UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.* HECTOR BALDERAS, Attorney General, and the NEW MEXICO ENVIRONMENT DEPARTMENT, Plaintiffs, v. THE UNITED STATES and THE UNITED STATES DEPARTMENT OF THE AIR FORCE, Defendants.	§	Case No. 6:19-cv-00178

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND REPLY IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

Plaintiffs, the New Mexico Attorney General and the New Mexico Environment Department ("NMED") (collectively "Plaintiffs" or "the State") brought suit in this matter to obtain relief against Defendants, the United States and the United States Department of the Air Force (collectively "Defendants"), for decades-long and continuing releases of toxic chemicals at Cannon Air Force Base ("Cannon") and Holloman Air Force Base ("Holloman") (collectively "the Bases"). These toxic chemicals are now emanating from the Bases and migrating into surrounding ecosystems.

The Amended Complaint alleges two claims under substantively similar theories and available relief. *See* ECF Doc. 9. The first count is pursuant to the New Mexico Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to -14 ("HWA"). The second count is under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, *et seq.* ("RCRA"). These counts are grounded in Defendants' improper disposal and failure to contain per- and poly-fluoroalkyl substances ("PFAS"), including pe-fluorooctanoic acid ("PFOA") and perfluorooctane sulfonate ("PFOS"), which are hazardous and solid wastes present in "aqueous film-forming foam" ("AFFF") used extensively by the United States Air Force for firefighting training activities and petroleum fire extinguishment at the Bases.[1]

On July 24, 2019, Plaintiffs filed a Motion for Preliminary Injunction pursuant to citizen suit provisions in both RCRA and New Mexico's HWA (ECF Doc. 11) (hereinafter "Motion"), which would require the Defendants to, in short, take steps necessary to abate the imminent and substantial endangerment caused by their prior and ongoing releases of PFAS into the environment. This relief would include sufficient containment and abatement measures to

[1] Although additional hazardous and toxic substances have been discharged and are present at the Bases, the State's Amended Complaint and Motion are focused on the PFAS contamination at and adjacent to the Bases.

protect public health and the environment; the costs for any such work, whether performed by the State, third parties, or the Defendants; and testing to delineate the full extent of the contaminants' reach and impact on human health and the environment.

Defendants responded to Plaintiff's Amended Complaint and Motion on September 7, 2019, arguing that Plaintiffs are barred from bringing a RCRA action pursuant to § 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), which bars federal courts from exercising jurisdiction if certain criteria are met. 42 U.S.C. § 9613(h). With respect to the State's count under the HWA, Defendants assert that the sovereign immunity waiver contained in RCRA is not effective in connection with the imminent and substantial endangerment authority of the HWA[2] such that this claim may not be brought against the United States.[3] As will be addressed more fully below, these arguments must fail.

In the context of Defendants' Motion to Dismiss and Brief in Opposition to Plaintiffs' Preliminary Injunction request (ECF Doc. 31) (hereinafter, "Defendants' Brief"), Defendants do not dispute a number of the State's contentions. Specifically, Defendants concede that:

1. The sovereign immunity of the United States is waived under RCRA's citizen suit provision, Defs.' Brief, at 24 ("[A]s a threshold matter, RCRA's citizen suit provision provides the only applicable waiver of sovereign immunity for an imminent-endangerment suit against the United States.");
2. Plaintiffs supplied Defendants with sufficient notice of their claims pursuant to RCRA, Defs.' Brief, at 24;

[2] The specific provision under New Mexico's HWA at issue here, NMSA 1978 § 74-4-13(A), also provides for injunctive relief where there exists an imminent and substantial endangerment of human health or the environment.
[3] Alternatively, Defendants argue that even if sovereign immunity is waived for the State law claim, that the claim is barred by § 113(h) of CERCLA for the same reasons as the RCRA claim.

3. The constituents of AFFF, namely PFOA and PFOS, that are the subject of Plaintiffs' Amended Complaint and request for injunctive relief are present on and off the Bases at levels higher than the current federal regulatory guidelines, Defs.' Brief, at 2, 10, 12;[4]
4. PFOS and PFOA have migrated off site and have been confirmed to have reached drinking water wells, Defs.' Brief, at 2, 10-11;
5. Defendants have been aware of the concern potential exposure to PFAS since at least 2010, but only began studying the Bases about four years ago, Defs.' Brief, at 1-2;
6. Defendants continue to use PFAS at the Bases despite the known adverse effects on human health and the environment, Defs.' Brief, at 7 (referencing Howard Decl. ¶ 11);
7. Defendants have "prioritized"[5] PFAS contamination at the Bases for additional study (as opposed to actual remedial measures to contain or clean up) in or about 2021 for Cannon and 2023 for Holloman, Defs.' Brief, at 2, 11, 13; and
8. Defendants do not dispute the toxic and hazardous nature of PFAS as alleged by the State but instead have focused on their preference for continued study. Defs.' Brief, at 7-8.

These concessions, when coupled with additional evidence and applicable law, support the remedies requested in Plaintiffs' Amended Complaint and Motion. Plaintiffs' request is simple: that Defendants be ordered to do what is necessary to protect the people and the environment of the State of New Mexico from the current and potentially devastating effects of ongoing exposure to toxic chemicals known to be present at and emanating from the Bases.

