doing so, Congressional action would immediately provide critical public health and environmental protections while saving the U.S. EPA both time and resources. States and territories could then implement RCRA with the assistance of the U.S. EPA by focusing efforts to address the primary sources of PFAS pollution.

Impacts to our Health, Environment and Economy

PFAS threaten our health, environment, and economy. While the U.S. 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 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.

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[11] https://www.epa.gov/system/files/documents/2021-10/508compliant_ezd5442262_2021-06-23-governor-letter-to-epa-for-pfas-petition.pdf-incoming-document.pdf

[12] https://www.epa.gov/system/files/documents/2021-10/oct_2021_response_to_nm_governor_pfas_petition_corrected.pdf

[13] https://www.epa.gov/hw/proposal-list-nine-and-polyfluoroalkyl-compounds-resource-conservation-and-recovery-act#Summary

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 20,900 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 $3.7 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. In May of 2022, the fifth-generation dairy farmer was forced to euthanize his entire herd of 3,665 cows because of PFAS contamination. NMED provided over $850,000 to the dairy farmer for expenses associated with the proper disposal of PFAS-contaminated hazardous carcasses.

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 and home to North America's largest and most technologically advanced cheddar cheese plants in the world, 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 U.S. 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. In fact, outdoor recreation accounted for 1.9 percent of New Mexico's gross domestic product and created $2.4 billion in added value for New Mexico and created almost 28,000 jobs.

As an example of how PFAS contamination could impact both tourism and human health, 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 U.S. Air Force'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 U.S. Air Force 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.[14,15] In 2023, A University of New Mexico (UNM) study found extremely high levels of PFAS contamination in nearly two dozen bird and mammal species around Lake Holloman. Researchers at UNM have found that the ducks at Holloman Air Force Base were extraordinarily contaminated – to the

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

point where humans should not consume them at all. Lake Holloman is adjacent to White Sands National Park, which is the most visited National Park in New Mexico, welcoming almost 730,000 visitors in 2023.

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. More than twice as many jobs in New Mexico depend on outdoor recreation than on the energy and mining sectors combined. 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.

And PFAS contamination continues to grow in New Mexico with numerous active and closed federal facilities, including the New Mexico National Guard facilities in Rio Rancho, Roswell, and Santa Fe; the Department of Energy facilities in Albuquerque and Los Alamos; and other U.S. DOD facilities across the state.

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.

Conclusion

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

1. Modify CERCLA and the Defense Environmental Restoration Program so the U.S. EPA is solely responsible for the implementation of CERCLA.

2. Take immediate action to list discarded PFAS as a RCRA hazardous waste.

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