

Bolstered By New Law, New Mexico Sues Air Force Over PFAS Releases

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New Mexico is again suing the Air Force in state court over its alleged failure to control PFAS releases and mitigate off-base contamination at Cannon Air Force Base (AFB) under its hazardous waste permit, bolstered by a new state law that regulates firefighting foam containing PFAS as “hazardous waste.”

[The June 23 suit \[insideepa.com\]](#) brings the state’s long-running fight with the Air Force over its per- and polyfluoroalkyl (PFAS) releases and cleanup demands at Cannon AFB full-circle, after originally filing in state court several years ago for alleged violations of the military service’s state-administered Resource Conservation & Recovery Act (RCRA) permit.

The Air Force subsequently moved that litigation to federal court, while separately suing the state over the permit requirements. The Air Force’s challenge to the permit is currently pending in the U.S. Court of Appeals for the 10th Circuit. The new litigation, *State of New Mexico v. United States, et al.*, was filed in state court, in the First Judicial District Court in Santa Fe.

It relies on both existing and expanded authority under the state’s new law, known as HB 140, the New Mexico Environment Department (NMED) says in a June 23 press release. “After years of contesting responsibility, today’s lawsuit puts every one of the Air Force’s excuses to rest,” NMED Secretary James Kenney said in the release. “The Air Force has spent years contesting the Environment Department’s authority as opposed to any meaningful cleanup of the toxic PFAS contamination in local drinking water sources that serve both residents and dairy farmers.”

Kenney filed the suit just days after the new state law went into effect. [HB 140 \[insideepa.com\]](#), signed into law by Gov. Michelle Lujan Grisham (D) April 8, went into effect June 20. The new law defines discarded aqueous film-forming foam (AFFF) containing intentionally added PFAS as “hazardous waste.”

The law, backed by NMED, was expected to bolster the state’s efforts to exercise its federally delegated and state authorities to require cleanup of Cannon AFB, near Clovis, NM, where AFFF from the base has caused off-base PFAS contamination of groundwater at 6,500 times federal drinking water limits, leading to significant impacts to local dairy farms, according to NMED.

The state has argued since 2019 -- when it filed an initial suit in state court under the state Hazardous Waste Act (HWA) and the citizen suit provision of RCRA -- that PFAS is subject to regulation under the HWA, NMED says in the release. HB 140 clarifies “state-level regulation even when these substances aren’t federally listed by [EPA] as such,” NMED says.

In a June 25 interview with *Inside PFAS Policy*, Kenney noted that since 2018, the state has said “this waste meets the federal and state definition of hazardous,” while the Air Force has challenged that. With HB 140, “we’ve affirmed what we’ve been telling them since 2018. So . . . there’s no fair-notice issue.”

Alleged Violations

In the new lawsuit, NMED charges the Air Force is violating both the HWA and Cannon's RCRA permit, citing both the new hazardous waste listing for AFFF under state law and EPA's listing of the two most-studied PFAS as "hazardous substances" under the Superfund law.

"The Permit sets forth requirements and standards for Defendants' performance of corrective actions to address releases of hazardous waste, hazardous constituents, and contaminants," the suit says. "Defendants have failed to comply with such requirements and standards, constituting violations of the Permit."

The suit notes severe PFAS contamination in and around the base resulting from Cannon's historic and ongoing practices, particularly its use of PFAS-containing AFFF in firefighting and training activities. It notes levels in groundwater at Cannon reached 26,200 parts per trillion (ppt), exceeding state water quality standards as well as EPA's drinking water standards -- "by over 650,000%."

It says while the Air Force has acknowledged that Cannon and its surroundings are contaminated with PFAS and the cause is the base, it refuses "to comply with the Permit's requirements for corrective action, under NMED oversight, in addressing PFAS contamination at Cannon. Moreover, Defendants have failed completely to even begin addressing off-base contamination, again despite the Permit's clear requirement that they do so."

As a result, the state says in the complaint, it has been forced "to bring this action for injunctive relief, declaratory relief, statutory and administrative penalties, and any other relief that is just and appropriate."

The contaminated groundwater plume continues to threaten the community and has devastated local agriculture, the state says in the release. The complaint says the Air Force continues to use AFFF at the base, despite available alternatives; its response at the base fails to apply state standards and remediation guidelines for PFAS, as required by the permit and federal law; and it fails to subject its PFAS response to NMED oversight. Further, it has not conducted any mitigation of off-base PFAS contamination, the complaint says, and it has failed to give the state meaningful involvement per cooperative federalism principles.

Among the actions the state seeks are immediate injunctive relief requiring the military to comply with the permit and perform corrective action under NMED oversight to address PFAS releases. It calls for ending all use, except for emergency purposes, of PFAS-containing AFFF; managing all PFAS waste resulting from remedial or corrective action activities as hazardous waste, to be disposed of in RCRA Subtitle C hazardous waste facilities; preventing further migration of hazardous waste, constituents or contaminants; providing water treatment systems to residents with PFAS-contamination; installing drinking water lines for willing residents with private well contamination in the spill area; holding regular public community meetings; installing stormwater controls and retention basins to block off-site migration of PFAS; valuating nearby private property affected by PFAS contamination; and compensating those property owners for losses due to PFAS pollution, among other actions, reimbursements and civil penalties.

CERCLA Bar

The suit comes after the Air Force transferred the state's 2019 lawsuit to federal court -- specifically the multidistrict litigation (MDL) governing AFFF PFAS cases.

Presiding Judge Richard Gergel of the U.S. District Court for the District of South Carolina ruled earlier this year that the state's action was a challenge to the Defense Department's (DOD) response under the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) and therefore section 113(h) of CERCLA stripped federal courts, though not state courts, from hearing the state's claims for injunctive relief, the June 23 complaint notes.

"Significantly, the MDL court dismissed Plaintiffs' claims without prejudice, . . . and during the oral argument on Defendants' motion, noted the availability of permit enforcement in non-federal forums, including state court," the complaint says. Kenney in the interview said the Air Force's next step would be to respond in state court to the suit. "If they attempt to move [this] to the federal court, I think they run the risk of bringing something back to Judge Gergel, who clearly said this should be in state court," to which the U.S. government agreed.

An Air Force spokesman declined to comment on the litigation.

In light of HB 140, NMED also issued notifications to all facilities with RCRA facility permits, including DOD and Energy Department facilities, an NMED spokesman says. "The notifications explained the impacts the state law and procedures for incorporating requirements into the permits, if necessary." -- *Suzanne Yohannan* (syohannan@iwpnews.com)