The unique nature of the State's role also counsels in favor of allowing the claims to continue. The Supreme Court has long recognized the importance of state authority to protect its citizens and state resources; that "if the health and comfort of the inhabitants of a state are

[4] *See also* Paul Decl.¶¶ 9, 11, 13, 15; Kottkamp Decl. ¶¶ 11-13.
[5] Defendants term this a "risk-based prioritization approach," which does not illuminate any information to allay the State's claims or address the realities of the ongoing consequences to the citizens of the State and its environment.

threatened, the state is the proper party to represent and defend them." *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). Defendants' position here, which would limit the State's ability to protect its citizens and environment, runs afoul of such Constitutional principles. *See Nat'l League of Cities v. Usery*, 426, U.S. 833, 842-43 (1976) (finding that the federal government may "not exercise power in a fashion that impairs the states' integrity or their ability to function effectively in a federal system").[6] Indeed, CERCLA expressly states that "nothing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liabilities or requirements." 42 U.S.C. § 9614(a). Such protection of a state's authority is reinforced by two other complementary provisions of CERCLA. For example, its savings clause provides, in part, that CERCLA shall not "affect or modify in any way the obligations or liabilities of any person under Federal or State law . . . with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d). Because RCRA pre-dates CERCLA, this language necessarily applies to RCRA. In addition, 42 U.S.C. Section 9620(i) provides that CERCLA shall not "affect or impair the obligation of any department, agency or instrumentality of the United States [here, Defendants] to comply with any requirement of [RCRA]."[7]

As explained below, Plaintiffs are not barred from such relief. Defendants' Motion to Dismiss should be denied, and Plaintiffs' Motion for Preliminary Injunction should be granted.

II. STANDARD OF REVIEW

A. Motion to Dismiss

[6] *Cf. Wyeth v. Levine* 555 U.S. 555, 565 (2009) (stating that where considering preemption issues "in a field which the States have traditionally occupied[,]" we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress") (quoting *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

[7] A court must interpret a statute "as a symmetrical and coherent regulatory scheme . . . and fit, if possible, all parts into a harmonious whole." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000) (internal citations omitted).

Dismissal of a federal claim for lack of jurisdiction "is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 89 (1998) (internal quotations omitted). The court's task in resolving a Rule 12(b)(1) motion is a relatively limited one; at issue is only whether the court lacks authority to adjudicate the matter. *Kenney v. Helix TCS, Inc.,* 284 F. Supp. 3d 1186, 1188 (D. Colo. 2018) (citing *Glapion v. Castro*, 79 F.Supp.3d 1207, 1212 (D. Colo. 2015)). "The issue is not whether plaintiff will ultimately succeed on the merits." *Id.* (quoting *Hanford Downwinders Coalition, Inc. v. Dowdle*, 841 F.Supp. 1050, 1057 (E.D. Wash. 1993)).

B. Preliminary Injunction

Defendants do not dispute the requisites for a preliminary injunction. These four criteria are: (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the threatened injury to the movant outweighs whatever damage the injunction may cause to the defendant; and (4) that the injunction is in the public interest. *Attorney General of Oklahoma v. Tyson Foods, Inc*., 565 F.3d 769, 776 (10th Cir. 2009). As described previously in Plaintiffs' Motion and herein, Plaintiffs have met these requisites. While Defendants focused in their Brief on the heightened standard for mandatory injunctions, as described in *Tyson Foods* and *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973 (10th Cir. 2004), these cases do not change the State's ability to meet the requirements for a preliminary injunction here.

Under RCRA, this Court enjoys "broad and flexible equit[able] powers" to reduce or eliminate the risk of harm to human health. *United States v. Price*, 688 F.2d 204, 211 (3rd Cir. 1982). Title 42 U.S.C., Section 6972 expressly provides the authority to order preliminary

injunctive relief in order to prevent irreparable harm. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996); *Francisco Sanchez v. Esso Standard Oil Co.*, 572 F.3d 1, 20 (1st Cir. 2009). Section 6972(a)(1)(B) of RCRA allows for a preliminary injunction to issue where: (1) there defendant is a person, including, though not limited to, one who was or is a generator of solid or hazardous waste, or one who was or is an owner of a solid or hazardous waste treatment, storage, or disposal facility; (2) this defendant contributed to, or is contributing to, the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and (3) such waste may present an imminent and substantial endangerment to health and the environment. *See Burlington Northern & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2010). Defendants do not appear to contest the factual predicate regarding the ongoing presence of hazardous wastes emanating from their facilities. Instead, Defendants ask the State, its citizens, and its natural resources to await any action to ensure their safety until the completion of an undefined, nationwide process involving hundreds of military facilities that, in addition to being vulnerable to budgetary problems or other variables,[8] appears to have no timeline or consequences. Plaintiffs are asking the Court for relief specific to the Bases, and Defendants' invocation of its national problem is improper in defense of its liabilities here. That Defendants have cleanup liability at other military installments across the country has no bearing on its responsibility to the State of New Mexico and under the HWA and RCRA to remediate the hazardous contamination it has caused at Cannon and Holloman.

