



July 23, 2021

Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, District of Columbia 20460-0001

Dear Administrator Regan,

I write to you in response to the U.S. Environmental Protection Agency's (EPA) July 1, 2021 memorandum titled, Strengthening Environmental Justice Through Cleanup Enforcement Actions. I ask that you reverse EPA's 2019 decision not to provide direct and confidential aid to the State of New Mexico in support of our imminent and substantial endangerment enforcement action against the U.S. Air Force.

The July 1, 2021 memorandum, issued by Larry Starfield, Acting Assistant Administrator of the Office of Enforcement and Compliance Assurance (OECA), to the Office of Site Remediation Enforcement Managers, Regional Superfund Division Directors and Deputies, and Regional Counsels and Deputies builds upon your April 7, 2021 directive for EPA offices to "strengthen enforcement of violations of cornerstone environmental statutes and civil rights laws in communities overburdened by pollution." Both the July 1, 2021 memorandum and April 7, 2021 directive set the stage for robust EPA support of New Mexico's efforts to protect environmental justice communities from the injustice of pollution.

Per- and polyfluoroalkyl substances (PFAS) contamination continues to threaten the minority-majority communities around the Cannon Air Force Base (CAFB) and Holloman Air Force Base (HAFB). The historic use of aqueous film forming foams (AFFF) for firefighting training at these bases contaminated groundwater resources at and around the bases. This contamination threatens public and private water supplies, depreciated residential and commercial property values, and continues to threaten New Mexico's agricultural economy which directly impacts the security of our Country's food supply.

The EPA has the authority to compel action at these sites pursuant to Section 6001(b) of the Resource Conservation and Recovery Act (RCRA). An EPA action at CAFB and HAFB could take many forms, from supporting New Mexico in its litigation to a variety of opportunities to compel interim relief to address these acute threats. In particular and as supported by OECA's July 1 memo, the EPA could:

1. Affirm state authority by confirming that states can and should utilize RCRA 7002 to protect the public health and the environment of all communities – including environmental justice

communities – from PFAS contamination originating from federal facilities;

2. Direct OECA to enter into a confidentiality agreement with the New Mexico Environment Department to support confidential settlement negotiations the U.S. Air Force that could result in a timely and comprehensive cleanup settlement for these sites;
3. Direct EPA program offices to directly engage with impacted frontline communities in person to communicate risk and document any harm to public health and the environment from PFAS contamination caused by the U.S. Air Force’s discharges at CAFB and HAFB;
4. Direct the EPA’s Office of Research and Development (ORD) to determine the human health impacts of PFAS in the frontline communities around CAFB and HAFB;
5. Direct EPA’s ORD to evaluate the design and efficacy of the USAF’s proposed pilot study at CAFB scheduled to begin in April 2023 and designed to prevent further migration of PFAS from the base causing further imminent and substantial endangerment;
6. Call on the White House, Department of Justice and the Department of Defense to withdraw the United States’ lawsuit challenging the State of New Mexico’s authority to require PFAS cleanup under a RCRA permit and agree to a cooperative clean-up plan that will be completed at an accelerated pace to ensure protection of the communities surrounding the bases from the harmful effects of PFAS contamination; and
7. Act swiftly on Governor Michelle Lujan Grisham’s June 23, 2021 petition by listing PFAS as a class of hazardous waste pursuant to RCRA.

By taking some, or all, of these steps, the EPA could also fulfil the then-empty pledge made by Administrator Wheeler on April 3, 2019, to Senator Tom Udall and the Senate Appropriations Committee to provide legal and technical assistance to New Mexico at these sites.¹

Unfortunately, since Administrator Wheeler made this promise, the EPA has failed to honor this pledge, despite our notification to EPA’s Washington and Region 6 offices on August 6, 2019 of this refusal to provide the publicly promised meaningful assistance to New Mexico, with the agency using the rationale of the “unitary and uniform execution of law.” However, as the July 1, 2021 OECA memo emphasizes, EPA does have the authority to take action in this instance, similar to the authority discussed in EPA Assessment of Penalties Against Federal Agencies for Violation of Underground Storage Tank Requirements of the Resource Conservation and Recovery Act.

By using this existing authority or, at the very least, acknowledging that PFAS is a hazardous waste, the EPA could quickly put its new focus on environmental justice into action by helping these communities and fulfilling the promises made to our state. Such action would allow New Mexico to

¹ <https://www.appropriations.senate.gov/hearings/review-of-the-fy2020-budget-request-for-the-environmental-protection-agency> (discussion begins at 1:59:11) and <https://www.epa.gov/sites/production/files/2015-01/documents/ffustpenalty.pdf>

shift our focus and limited resources to oversight of effective remediation rather than litigation with DOD. With such action, EPA could also further rebuild and strengthen trust with communities who have long supported and welcomed their federal and military neighbors, though at a heavy price.

I look forward to your response and insights as to how the EPA and New Mexico can work together to address the ongoing PFAS contamination at these facilities consistent with the Biden Administration's commitment to consciously and affirmatively pursue environmental justice to confront environmental challenges with state partners and provide meaningful help to these communities. My hope is that our cooperation can serve as a model for the rest of the country in putting our shared ideals into action.

Sincerely,

James C. Kenney
Cabinet Secretary

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