



MICHELLE LUJAN GRISHAM
GOVERNOR

JAMES C. KENNEY
CABINET SECRETARY

November 10, 2021

The Honorable Lloyd J. Austin III
Secretary
U.S. Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

RE: Cannon Air Force Base, Clovis, New Mexico

Dear Secretary Austin,

On October 18, 2021, the Biden-Harris Administration announced its plan to accelerate efforts to protect Americans from per- and polyfluoroalkyl substances (PFAS), which can cause severe health problems and persist in the environment once released, posing a serious threat across rural, suburban, and urban areas. To safeguard public health and protect the environment, the Biden-Harris Administration efforts will help prevent PFAS from being released into the air, drinking systems, and food supply, and the actions will expand cleanup efforts to remediate the impacts of these harmful pollutants. Eight agencies were included in this announcement, including the U.S. Department of Defense (DOD).

Consistent with the Biden-Harris Administration efforts, Administrator Michael Regan of the U.S. Environmental Protection Agency (EPA) pledged to take two additional actions to protect communities from PFAS pollution. By a letter dated October 26, 2021, Administrator Regan granted, in part, Governor Michelle Lujan Grisham's petition under the Resource Conservation and Recovery Act (RCRA). Specifically, Administrator Regan announced that the EPA will:

1. Initiate a rulemaking to clarify that RCRA corrective action authority applies to the cleanup of substances that meet the statutory definition of hazardous waste.
2. Initiate another rulemaking to add certain PFAS to the list of hazardous constituents under Appendix VIII of 40 CFR Part 261.

During the Trump Administration, the DOD brought a lawsuit against the New Mexico for exercising State authority to require Cannon Air Force Base to address PFAS contamination under the State's Hazardous Waste Act as it relates to the implementation of the Resource Conservation and Recovery Act (RCRA). As explained at length in New Mexico's briefing in the case, the State already has the authority to require RCRA corrective action for substances meeting the statutory definition of hazardous waste, pursuant to the New Mexico Hazardous Waste Act and longstanding EPA guidance. The EPA's clarification further precludes any argument to the contrary, and EPA's identification of relevant PFAS hazardous constituents provides additional, redundant corrective action authority for those substances.

In accordance with the Biden-Harris Administration efforts to protect Americans from PFAS and Administrator Regan's binding commitment to Governor Michelle Lujan Grisham, I urge you to end the DOD's and U.S. Air

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Force's litigation efforts and begin working cooperatively with New Mexico to comply with federal and state law by implementing RCRA corrective action. Continued insistence on the Trump Administration's litigation is untenable and indefensible as a matter of public policy, good governance, and simple conscience.

We appreciate the efforts of the Biden-Harris Administration to protect public health and the environment from PFAS. Ending the lawsuit and working with New Mexico under RCRA will demonstrate DOD's commitment to those same goals for New Mexicans.

I remain committed to working with you and your staff on PFAS remediation in New Mexico. Please feel free to contact me at (505) 470-6161 or James.Kenney@state.nm.us or contact Bruce Baizel, General Counsel, at (505) 490-5427 or Bruce.Baizel@state.nm.us.

Sincerely,

James C. Kenney
Cabinet Secretary

Enclosure

Cc: Bruce Baizel, General Counsel, New Mexico Environment Department, Bruce.Baizel@state.nm.us
Courtney Kerster, Senior Advisor, Office of Governor Michelle Lujan Grisham;
Courtney.Kerster@state.nm.us



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OCT 26 2021

THE ADMINISTRATOR

The Honorable Michelle Lujan Grisham
Governor of New Mexico
New Mexico State Capitol
490 Old Santa Fe Trail, Room 400
Santa Fe, New Mexico 87501

Dear Governor Lujan Grisham:

With this letter, the U.S. Environmental Protection Agency is acting upon your petition of June 23, 2021. In the petition, you requested that perfluoroalkyl and polyfluoroalkyl substances be listed as hazardous wastes, either individually or as a class, under Subtitle C of the Resource Conservation and Recovery Act.

The EPA and the Biden-Harris Administration appreciate your leadership on this issue and share your concerns about the risks of PFAS-containing wastes in New Mexico and across the country. Our agency is committed to working in close collaboration with states to protect Americans from these chemicals, which can cause severe health problems and persist in the environment once released, posing a serious threat across rural, suburban and urban areas. We are proud to be part of President Biden's governmentwide approach to tackling PFAS.

On October 18, 2021, the EPA announced a comprehensive Strategic Roadmap to deliver protections from PFAS by advancing concrete actions that address the full lifecycle of these chemicals. In response to your petition the EPA will be initiating the rulemaking process for two additional actions to address PFAS under RCRA and intends to propose a partial grant of your petition.

First, the EPA will initiate the rulemaking process to propose adding PFOA, PFOS, PFBS and GenX as RCRA Hazardous Constituents under 40 CFR Part 261 Appendix VIII by evaluating the existing data for these chemicals and establishing a record to support such a proposed rule. RCRA Hazardous Constituents are subject to corrective action requirements at hazardous waste treatment, storage, and disposal facilities, and such a listing would also be a fundamental part of any subsequent hazardous waste listing determination. Specifically, the addition of one or more PFAS chemicals to 40 CFR Part 261 Appendix VIII is a necessary component of a hazardous waste listing determination under 40 CFR 261.11(a)(3), and efforts undertaken to add PFAS constituents to Appendix VIII would help advance any longer-term process to make a hazardous waste listing determination in the future.

Second, we will initiate a rulemaking to clarify in our regulations that the RCRA Corrective Action Program has the authority to require investigation and cleanup for wastes that meet the statutory definition of hazardous waste, as defined under RCRA section 1004(5). This modification would clarify that emerging contaminants such as PFAS can be addressed through RCRA corrective action.

The EPA is committed to working collaboratively with our state partners to advance solutions that stand the test of time, and I appreciate your engagement on these important issues. They are critical not only to the protection of communities in New Mexico, but across our nation.

You are most welcome to reach out to my office if you would like to discuss this further, or your staff may work with Deputy Associate Administrator for Intergovernmental Relations Casey Katims at katims.casey@epa.gov.

In the meantime, I look forward to staying in close contact as these efforts move forward.

Sincerely yours,

A handwritten signature in black ink that reads "Michael S. Regan". The signature is written in a cursive, flowing style.

Michael S. Regan

cc: Mr. James C. Kenney
Secretary
New Mexico Environment
Department

Mr. Barry N. Breen
Acting Assistant Administrator
Office of Land and Emergency
Management

Carlton Waterhouse, Ph.D.
Deputy Assistant Administrator
Office of Land and Emergency
Management