The underlying purpose of RCRA is to address situations where hazardous wastes imperil human health. *See Maine People's Alliance & Natural Res. Def. Council v. Mallinckrodt Inc.*,

[8] For example, for Cannon, "[t]he Air Force plans to request funds to perform the RI as part of the fiscal year 2020 budget request," Kottkamp Decl., ¶ 17, but that request may be denied. For Holloman, Defendants do not even mention a similar plan to request funds, Paul Decl., ¶ 16, but presumably, a budget request associated with this tentatively scheduled work would also be required as with Cannon.

471 F.3d 277, 296–97 (1st Cir. 2006). The imperiled ecological resources of the State are and will continue to be damaged by Defendants' contamination, although the full extent of those injuries has not yet been fully identified, especially when Defendants have indicated an intent to continue the use of AFFF containing PFAS despite the environmental and health risks associated therewith. Because these contaminants remain in the environment at alarmingly high levels, and because they are known to be persistent, to bioaccumulate, and to be moving towards threatened communities, human health and the environment is at risk of serious harm. It is precisely this harm that RCRA and the HWA intended to prevent.

III. ARGUMENT

A. Defendants' Motion to Dismiss Should Be Denied.

1. Jurisdiction over the State's Claims is Not Precluded by CERCLA.

Defendants have argued that the State's RCRA claim is barred as it amounts to a "challenge" of removal or remedial actions under CERCLA. Pursuant to the express language in CERCLA § 113(h), a federal court is denied jurisdiction only when asked "to review a removal or remedial action selected under section 9604" of the Act. 42 U.S.C. § 9613(h). "Congress' expressed purpose in enacting § 9613(h) was 'to prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing the EPA's cleanup activities.'" *United States v. State of Colorado*, 990 F.2d 1565, 1576 (10th Cir. 1993). The elements of § 113(h) have not been met here, and the State's lawsuit presents no risk of delaying cleanup activities at Cannon or Holloman. In fact, under the present circumstances, the delay has been and continues to be at the hands of Defendants.

Defendants' argument is based on their purported "overall plan to address PFOS and PFOA released at or from its facilities." Defs.' Brief, at 8; *see also id.* at 9 (citing Kottkamp

Decl. ¶ 6). This argument, however, fails to address the specific circumstances present at Cannon and Holloman, which are the only sites at issue in this lawsuit. Although Defendants claim to have conducted assessments at the Bases as part of their "overall plan," these assessments have only confirmed what was suspected back in 2010: that significant PFAS contamination is present at Cannon and Holloman as a result of Defendants' use of AFFF. No decisions have been made at either of the Bases as to cleanup measures required to eliminate the risks to human health and the environment that exist due to Defendants' contamination. Indeed, Defendants have not even made the decision that CERCLA is the proper avenue for cleanup activities. The State could not be challenging any remedial actions of Defendants, as none have been investigated, planned, or commenced at either of the Bases.

As such, granting Defendants' Motion to Dismiss is inappropriate and the State should be allowed to proceed with its claims against Defendants and discovery related to those claims.

i. Defendants have not "Selected" a "Removal or Remedial Action"

CERCLA's bar to jurisdiction does not apply here because Defendants' alleged plans to investigate Cannon and Holloman do not constitute "removal or remedial actions" under CERCLA § 113(h). Defendants merely state that they are engaged in a nationwide investigation process of indefinite duration and of which they provide only vague details. In enacting CERCLA, Congress did not intend that Defendants be allowed to "preclude review by simply pointing to ongoing testing and investigation, with no clear end in sight," as Defendants have done here. *Frey v. Environmental Protection Agency*, 403 F.3d 828, 835 (7th Cir. 2005). By calling the bare-boned "investigation" that Defendants have conducted over the past nine years since they discovered the possibility of extensive contamination at Cannon and Holloman as removal or remedial actions, this Court would allow just that.

CERCLA defines the term "remove" or "removal" as:

> [T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, *such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances,* the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act

42 U.S.C. § 9601(23) (emphasis added). CERCLA defines "remedy" or "remedial action" to mean:

> [T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. . . .

Id. § 9601(24). Like the defendants in *Frey*, Defendants here point to the italicized language above regarding monitoring and assessment in an attempt to argue that their activities to date constitute a "response." Defs.' Brief, at 5, 20. The *Frey* court rejected this argument, holding that "a reading of the full definition . . . indicates removal is concerned with minimizing and mitigating damage from the 'threat of release' of a hazardous substance through measures such as 'security fencing,' 'temporary evacuation' and 'emergency assistance.'" *Frey*, 403 F.3d at 835-836 (quoting 42 U.S.C. § 9601(23)). In short, "[r]emoval refers to a short-term action taken to halt risks posed by hazardous wastes immediately." *Id.* at 835. "Remedial actions," on the

other hand, "involve permanent solutions, taken instead of or in addition to removal, such as the destruction of hazardous materials." *Id.*

In *Frey*, plaintiffs brought a challenge under CERCLA's citizen suit provision as to a NPL site where EPA had completed excavation of PCB hot spots but asserted an intention to conduct further unspecified remediation of water and soil at some unspecified future date. 403 F.3d at 834-35. In denying defendants' motion to dismiss for lack of subject matter jurisdiction, the Seventh Circuit held that because EPA failed to provide any objective reference by which to measure its remedial progress, plaintiffs were entitled to bring the lawsuit. *Id.* at 835.

