STATE OF NEW MEXICO
COUNTY OF SANTE FE
FIRST JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO *ex rel.* RAÚL TORREZ, ATTORNEY GENERAL, and the NEW MEXICO ENVIRONMENT DEPARTMENT, *Plaintiffs*, v. UNITED STATES OF AMERICA, and the UNITED STATES DEPARTMENT OF THE AIR FORCE, *Defendants*.	Case No. D-101-CV-2025-01594

STATE OF NEW MEXICO'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, the State of New Mexico, by and through Attorney General Raúl Torrez ("New Mexico"), and the New Mexico Environment Department ("NMED") (collectively, "Plaintiffs" or "the State"), file this Motion for a Preliminary Injunction to require Defendants to comply with the New Mexico Hazardous Waste Act, NMSA 1978, § 74-4-1 through -14 ("HWA"), and with the valid and enforceable permit issued to Defendants under said Act.

INTRODUCTION

Cannon is contaminated with per- and polyfluoroalkyl substances ("PFAS"), a class of toxic chemicals that are known colloquially as "forever chemicals." Compl. ¶ 72. PFAS contamination at Cannon is severe: in addition to contaminated areas on-site, the underlying groundwater (the Ogallala aquifer, the sole drinking water source for the region) is contaminated at alarming levels. Groundwater contamination has spread, and continues to spread, off-site in a

groundwater plume that stretches over three miles east-southeast of Cannon. Compl. ¶¶ 72-73.[1]

NMED has issued Cannon a permit that requires the cleanup of PFAS, both on- and off-site, under State oversight ("the Permit"). Compl. ¶¶ 30-39. Just this year, the New Mexico legislature clarified and reinforced NMED's authority over AFFF, PFAS, and sites contaminated with those substances, by amending the HWA's definition of "hazardous waste" to expressly include "discarded [AFFF] containing intentionally added [PFAS]."[2]

Defendants continuously refuse to comply with the Permit and the HWA, forcing the State to file this action. Compl. ¶¶ 78-132. Most recently, Defendants have refused NMED access to perform sampling of PFAS contamination at Cannon, part of the State's efforts to determine the nature and extent of PFAS releases, and a necessary step in the State's remediation. **Exhibit A** (Affidavit of Neil Dolly). As detailed herein, Defendants are unequivocally required to grant such access not only under the Permit, but under the express terms of the HWA itself.

The State seeks immediate injunctive relief requiring Defendants to comply with the Permit and HWA, by taking any and all actions necessary to: (1) grant NMED access to Cannon to perform sampling of PFAS contamination; (2) prepare an Investigation Work Plan, pursuant to the Permit and subject to NMED approval; and (3) perform any and all other actions required by the Permit. The State, its citizens, and the environment cannot afford to wait for a trial on the merits. PFAS contamination at and around Cannon poses an imminent threat to human health and the environment, and the State must take immediate steps to investigate and remediate it.

As detailed herein, this Motion satisfies all the elements necessary and sufficient for this Court to grant a preliminary injunction:

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[1] Citing Defendants' findings to that effect, in addition to those of NMED.

[2] H.B. 140, 57th Leg., 1st Sess. (N.M. 2025), https://www.nmlegis.gov/Sessions/25%20Regular/final/HB0140.pdf.

1. *The State is likely to prevail on the merits*. Defendants cannot reasonably deny that they have violated the Permit and the HWA (and indeed have admitted as much).

2. *A preliminary injunction is necessary to prevent irreparable injury*. The injury to the State's sovereignty and regulatory authority cannot be measured by any certain pecuniary standard. Moreover, threats to the environment are, by their nature, irreparable. Finally, the harms and conduct here are of a continuous nature, and can be prevented only through injunctive relief.

3. *The threatened injury outweighs any damage the injunction might cause Defendants*. The State's requested injunctive relief would merely require Defendants to comply with the law, and any costs incurred by Defendants in doing so are self-inflicted. Meanwhile, the threatened injury to the State, its environment, and public health is immeasurable.

4. *Issuing the injunction is not adverse to the public interest*. Indeed, the State of New Mexico has expressed a strong public policy in favor of PFAS regulation and cleanup under State oversight, as reflected in this year's amendment to the HWA.

