



DEPARTMENT OF THE AIR FORCE
AIR FORCE CIVIL ENGINEER CENTER
JOINT BASE SAN ANTONIO LACKLAND TEXAS

10 January 2019

Ms. Suzanne Bilbrey, P.E.
Director, Environmental Directorate
Air Force Civil Engineer Center
2261 Hughes Avenue, Suite 155
JBSA Lackland TX 78236

Ms. Michelle Hunter
Chief, Ground Water Quality Bureau
New Mexico Environment Department
1190 South Saint Francis Drive (87505)
Post Office Box 5469
Santa Fe, NM 87502-5469

RE: Notice of Violation, Cannon Air Force Base, Soil and Groundwater Contamination with Per and Poly-Fluoroalkyl Substances (PFAS)

Dear Ms. Hunter,

The United States Air Force (Air Force) acknowledges the receipt of the Notice of Violation (NOV) dated 30 November 2018 issued against Cannon Air Force Base, New Mexico. Based on our review of the legal authority cited within the NOV, the New Mexico Ground and Surface Water Protection Regulations (20.6.2 NMAC) do not apply to the Air Force and the New Mexico Environmental Department (NMED) lacks authority to enforce the cited regulations against the Air Force. However, when the Air Force detected perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA) in drinking water at concentrations above the United States Environmental Protection Agency's (EPA's) lifetime health advisory (LHA) levels, we took immediate action under the federal environmental cleanup law to provide alternate drinking water to impacted water users. Our ongoing actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, 42 U.S.C. §§ 9601-9675) remain aimed at protecting human health from PFOS and PFOA concentrations that exceed unacceptable levels. A detailed explanation of the Air Force position follows below.

Legal constraints limit the Air Force's authority and ability to investigate and mitigate PFAS compounds under the New Mexico Water Quality Act. States may regulate Federal facilities only to the extent that such regulation is clearly authorized by Congress. Congressional authorizations are generally referred to as "waivers of sovereign immunity." Where no waiver of sovereign immunity exists, the Federal government is not subject to state regulation. See *Mayo v. United States*, 319 U.S. 441, 445 (1943); see also *Department of Energy v. Ohio*, 503 U.S. 607

(1992). Along the same lines, Federal facilities that are subject to state regulation are not liable to pay fines and penalties for violating state requirements unless Congress' waiver of sovereign immunity expressly includes the payment of fines and penalties for violating state requirements.

The NOV cites generally to the New Mexico Water Quality Act and the New Mexico Ground and Surface Water Protection Regulations at 20.6.2 NMAC for authority. The NOV specifically alleges that the Air Force failed to take actions required under 20.6.2.1203 NMAC, which prescribes corrective actions related to unauthorized discharges. The NOV does not, however, cite to a violation of any Federal environmental statute to which the United States has waived sovereign immunity, in whole or in part.

In this instance there is no Federal environmental statute for which a waiver of sovereign immunity makes the New Mexico Ground and Surface Water Protection Regulations applicable to the Air Force. In addition, no Federal waiver of sovereign immunity makes the Air Force liable to pay fines and penalties for violating the New Mexico groundwater protection regulations. Consequently, NMED lacks the authority to enforce the New Mexico Water Quality Act and related New Mexico Ground and Surface Water Protection Regulation against the Air Force.

As noted above, the Air Force is assessing and mitigating PFOS and PFOA at and emanating from Cannon Air Force Base pursuant to the CERCLA, the Defense Environmental Program statute (DERP, 10 U.S.C. §§ 2701-2711), and CERCLA regulations referred to as the National Contingency Plan regulations (NCP, 40 C.F.R. Part 300).

The Air Force has authority to respond to PFOS and PFOA levels in drinking water under CERCLA Section 104(a) (42 U.S.C. § 9604(a)) because these two PFAS compounds are "pollutants or contaminants" under CERCLA and the Air Force determined that their presence in drinking water at levels above the EPA LHAs poses an imminent and substantial danger to public health or welfare. That risk determination is based on available toxicity data. No such determinations have been made for other PFAS compounds at this time, at least in part because numerical criteria to assess unacceptable risk/hazard does not exist. Accordingly, the Air Force's efforts in response to PFAS are focused on PFOS and PFOA compounds.

Operating under its CERCLA and DERP authorities, the Air Force's priority is to protect drinking water supplies for humans from unacceptable levels of PFOS/PFOA that result from our activities. Where the Air Force is the source of PFOS/PFOA that exceeds the LHA in drinking water, the Air Force provides alternative drinking water as quickly as possible to affected humans. Then the Air Force implements more permanent solutions as needed to ensure affected humans have drinking water available that meets the LHA levels. Permanent solutions can include installation of treatment systems or connection to public utilities to provide longer-term assurances that people are not drinking water containing PFOS/PFOA above unacceptable levels. In addition, as required by CERCLA, the Air Force collaborates with local, state, and federal regulatory officials and the affected community as we implement response actions.

The Air Force will utilize its Program Requirement Development (PRD) Process to program for future requirements. The PRD is a year-long formal process that assists the Air Force with identifying, estimating, and validating the resources needed to execute an

Environmental Restoration Program that complies with CERCLA, DERP, the NCP, and United States Department of Defense directives. The process integrates planning, programming, budgeting, and execution with environmental liability requirements using cost development and estimating to produce validated requirements. The PRD includes standardized business processes that ensure consistency across installations resulting in a cohesive program that reliably identifies out-year requirements through preparation of Project Cost Estimating Assumptions Documents (PCEAD) as a first step.

The Air Force has programmed a Remedial Investigation (RI) for the Fiscal Year 2021 PRD cycle and information to populate the PCEAD is currently being collected. The RI is intended to fully identify the nature and extent of PFOS/PFOA in the vicinity of the Cannon Air Force Base. The RI is the next step in the environmental remediation process prescribed and described by CERCLA and the NCP.

Additionally, the Air Force is currently designing in-train point-of-use filtration systems for drinking water where the EPA LHA levels during the expanded Site Investigation phase were exceeded. Once installed, the filtration systems will be monitored frequently to ensure no breakthrough and PFOS/PFOA concentrations meet the EPA LHA. The installation of the filtration systems will replace the need for providing alternate water supplies.

Based on the foregoing explanation, the Air Force requests NMED withdraw the NOV the Department issued against Cannon Air Force Base and work with the Air Force to appropriately address NMED's concerns about PFAS through the CERCLA process.

Thank you for your consideration. If you have any questions, please let my Point of Contact on this matter, Mr. Christopher Segura, AFCEC/CZOW, know. He can be reached at (505) 853-5443 and christopher.segura.2@us.af.mil.

Sincerely,



SUZANNE BILBREY, P.E.
Director, Environmental Directorate

cc:
AFLOA/JACE-FSC