Despite EPA's assertion that the ongoing investigation and testing of groundwater and soil contamination precluded review under CERCLA, the Seventh Circuit found "no support in the statute for such an open ended prohibition on a citizen suit." *Id.* at 834 (recognizing that "the time limits in § 113(h) are geared to concrete, existing, remedial measures; not measures that might be devised at some future date") (*quoting Frey v. Environmental Protection Agency*, 270 F.3d 1129, 1134 (7th Cir. 2001)). Rather, the court concluded that "there must be some objective indicator that allows for an external evaluation, with reasonable target completion dates, of the required work for a site." *Id.* at 835.[9]

As in *Frey*, no such objective evidence exists in this record. There is no timetable or other objective criterion by which to assess when Defendants' study and investigation phase may end. Defendants seek to excuse their responsibilities based on other liabilities. This should not be permitted. Further, the only information regarding any purported investigations at Cannon and Holloman is based upon Defendants' own self-serving statements presented to this Court in its Brief, which states that remedial investigations have been scheduled at Cannon in 2021 and at

[9] In *Cannon*, the Tenth Circuit acknowledged the Seventh Circuit's concern, but found that under the circumstances of that case, discussed below, dismissal at the summary judgment stage of litigation was appropriate.

Holloman in 2023. Defs.' Brief, at 2. These estimated timelines are not guaranteed,[10] and Defendants have made no enforceable commitment to any future cleanup efforts.

Also weighing against Defendants' assertion that § 113(h) bars this action is the fact that the *liable party* is also in charge of its own investigations, timelines, and decisions. Unlike a typical CERCLA cleanup action, the EPA is not involved in the oversight of any part of Defendants' overall PFAS plan. In *State of Colorado v. United Department of the Army,* 707 F. Supp. 1562 (D. Colo. 1989), the court took great pains to discuss the conflict of interest that existed between the U.S. Department of Justice ("DOJ") attorneys representing both the Department of the Army as a defendant in that case and the EPA as a plaintiff in a consolidated CERCLA case involving a site that had not yet been placed on the NPL. The court stated: "Were I to dismiss this [RCRA] action, the Army's cleanup efforts would go unchecked by any parties whose interest are in any real sense adverse to those of the Army." *Id.* at 1570. Despite the fact that the case involved a conflict of interest between DOJ attorneys, the principles remain the same, as evidenced by the court's explanation of what would happen should it dismiss the RCRA claim and approve the supposed "consent decree" between the EPA and the Army:

> Since it is the E.P.A.'s job to achieve a clean up as quickly and thoroughly as possible, and since the Army's obvious financial interest is to spend as little money and effort as possible on the cleanup, I cannot imagine how one attorney can vigorously and wholeheartedly advocate both positions. . . . The Army, in effect, seeks full and unbridled discretion, subject only to E.P.A.'s input through the same attorneys who represent the Army, to regulate the . . . cleanup, a process that has been ongoing for more than five years and is still nowhere near completion or resolution. CERCLA was enacted to "speed up" the cleanup process, not delay it.

[10] *See infra*, n. 8.

State of Colo. v. U.S. Dep't of the Army, 707 F. Supp. 1562, 1570 (D. Colo. 1989).[11] Similar considerations in this case counsel against dismissing the State's claim and allowing the Defendants to proceed without any oversight.

Finally, Defendants cite *Cannon v. Gates*, 538 F.3d 1328 (10th Cir. 2008), for the proposition that removals may include preliminary investigative efforts, Defs.' Brief, at 5, but nothing in that case demands a similar finding here. In *Cannon,* the court observed that determining the applicability of § 113(h) requires resolving: (1) whether the United States has selected a removal or remedial action, and (2) whether plaintiff's claims present a challenge to that removal or remedial action. *Id.* at 1332-33. In finding that the first prong had been satisfied, the court looked to the fact that the government had *completed* a preliminary assessment of the property, issued a draft site engineering evaluation/cost report, and planned a site inspection during the pendency of the suit. *Id.* at 1334. (The second prong will be discussed in the next section below.) Thus, unlike here, in that case the Government had already taken several steps towards determining how it would address the contamination present at the property at issue.[12]

Here, Defendants do not even know the extent of the contamination that needs to be addressed, although it is known to be significant. The only action that Defendants have taken with regard to this significant contamination issue at Cannon is, as stated in their Brief, to visit the site, review documents, and speak to personnel. Defendants then deemed the compilation of this surficial evidence a "preliminary assessment," and have stated that the "next step" is to

[11] *See also State of Colo. v. United States*, 867 F. Supp. 948, 953 (D. Colo. 1994) ("The need for oversight activities to enforce removal and remedial actions is particularly acute in situations where the United States is a CERCLA defendant. If only the Environmental Protection Agency were granted oversight authority, the State would be forced to leave the interests of its people in the hands of a law enforcement agency with an inherent conflict of interest. There is no reason to believe that the United States is immune from the conflicts that arise when a liable party is responsible for enforcing its own cleanup activities.").