ARGUMENT

To obtain a preliminary injunction, a plaintiff must show that (1) there is a substantial likelihood that it will prevail on the merits; (2) it will suffer irreparable injury unless the injunction is granted; (3) the threatened injury outweighs any damage the injunction might cause; and (4) issuance of the injunction will not be adverse to the public's interest. *LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314. As detailed below, all four elements are satisfied here.[3]

[3] Note that in ruling on preliminary injunctions, federal courts have held that "[i]n cases where the governing statute specifically authorizes injunctive relief—a 'statutory injunction'—the statute controls." *United States v. High Plains Livestock, LLC*, 148 F. Supp. 3d 1185, 1202 (D.N.M. 2015) (citing *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1098 (11th Cir. 2004)). Here, the HWA expressly authorizes the relief sought by this Motion for violations of the HWA or HWA permits. NMSA 1978, § 74-4-10(A) (authorizing NMED to "commence a civil action in district court for appropriate relief, including *a temporary or permanent injunction*") (emphasis added).

Moreover, federal courts have found that "[a]s irreparable harm is presumed in a statutory enforcement action [like this one], the district court need only find some chance of probable success on the merits." *High Plains*, 148 F. Supp. at 1202 (citing *FTC v. Skybiz.com, Inc.*, No. 01-CV-396-K(E), 2001 WL 1673645, at *8 (N.D. Okla. Aug. 31, 2001), *aff'd*, 57 F. App'x 374 (10th Cir. 2003). While New Mexico courts may look to federal jurisprudence in deciding motions for preliminary injunction, s*ee, e.g.*, *LaBalbo*, 1993-NMCA-010, ¶ 11, the State will address all four elements under *LaBalbo* out of an abundance of caution.

I. The State Will Prevail on the Merits

The State's Complaint alleges that Defendants have violated and continue to violate the Permit and the HWA by failing to take corrective action (*i.e.* investigate and clean up)[4] under NMED oversight to address PFAS contamination at Cannon. *E.g.*, Compl. ¶¶ 2, 5-6, 98-127.[5] Such actions are expressly required by the Permit, which defines "[h]azardous waste, for the purposes of corrective action" to expressly include PFAS, and requires Defendants to take corrective action for any releases. Compl. ¶¶ 36, 38, 98 (citing to the Permit, Compl. Ex. A).

There can be little doubt as to the veracity of these claims. Defendants have not been shy in stating their intention not to comply with the Permit. *See*, *e.g.*, **Exhibit B** (Sept. 10, 2021 Letter); *see also* Compl. ¶¶ 89, 125-26, 129-32. Indeed, Defendants' employees have openly admitted, under oath, that they are not following the Permit: "[W]e do not use the [Permit] to investigate and . . . perform cleanup actions regarding [PFAS]"; "I can't say that we follow the entire [Permit]." **Exhibit C** (deposition excerpts from other litigation, highlighted).[6]

Matters are equally clear with regards to NMED's right to access Cannon for purposes of inspection and sampling of PFAS contamination at Cannon. The HWA provides that:

> Any person who generates, stores, treats, transports, disposes of or otherwise handles or has handled hazardous wastes ***shall . . . permit*** the secretary or his authorized representatives:
>
> (a) to enter at reasonable times any establishment or other place maintained by any person where hazardous wastes are or have been generated, stored,

[4] NMSA 1978, § 74-4-3(c) ("'[C]orrective action' means an action . . . to investigate, minimize, eliminate or clean up a release.").

[5] Additional violations of the Permit are also alleged.

[6] This deposition testimony was taken in other litigation of PFAS contamination at Cannon. *See* Compl. ¶¶ 23-28. Note that the deponents (Chris Gierke and Sheen Kottkamp, both Air Force employees) reference "RCRA" and a "RCRA permit," but mean the Permit, which was issued under the HWA. The HWA is a state analog to the federal Resource Conservation and Recovery Act ("RCRA") and operates in lieu of RCRA in New Mexico. *See* 42 U.S.C. § 6926; 50 Fed. Reg. 1,515 (Jan. 11, 1985); 60 Fed. Reg. 53,708 (Oct. 17, 1995). Thus, the Permit is commonly referred to as a RCRA permit, despite the fact that it was issued under the HWA.

> treated, disposed of or transported from or where a storage tank is located; and
>
> (b) to inspect and obtain samples from any person of any hazardous wastes and samples of any containers or labeling for the wastes.

