

New Mexico Adds Superfund Claims To PFAS Suit Against US

By Juan-Carlos Rodriguez

Law360 (July 17, 2024, 2:43 PM EDT) -- New Mexico is expanding its lawsuit against the federal government over costs related to cleaning up forever chemicals near military sites by utilizing a new rule listing the substances as hazardous under the Superfund law.

The U.S. Environmental Protection Agency in May designated two per- and polyfluoroalkyl substances, or PFAS, as hazardous under the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA. New Mexico is suing the federal government, the Army and the Air Force over contamination near bases and **amended its complaint** last week to include new CERCLA claims based on the EPA's rule.

The Land of Enchantment's lawsuit, which is part of sprawling multidistrict litigation in South Carolina related to contamination from aqueous film-forming foam, or AFFF, stems from pollution it says has occurred in and around Cannon Air Force Base, Holloman Air Force Base, Kirtland Air Force Base, White Sands Missile Range and Fort Wingate.

"We applaud the EPA's listing of certain PFAS, or 'forever chemicals,' as hazardous substances under the Superfund statute," New Mexico Attorney General Raúl Torrez said in a statement last week. "This enables us to pursue monetary damages and costs at federal facilities, as stated in our amended complaint."

The **EPA's rule** designated perfluorooctanoic acid, or PFOA, and perfluorooctanesulfonic acid, or PFOS, as CERCLA hazardous substances, both of which have been used as ingredients in the firefighting foam. The foam was used at the military bases and poses risks to the surrounding communities, according to New Mexico's complaint.

PFOA and PFOS are two of the most widely- and longest-used chemicals in the PFAS family, which consists of thousands of individual substances. The EPA has said there's significant evidence that both chemicals may substantially endanger human health and the environment, and have been linked to problems including cancers, impacts to the liver and heart, and immune and developmental damage to infants and children.

In addition to adding new CERCLA claims to its lawsuit, New Mexico named the Army as a defendant and expanded the list of military installations for which it is seeking cleanup funds.

"The state has suffered a direct injury as a result of the continued presence of PFAS in the resources of the state and the United States' refusal to take timely action to clean up the contamination or mitigate the damages associated with the same," the state said in its amended complaint.

New Mexico said that aside from endangering human health and the environment, its injuries include damage to its natural resources, including to the soil, sediments, groundwater and surface water aquifers, as well as harm and the threat of harm to its wildlife.

The state had already asserted claims under the New Mexico Hazardous Waste Act and the Resource Conservation and Recovery Act.

In February, the U.S. Department of Defense **asked** the South Carolina federal judge overseeing the MDL to free it from the litigation, saying it is already conducting a large-scale remediation effort aimed at more than 400 contaminated facilities nationwide.

It's unclear how the EPA's new rule and New Mexico's legal claims could affect the department's legal position.

The U.S. Department of Justice declined to comment Wednesday.

New Mexico is represented by Raúl Torrez and William G. Grantham of the New Mexico Department of Justice, Zachary Ogaz of the New Mexico Environment Department and Allan Kanner, David Ivy-Taylor and Annemieke Tennis of Kanner & Whiteley LLC.

The federal government is represented by Todd Kim and Andrew D. Knudsen of the U.S. Department of Justice Environment and Natural Resources Division and Christina M. Falk, David J. Hammack, Haroon Anwar, Timothy B. Walthall, Michele S. Greif and Marianne F. Kies of the U.S. Department of Justice Civil Division.

The case is State of New Mexico et al. v. The United States et al., number 2:20-cv-02115, in the U.S. District Court for the District of South Carolina. The MDL is In re: Aqueous Film-Forming Foams Products Liability Litigation, number 2:18-mn-02873, in the U.S. District Court for the District of South Carolina.

--Editing by Patrick Reagan.

Update: This article has been updated to reflect current counsel information and to include a response from the U.S. Department of Justice.