[12] Moreover, in reaching its conclusion, the court looked to the case *Razore v. Tulalip Tribes of Washington*, 66 F.3d 236 (9th Cir. 1995), which held that § 113(h) stripped federal jurisdiction where the EPA had completed a remedial investigation and feasibility study. No remedial investigation or feasibility study has begun, let alone been completed here.

conduct a remedial investigation, which is *estimated* to begin in 2021. *See* Defs.' Brief, at 9-11. Defendants have taken even less action at Holloman, where they claim to have conducted a preliminary assessment and drafted a report that recommended further studies. There, the "next step" is to begin a remedial investigation in 2023 or 2024. *Id.* at 13. Neither of these suggested remedial investigations will include any cleanup work at the Bases that will eliminate the imminent and substantial endangerment caused by Defendants' contamination. As such, nothing Defendants have done constitutes a removal or remedial action.

ii. Plaintiffs' Suit is Not a "Challenge" to a Removal or Remedial Action

Because there is no removal or remedial action, there can be no challenge to any removal or remedial action. Thus, this is not a lawsuit that "calls into question" a removal plan or that will cause any "interfere[nce] with the implementation of a CERCLA remedy." *See Cannon*, 538 F.3d at 1335 (citing *New Mexico v. Gen. Elec.*, 467 F.3d 1223, 1249 (10th Cir. 2006); *Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1072 (11th Cir. 2002)).

Defendants rely upon *Reynolds v. Lujan*, 785 F.Supp. 152 (D. N.M. 1992) for the proposition that CERCLA bars RCRA citizen suits under § 6972(a)1(B) when "the Administrator . . . is actually engaging in a removal action under section 104 of [CERCLA,]" 42 U.S.C. §§6972(b)(2)(B)(ii), 6903(1). In *Reynolds*, the state and the federal defendants were actively involved in the remediation of a CERCLA National Priority List ("NPL") site and had progressed much further than the mere initial investigations the Defendants have undertaken at Cannon and Holloman. Here,, Defendants are far from engaged in removal actions the kind of which are contemplated by CERCLA § 104.[13] Furthermore, while the plaintiffs in *Reynolds* sought to have the landfill at issue closed in accordance with RCRA closure procedures, which

[13] Moreover, the site inspection reports were produced by Defendants "as a courtesy" rather than in pursuit of CERCLA remedial action. Amended Complaint, ¶ 61.

would have altered the means by which the CERCLA plans were implemented, *id.* at 154, New Mexico merely seeks to have Defendants contain and abate the current uncontrolled and *ongoing* releases[14] of PFAS in order to preserve the natural resources of the State and protect the health of its citizens.

Similarly, in *Anacostia Riverkeeper v. Washington Gas Light Co.*, 892 F.Supp.2d 161 (D. D.C. 2012), remediation at the site at issue had already commenced. Specifically, EPA had issued in 1999 a Record of Decision ("ROD"), a decision document that follows the completion of remedial investigations and feasibility studies, in which EPA instructed the property owner to remediate the site according to the plan laid out in the ROD. The National Park Service also issued an ROD for the portion of the property under its jurisdiction that also laid out a remediation plan. Plaintiffs in *Anacostia* sought to have the court direct the defendants to remediate the site as per RCRA given the delay in the implementation of the selected NPS plan. Unlike Cannon and Holloman, the *Anacostia Riverkeeper* site was subject to two specific RODs delineating the precise manner in which the federal government expected the site to be remediated. No such plans exist for the Bases. According to the court in *Anacostia Riverkeeper*, "[a] suit challenges a remedial action within the meaning of [§] 113(h) if it interferes with the implementation of a CERCLA remedy." *Id.* at 169 (internal quotation omitted). There is no such CERCLA remedy at issue or even being considered here. The entirety of the court's analysis in *Anacostia Riverkeeper* focused on the fact that there was a selected response plan and that work was being undertaken at the site, neither of which has occurred at the Bases. *Id.* at 171.

In *Shea Homes Ltd. Partnership v. United States*, 397 F. Supp. 2d 1194, 1204 (N.D. Cal. 2005), the United States Army Corps of Engineers ("Army Corps") was conducting monitoring

[14] Indeed, Defendants have admitted that they continue to use and thus will continue to release AFFF containing PFOA and/or PFOS. Defs.' Brief, at 7 (citing Howard Decl. ¶ 11).

and remedial efforts at a landfill site purchased by developer and plaintiff, Shea. *Id.* at 1197. Multiple affirmative steps had been taken to cap the landfill and monitors installed to manage methane leakage. *Id.* The work was done pursuant to Defense Environmental Restoration Program ("DERP") and orders issued by the Regional Water Quality Control Board ("RWCQB"). *Id.* Following multiple years of testing, the RWQCB would not authorize the closure of the site, ordered further testing, ordered the Army Corps to produce and submit a plan to maintain methane concentrations below compliance levels, and issued a Cleanup and Abatement Order to the Army Corps "to investigate, design, and implement a final remedy with respect to the methane or face civil penalties." *Id.* Thus, the Army Corps was subject to repeated direction and orders by the RWQCB. Given this background, *Shea* is not persuasive here, where there is a complete lack of direction or oversight and whether to conduct any work at the Bases is currently at the sole discretion of Defendants.