NMSA 1978, § 74-4-4.3(A) (emphasis added).[7] Likewise, the Permit requires Defendants to permit NMED sampling of "any substances . . . at any location". Compl. Ex. A (the Permit) at Section 1.13.8. Such access has been denied. **Exhibit A.** And again, Defendants do not deny this.[8]

Thus, there can be little doubt that the State will prevail on the merits. The State currently understands that Defendants' position is to contest the Permit's validity with respect to PFAS, having filed an appeal on that issue. *See* Compl. ¶¶ 18-21. However, Defendants' position in other ongoing litigation does not excuse noncompliance with the Permit and the HWA. Even assuming Defendants' arguments have merit (they do not), they would first need to be adopted by a court before Defendants are excused from any obligations created by the Permit and/or the HWA. It should go without saying that laws (and permits) remain in effect and enforceable until they are successfully challenged.[9] Indeed, Defendants have admitted in other litigation that "the [P]ermit remains in effect" pending their ongoing appeal.[10] Thus, this Motion merely seeks to maintain the status quo: that Defendants are required to comply with the Permit and HWA. *See Insure N.M.,*

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[7] *See also* H.B. 140, 57th Leg., 1st Sess. (N.M. 2025) (defining "hazardous waste" to include "discarded [AFFF] containing intentionally added [PFAS]") (effective June 20, 2025), https://www.nmlegis.gov/Sessions/25%20Regular/final/HB0140.pdf.

[8] *News Release: Cannon Air Force Base Hosts New Mexico Environment Department for Hazardous Waste Inspection*, CANNON.AF.MIL, https://www.cannon.af.mil/News/Article/4250001/news-release-cannon-air-force-base-hosts-new-mexico-environment-department-for/ ("While NMED sought to collect samples for [PFAS], the Air Force could not authorize PFAS sampling due to ongoing litigation."); *see also* **Exhibit A**.

[9] Defendants have not been successful in their efforts to vacate the Permit's requirements for PFAS. *See* Compl. ¶¶ 18-21. Nor did Defendants request a stay of the Permit or any part of it, either administratively or judicially, pending their ongoing appeal. *Id.* ¶ 22..

[10] Opp'n to Mtn. for Prelim. Inj. and Cross Mtn. to Dismiss, *New Mexico v. United States*, No. 2:19-CV-00178-MV-JFR (D.N.M.) (filed Sept. 7, 2019) at 9 n.3.

LLC v. McGonigle, 2000-NMCA-018, ¶ 9, 128 N.M. 611 ("The object of the preliminary injunction is to preserve the status quo pending the litigation of the merits.").

II. Irreparable Injury

An irreparable injury is one that "cannot be compensated or for which compensation cannot be measured by any certain pecuniary standard." *State v. City of Sunland Park*, 2000-NMCA-044, ¶ 19, 129 N.M. 151 (citation omitted).[11] Here, Defendants' willful violations of the Permit and HWA are an affront and injury to the State's sovereignty and regulatory authority (and a direct contradiction of the will of the legislature) which cannot be compensated for at law, nor can those violations be quantified or measured by any certain pecuniary standard.[12] Defendants' violations also endanger the State's environment by preventing the State from ensuring that PFAS contamination at Cannon is adequately investigated and cleaned up. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e*., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *accord Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1086 (10th Cir. 2004) ("Environmental harm is, by its nature, generally irreparable."); *Dine Citizens Against Ruining Our Environment v. Haaland*, 59 F.4th 1016, 1050 (10th Cir. 2023).

Finally, the New Mexico Supreme Court has held that "[w]here the imminent harm or conduct is or will be of a continuous nature, the constant recurrence of which renders a remedy at

[11] Federal courts have also held that irreparable injury is presumed in an enforcement action like this one. *High Plains,* 148 F. Supp. at 1202. Rather, "[w]hen the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown." *Atchison, T. & S. F. Ry. Co. v. Lennen*, 640 F.2d 255, 259 (10th Cir. 1981).

[12] While Defendants can and do face statutory and administrative penalties for their violations of the Permit and the HWA, such penalties are punitive rather than compensatory.

law inadequate, except by a multiplicity of suits, then the injury is irreparable at law and relief by injunction is therefore appropriate." *Winrock Enters. v. House of Fabrics of N.M., Inc.*, 1978-NMSC-038, ¶ 16, 91 N.M. 661. Here, it is clear that Defendants' conduct and the harm to the State will continually recur absent this Court's intervention. Indeed, even in the short time since the filing of the Complaint, Defendants have *again* violated the Permit and the HWA (by denying access to NMED for inspection and sampling). **Exhibit A.** The State has repeatedly sought to obtain Defendants' compliance administratively, only to be refused at every turn. *See, e.g.*, **Exhibit D**; *see also* Compl. ¶¶ 89, 125-27, 129-31. Nor has the State been able to obtain compliance in federal court, which found after years of litigation that it (but not state courts) lacks jurisdiction over Plaintiffs' injunctive claims. *See id.* ¶¶ 23-28. Thus, the State is forced to bring this Motion: Defendants' willful violation of the Permit and the HWA cannot be allowed to continue.

