

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

|                                       |   |                      |
|---------------------------------------|---|----------------------|
| _____                                 | ) |                      |
| UNITED STATES OF AMERICA,             | ) |                      |
|                                       | ) |                      |
| Plaintiff,                            | ) |                      |
|                                       | ) |                      |
| v.                                    | ) | Case No.: 1-19-cv-46 |
|                                       | ) |                      |
| NEW MEXICO ENVIRONMENT                | ) |                      |
| DEPARTMENT, and JAMES KENNEY,         | ) |                      |
| Secretary (in his official capacity), | ) |                      |
|                                       | ) |                      |
| Defendants.                           | ) |                      |
| _____                                 | ) |                      |

**COMPLAINT**

The United States of America, on behalf of the United States Department of the Air Force, alleges as follows:

**NATURE OF THE ACTION**

1. This is a civil action for declaratory and injunctive relief by the United States of America, on behalf of the Air Force, challenging the final action by the New Mexico Environment Department ("NMED"), on behalf of the State of New Mexico, in issuing a permit to Cannon Air Force Base under the New Mexico Hazardous Waste Act ("HWA"), NMSA §§ 74-4-1-14, on December 19, 2018 (the "Permit") (Exhibit A);

2. The Permit replaces the Air Force's existing HWA permit, for Cannon Air Force Base.

3. The United States challenges the Permit's definition of "hazardous waste" for the purpose of corrective action in Permit Section 1.12 which is inconsistent with both the federal Resource Conservation and Recovery Act ("RCRA") and the HWA and is barred by sovereign immunity.

4. The United States seeks (1) a declaration that the challenged language in Permit Section 1.12 is contrary to the HWA, RCRA, and the relevant state and federal implementing

regulations and is arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the record, or otherwise not in accordance with law and (2) all appropriate injunctive relief.

### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345.

6. Venue is proper in the United States District Court for the District of New Mexico pursuant to 28 U.S.C. § 1391(b) because NMED conducts business in this district, the claims in this civil action arose in this district and the subject property is located in this district.

### **PARTIES**

7. The Plaintiff in this action is the United States of America. The United States, acting through the Air Force, is the owner of the Cannon Air Force Base, which is located in Curry County, New Mexico and is the subject of the Permit.

8. Authority to bring this suit is vested in the United States Department of Justice by 28 U.S.C. §§ 516 and 519.

9. Defendant NMED is the state agency that regulates hazardous waste in the State of New Mexico under the HWA, N.M. Stat. Ann. 1978, § 74-4-1 *et seq.*

### **STATUTORY AND REGULATORY BACKGROUND**

10. RCRA gives EPA authority over the management of hazardous waste. RCRA defines hazardous waste as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics" may pose a serious risk to human health or the environment if not properly managed. 42 U.S.C. § 6903(5).

11. Under section 3006 of RCRA, EPA may authorize states to administer and enforce their own state hazardous waste program in lieu of the federal program of Subchapter III of RCRA. 42 U.S.C. § 6926.

12. Consistent with RCRA section 3006, EPA approved the State of New Mexico's hazardous waste program, set forth in the HWA, and authorized the State to operate its program

in lieu of the federal program under Subchapter III of RCRA. EPA also authorized the State to issue and enforce permits for the storage, treatment, or disposal of hazardous waste. NMED therefore can issue hazardous waste permits to hazardous waste management facilities within the State of New Mexico.

13. The HWA generally requires that New Mexico promulgate hazardous waste regulations that are "equivalent to and no more stringent than federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended." N.M. Stat. Ann. 1978, § 74-4-4.A.

14. New Mexico has adopted the same definition of hazardous waste as in RCRA. Compare N.M. Stat. Ann. 1978 § 74-4-3(K) *with* 42 U.S.C. § 6903(5).

15. Section 6001(a) of RCRA contains a limited waiver of the United States' sovereign immunity as to the application of RCRA and state hazardous waste laws such as the HWA to federal facilities like Cannon Air Force Base. 42 U.S.C. § 6961(a).

16. The Permit constitutes, in whole or in part, a "final administrative action" subject to judicial review pursuant to section 74-4-14.A of the HWA. N.M. Stat. Ann. 1978, § 74-4-14.A. Under that statute, the action shall be set aside if it is: "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law." Id. § 74-4-14.C.

### **FACTS**

17. The United States, through the Air Force, owns Cannon Air Force Base.

18. The challenged Permit replaces the existing permit, which, in most relevant part, addresses corrective action at Cannon.

19. The United States anticipates filing shortly a notice of appeal challenging the Permit in the New Mexico Court of Appeals, as a protective measure only. The United States further intends to move to stay that proceeding pending resolution of this case.

**COUNT I --Permit Section 1.12 – Definition of Hazardous Waste**

20. The allegations in Paragraphs 1-19 are incorporated herein.
21. The definition of “hazardous waste” for the purposes of corrective action in Permit Section 1.12 is inconsistent with the HWA and its implementing regulations.
22. The definition of “hazardous waste” for the purposes of corrective action in Permit Section 1.12 exceeds the scope of RCRA’s waiver of sovereign immunity, 42 U.S.C. § 6961(a), and so cannot be used in an HWA permit for a federal agency.

**PRAYER FOR RELIEF**

WHEREFORE, the United States of America prays that this Court order the following relief:

- (1) Declare that the language in Permit Section 1.12 defining “hazardous waste” for the purpose of corrective action is contrary to the HWA, RCRA, and the relevant implementing regulations under each statute.
- (2) Set aside the unlawful provisions of the Permit; and
- (3) Grant such other relief as may be just and proper.

Respectfully submitted,

*/s/ Eileen T. McDonough*  
United States Department of Justice  
Environmental Defense Section  
P.O. Box 7611  
Washington, D.C. 20044  
eileen.mcdonough@usdoj.gov  
(202) 514-3126