Defendants nonetheless attempt to use *Shea* to argue that even an attempt to enforce RCRA to mandate cleanup is barred by § 113(h). *Id.* at 1204. However, as noted above, *Shea* does not stand for such a sweeping premise and the factual circumstances of the case are distinguishable: here there is no cleanup to interfere with because Defendants have yet to even undergo a remedial investigation. Moreover, a critical distinction in *Shea* was that the plaintiff was a private party, not a state. Based on this distinction, the court declined to follow the holding of *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993), that an action to enforce EPA-delegated authority under state law is not a challenge under § 113(h). *Id.*

In its Amended Complaint, the State has requested a variety of relief from Defendants to address the contamination at Cannon and Holloman, including: declaratory relief; injunctive relief requiring abatement and continued compliance with the HWA and RCRA; civil penalties;

payment of costs incurred and future costs associated with these claims; and reasonable attorneys' fees. Amended Complaint, at 33.[15] "A request for injunctive relief that has no effect on an ongoing cleanup is unlikely to constitute a challenge." *Giovanni v. United States Department of Navy*, 906 F.3d 94, 113 (2018) (citing *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Mont.*, 213 F.3d 1108, 1113, 1115 (9th Cir. 2000)). In *ARCO*, the Ninth Circuit held that injunctive relief ordering the release of documentation to the public about a contaminated site does not challenge a pending cleanup effort because information "does not alter cleanup requirements or environmental standards" and does not "terminate or delay the . . . cleanup." *ARCO*, 213 F.3d at 1115. The State is seeking relief that would fit within this "no impact" informational category, including, for example, declaratory relief and the payment of civil penalties, costs, and fees. Thus, in no event should this Court dismiss the Amended Complaint in its entirety, as the Court must consider each form of relief that the State requests.

As to the injunctive relief sought by Plaintiffs, as stated herein, there are no proposed cleanup actions that would be delayed. Where remediation at a contamination site is non-existent, litigation intended to jumpstart such remedial efforts will not be barred.[16] In *Browning v. Flexsteel Industries, Inc*, 959 F.Supp.2d 1134 (N.D. In. 2013), the court provided examples that may constitute interference, such as seeking additional testing if a remedial plan is being considered and/or implemented, or challenging the cost effectiveness of a portion of a remedial plan, none of which are relevant here. Further, the court noted that if a removal action were stalled, "and no additional removal or remedial actions have been selected or are under active

[15] Contrary to Defendants' suggestion, *see* Defs.' Brief, at 22, the Court's consideration should come based solely on a review of the relief sought in the Amended Complaint, as opposed to the State's Motion for Preliminary Injunction, as such would be improper in the context of a Motion to Dismiss.

[16] *See, e.g., Forest Park Nat. Bank & Trust v. Ditchfield*, 881 F.Supp.2d 949, 972 (N.D. Ill. 2012) (finding that where a suit sought "to jumpstart a nonexistent cleanup action," a "RCRA citizen-suit serves the very gap-filling purpose for which the citizen-suit provision was designed") (citing *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 486 (7th Cir.2011) (noting that the citizen-suit provision exists because "RCRA does not give sole responsibility to federal and state environmental agencies and assume that they will enforce the law adequately")).

consideration, litigation may serve to accelerate, rather than delay, cleanup efforts. Such suits are not necessarily barred." *Id.* at 1155. In that case, the court ultimately concluded that there was not enough information in the record to determine whether or not the requested relief would interfere with EPA remedial actions, and thus, defendant's motion to dismiss was premature. As in that case, here, where information does not show that the State is challenging an ongoing cleanup, the Motion to Dismiss should be denied.

iii. The Issues Raised in Defendants' Motion to Dismiss Present Factual Disputes that are Not Appropriate for Adjudication at this Time.

Defendants admit that their argument seeking to cast the RCRA claim as a challenge to a response action is a factual attack on the State's Amended Complaint. Defs.' Brief, at 15. Where there is a factual challenge to a plaintiff's assertion of subject matter jurisdiction, such a motion should be denied to allow for discovery. *See In re Gold King Mine Release in San Juan Cty., Colorado, on Aug. 5, 2015*, No. 1:18-MD-02824-WJ, 2019 WL 999016, at *8 (D.N.M. Feb. 28, 2019); *see also Cannon v. Gates*, 538 F.3d 1328, 1332 (10th Cir. 2008) (deciding issues related to CERCLA § 113(h) at the summary judgment stage of the litigation). However, there are no removal or remedial actions actually being considered, let alone selected by Defendants, and as such, based on the record before the Court, the relief sought here, which would involve actual containment and abatement of the hazardous wastes[17] at the Bases, is not barred.