III. The Balance of Injuries

The threatened injury to the State outweighs any damage the requested injunction might cause Defendants. As discussed above, the threatened injury to the State is immeasurable. That is true in two senses of the word: the harm is not measurable by a pecuniary standard, but it is also undoubtedly great. Defendants' conduct injures the State's sovereignty and regulatory authority, and stands in direct contradiction to the will of the legislature. But the harm to New Mexico's environment is no less significant: PFAS contamination at Cannon is severe, and spreading every day. This contamination threatens the health and welfare of the public, and of New Mexico's wildlife and ecosystems. As the United States Supreme Court has noted, where irreparable injury to the environment is sufficiently likely (as here), "the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco*, 480 U.S. at 545.

On the other side of the scale, granting the State's Motion will not cause damage to the

Defendants, as the relief requested by the State would merely require them to comply with the law. With respect to granting NMED access to perform an inspection and sampling, Defendants will not even suffer monetary harm. While requiring Defendants to submit to the Permit's corrective action process under NMED oversight may require Defendants to incur costs, "financial concerns alone generally do not outweigh environmental harm." *Mineta*, 373 F.3d at 1086. Moreover, any monetary harms to Defendant are self-inflicted. *See Mineta*, 373 F.3d at 1086 ("We have previously accorded less weight to financial harms relative to environmental harms when the financial harms are self-inflicted.") (internal quotation and citation omitted). First, NMED has warned Defendants that investigation of PFAS contamination without approval is "performed at risk," because NMED would likely "require different or additional work . . . includ[ing] repeating work that does not meet the technical standards described in [the Permit]." **Exhibit D** (December 15, 2021 Notice of Disapproval).[13] And second, any costs for the investigation and cleanup are ultimately caused by Defendants' releases of PFAS into the environment at Cannon.

Finally, the Court should also take into account the overarching purpose of the HWA (and the Permit) in deciding this Motion. "The purpose of the [HWA] is to help ensure the maintenance of the quality of the state's environment." NMSA 1978, § 74-4-2. Federal courts have noted that, in ruling on preliminary injunctions, statutes with such purposes place a "thumb on the scale in favor of remediation." *Me. People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 297 (1st Cir. 2006).

IV. The Public Interest

The well-recognized and constitutionally based interest of protecting the public health and the environment weighs heavily in favor of a preliminary injunction in this case. Article XX,

[13] For these same reasons, good cause exists to waive the requirement that the State provide security for costs or damages as may be incurred by Defendants should the Court grant this Motion. *See* Rule 1-066(C) NMRA.

Section 21 of the New Mexico Constitution provides that "protection of the State's beautiful and healthful environment is . . . declared to be of fundamental interest to the public interest, health, safety and the general welfare." Indeed, the New Mexico legislature just this year affirmed the public's interest in environmental protection with respect to PFAS, and specifically required their cleanup, under NMED oversight, pursuant to the HWA. *See* H.B. 140, 57th Leg., 1st Sess. (N.M. 2025), https://www.nmlegis.gov/Sessions/25%20Regular/final/HB0140.pdf.

In comparison, allowing Defendants to avoid the State's oversight over the cleanup of PFAS contamination and unilaterally control the scope and timing of cleaning up contamination which they themselves caused serves no public interest. Accordingly, the Court should promote the public interest and issue the State's requested preliminary injunction.

CONCLUSION

The State respectfully requests the Court grant this Motion for Preliminary Injunctive Relief and require Defendants to take any and all actions necessary to:

1. Grant NMED immediate access to Cannon to perform an inspection and sampling of PFAS contamination;
2. Prepare a detailed Investigation Work Plan pursuant to the Permit, and submit it to NMED for approval within 90 days; and
3. Perform any and all other actions required by the Permit, both now and in the future.

Dated: July 23, 2025

Respectfully submitted:

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