



Michelle Lujan Grisham
Governor

Howie C. Morales
Lieutenant Governor

NEW MEXICO ENVIRONMENT DEPARTMENT

Harold Runnels Building
1190 Saint Francis Drive, PO Box 5469
Santa Fe, NM 87502-5469
Telephone (505) 827-2855

www.env.nm.gov



James C. Kenney
Cabinet Secretary

Jennifer J. Pruett
Deputy Secretary

August 2, 2019

David Gray
Acting Regional Administrator
U.S. Environmental Protection Agency Region 6
1201 Elm Street, Suite 500
Dallas, Texas 75270

RE: U.S. Air Force PFAS Contamination in New Mexico

Dear Mr. Gray,

I am in receipt of the July 19, 2019 letter to Governor Lujan Grisham from the U.S. Environmental Protection Agency's (EPA) Matthew Leopold, General Counsel, and Peter Wright, Assistant Administrator. The EPA states that it is unable to bring a judicial action against another Executive Branch department or agency. EPA concludes that direct and confidential participation in judicial litigation against the Department of Defense (DOD) would conflict with the unitary and uniform execution of law.

The EPA's required legal partnership with the U.S. Department of Justice (DOJ) in litigation is understandable. However, the EPA's reliance on DOJ's Unitary Executive Theory in PFAS litigation against the U.S. Air Force is to the detriment of both the EPA and NMED. It seems logical that if DOJ can represent EPA in Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or Superfund) matters in which it also represents sister federal agencies as Potentially Responsible Parties ("PRPs") the same approach could be applied to RCRA enforcement. Clearly, intra-executive branch judicial enforcement is possible.

Additionally, it is undisputed that EPA is unrestricted from taking administrative enforcement actions against federal agencies under its controlling Acts. Specifically, DOJ's Office of Legal Counsel addressed EPA's authority to enforce Resource Conservation and Recovery Act (RCRA) requirements at federal facilities in its June 14, 2000 opinion titled: *EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conservation and Recovery Act*.¹ The memo holds that RCRA Section "6001(b)'s authorization of EPA to bring enforcement actions against federal agencies 'pursuant to the enforcement authorities contained in this [title] . . . in the same manner

¹ See: <https://www.epa.gov/sites/production/files/2015-01/documents/ffustpenalty.pdf>

and under the same circumstances as an action would be initiated against another person' is unmistakably clear in authorizing assessment of those penalties against federal agencies."

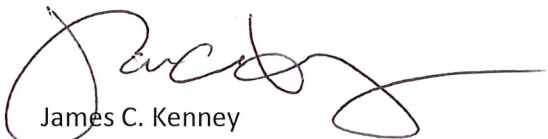
In 2014, EPA ordered the U.S. Army to take expedited corrective measures at the former Fort Gillem Army base in Forest Park, Georgia at the cost of \$1,003,825. Activities at the base resulted in soil, sediment, surface water, and groundwater contamination. The EPA's compliance order required the U.S. Army to determine the level of risk posed by contaminants to the residents and property owners surrounding Fort Gillem and mitigate any unacceptable risk to those persons. Further, the compliance order required the U.S. Army to identify and test all private drinking water wells and springs in the area, evaluate whether the wells or springs were contaminated, and take all appropriate actions to expeditiously mitigate any unacceptable risks to persons using such wells or springs. This is just one of 314 formal administrative cases the EPA initiated and settled against Executive Branch agencies and departments under RCRA authority according to EPA's Enforcement and Compliance History Online (ECHO) database.

With respect to technical support of our litigation, I appreciate your willingness to assist NMED with groundwater modeling support. Undoubtedly, such technical assistance will benefit our litigation provided such discussions and work products are confidential – meaning EPA refrains from sharing such information with DOJ and the U.S. Air Force. As we previously discussed, NMED would like to enter into a formal agreement to protect NMED's litigation interests.

The residents and local industries impacted by PFAS contamination around Cannon and Holloman Air Force Bases expect clean and safe water. That outcome is best delivered when the EPA and State are true collaborative partners in environmental enforcement. With or without EPA's support, I am committed to ensuring that New Mexico maintains a robust RCRA program for the protection of the citizens of New Mexico.

Should you have any questions about this letter, please do not hesitate to contact me.

Sincerely,



James C. Kenney
Cabinet Secretary

New Mexico Environment Department

cc: Matthew J. Leopold, EPA General Counsel
Peter Wright, EPA Assistant Administrator
Jennifer Hower, NMED General Counsel