Although Plaintiffs believe there are enough facts in the record to make a finding that the elements of CERCLA § 113(h) are not met, should the Court see otherwise, the State should be

[17] Defendants state that PFOA and PFOS are not listed substances under CERCLA. Defs.' Brief, at 5 n. 1. Defendants also state that they are treating PFOA and PFOS as "pollutants and contaminants." *Id.* This is a distinction without a difference for our purposes here. Initially, CERCLA is not limited to specifically identified substances. 42 U.S.C. § 9601(14). Further, given Defendants' acknowledgment of PFOA and PFOS's status as "pollutants" (a term used in the Clean Water Act ("CWA"), *see* 33 U.S.C. § 1362(6) definition of "pollutant"), they are included as a hazardous substance under CERCLA by definition. *See* 42 U.S.C. § 9601(14) (defining "hazardous substances" to include – among other things – "any substance designated pursuant to section 311(b)(2)(A) of the [CWA]"). Moreover, this case is brought under RCRA and the State's HWA such that these classifications are not necessary in order to obtain relief.

allowed to conduct further discovery on the issue of whether Defendants have "selected" a "remedial" or "removal" plan under CERCLA, especially where the only assertions of any actions being taken at Cannon and Holloman to address PFAS contamination are based on Defendants' assertions in their Motion to Dismiss and affidavits submitted in conjunction therewith.[18]

2. Defendants Have Waived Sovereign Immunity for Each of Plaintiffs' Claims

Eleventh Amendment sovereign immunity can be waived by express consent. *United States v. Testan*, 424 U.S. 392, 399 (1976). Defendants have expressly surrendered their immunity with respect to the enforcement of federal, state, and local environmental laws due to contamination at the hands of the government, including any immunity under RCRA and the HWA. As noted above, Defendants have not challenged the waiver of sovereign immunity with respect to the State's RCRA claim. Defs.' Brief, at 24. Defendants do argue that the State-authorized hazardous waste program does not engender the same waiver.[19] But this is incorrect.

New Mexico's State-authorized hazardous waste program operates "in lieu of" the federal requirements. *See* 42 U.S.C. § 6926(b). As explained in *Blumenthal Power Co., Inc. v. Browning-Ferris, Inc.*, No. 94CV2612, 1995 WL 1902124, at *3 (D. Md. Apr. 19, 1995), "[t]he phrase 'in lieu of' means that state law replaces federal law in authorized states." *Id.* (citing *Kelley ex rel. Michigan Natural Resources Comm'n v. H & H Tube & Mfg. Co.,* No. 89–

[18] At a minimum, the Court may allow the State to take jurisdictional discovery as to these contentions. *See Hernandez v. Chevron U.S.A., Inc.*, 347 F. Supp. 3d 921, 965 (D.N.M. 2018) ("The Court has discretion to grant or deny jurisdictional discovery[,]" and a court abuses that discretion "if the denial results in prejudice to the litigant.") (quoting *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1189 (10th Cir. 2010)).

[19] Defendants are also currently challenging New Mexico's authority to regulate the release of hazardous wastes in the State. *See United States v. New Mexico*, 2:19-cv-00046 (D.N.M.); *see also* Defs.' Brief, at 9 n. 3 (acknowledging that the State-issued permit is presumed valid while Defendants' appeal of the State's authority is pending).

CV–10059, 1990 U.S. Dist. LEXIS 19563, at *4 (E.D. Mich. May 8, 1990) (defining "in lieu of" to mean "instead of" or "as a substitute for")).

Section 6001(a) of RCRA provides that each department or agency of the federal government dealing with solid or hazardous wastes "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural." The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders and all civil and administrative penalties and fines. 42 U.S.C. § 6961(a). Moreover, this section provides that "[t]he United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil administrative penalty or fine. . . .)." *Id.*

Defendants argue that New Mexico's imminent-endangerment authority is not a "requirement" as to which Congress has waived federal sovereign immunity. *See* Defs.' Brief, at 25-26. Defendants are correct in that the Congress did not define "requirements" in the statute. However, the Tenth Circuit has recognized that "the meaning of 'requirement' cannot . . . be limited to substantive environmental standards—effluent and emissions levels, and the like—but must also include the procedural means by which those standards are implemented: including permit requirements, reporting and monitoring duties, and submission to state inspection." *United States v. State of New Mexico*, 32, F.3d 494, 497-498 (10th Cir. 1994).

Further, in *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994), the Supreme Court, interpreting the Clean Water Act, recognized that "requirements" are not limited to specific and objective criteria, but can include criteria that are open-ended. There, the Court

recognized that criteria "are often expressed in broad, narrative terms, such as 'there shall be no discharge of toxic pollutants in toxic amounts.'" *Id.* at 716.

In *United States Department of Energy v. Ohio,* 503 U.S. 607 (1992), cited by Defendants in support of their position, the issue to be determined by the Court was whether the waiver of sovereign immunity applied to punitive fines. The Court found that Congress's silence on that issue was dispositive, given that Congress had expressly waived immunity as to "coercive fines," and thus, the waiver did not apply. *Id.* at 627-28. Nothing in the Court's reasoning that led to that finding supports the notion that the imminent and substantial endangerment provision is not a substantive environmental requirement. Further, *Ohio* (as well as *Mitzefelt*, also cited by Defendants for a similar proposition) addressed previous versions of RCRA, prior to an amendment by Congress that clarified the scope of immunity. *See United States v. State of Colo.*, 990 F.2d 1565, 1570 (10th Cir. 1993) ("Congress recently amended § 6961 to clearly provide that federal agencies are not immune from such penalties.") (citing Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, § 102, 106 Stat. 1505 ("FFCA")). This amendment broadly waived sovereign immunity with respect to RCRA claims. It reads, in pertinent part:

> The Federal, State, interstate, and local substantive and procedural requirements referred to in this subsection include . . . all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature.... The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including . . . any injunctive relief, administrative order or civil or administrative penalty or fine . . .).

FFCA § 102(a)(3), reprinted in 1992 U.S.C.C.A.N. (106 Stat.) 1505.[20]

[20] It was also this amendment which expanded the definition of "person" under RCRA to expressly include: "each department, agency, and instrumentality of the United States." *Id.*

Defendants also cite to *Romero-Barcelo v. Brown* 643 F.2d 835, 855–856 (1st Cir. 1981), and *Florida Dep't of Envt'l Reg. v. Silvex Corp.*, 606 F. Supp. 159, 161, 163-64 (M.D. Fla. 1985), to support their argument, both of which were decided without giving consideration to pertinent statutory amendments and are readily distinguishable from the present case. In *Romero-Barcelo*, the First Circuit's discussion of "relatively precise standards" was in the context of the particular structure of the Noise Control Act and has no bearing on the meaning of "requirements" in RCRA § 6961. Similarly, the Middle District of Florida's reasoning in *Silvex* should be rejected because it failed to account for the amendments to the RCRA sovereign immunity waiver provisions that came as a result of the Supreme Court's decision in *United States Department of Energy v. Ohio*, 503 U.S. at 619 (finding no waiver of sovereign immunity under RCRA § 6001 for punitive penalties). With the passage of the FFCA, it is now "unmistakably clear that states could apply their solid and hazardous waste laws at federal facilities, including those 'respecting control and abatement of solid waste or hazardous waste disposal.'" *United States v. Manning*, 434 F. Supp. 2d 988, 998 (E.D. Wash. 2006), aff'd, 527 F.3d 828 (9th Cir. 2008).

Defendants invoke CERCLA in their attempt to avoid liability for the damages that they have caused, but even if CERCLA were to apply, the plain language of CERCLA also provides a waiver of the federal government's sovereign immunity. CERCLA's waiver of sovereign immunity provides:

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

42 U.S.C. § 9620(a)(1). Further, CERCLA states that:

> State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States or facilities that are the subject of a deferral under subsection (h)(3)(C) when such facilities are not included on the National Priorities List.

42 U.S.C. § 9620(a)(4).

Section 9620(a)(4) of CERCLA further provides that "[s]tate laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States or facilities that are the subject or a deferral under subsection (h)(3)(C) of this section *when such facilities are not included on the National Priorities List.*" (emphasis added). Neither Cannon nor Holloman are listed on the NPL, and thus, this waiver applies here.

The court in *United Sates v. Commonwealth of Pennsylvania Department of Environmental Resources* examined this language and held that the language in § 9260(a)(4) was "sufficiently specific to waive the sovereign immunity of the United States to state laws . . . that deal with removal and remedial actions as defined in CERCLA." 778 F. Supp. 1328, 1332 (M.D. Pa. 1991). The court reasoned:

> Congress chose to use the phrase "[s]tate laws concerning removal and remedial action" and must have known that "removal" and "remedial action" had precise, albeit broad, definitions in CERLCA. Given these definitions, *we cannot say that Congress really meant only state laws containing predetermined, objective, and precise standards for judging when violations have occurred under state law.*

Id. (emphasis added) (citing *Commonwealth, Dep't of Envtl. Resources v. United States Small Business Administration*, 134 Pa. Commw. 468 (1990)).

This waiver is further applicable where, as at the Bases, the United States has acted as a business, that is, as an owner, generator, or transporter of hazardous waste. Immunity from a CERCLA suit is limited to cases where the United States is acting in its regulatory capacity, which is not the case here. *See, e.g., United States v. Am. Color & Chem. Corp.*, 858 F. Supp. 445, 499 (M.D. Pa. 1994) ("Liability can be imposed only when the government acts as the operator of a business concern, not when it is acting in a government or regulatory capacity. It is only when the government acts as a business concern that the waiver of immunity set forth in section 120 of CERCLA applies.").

In *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432 (E.D. Cal. 1995), the court addressed the scope of the sovereign immunity waiver under CERCLA § 120 in considering whether the United States could be held liable for response costs associated with the release of acid mine drainage from an inactive hardrock mine in California, where the Bureau of Reclamation ("Reclamation") had constructed and operated several dams that allegedly concentrated acid mine drainage and aggravated the pollution problem. The court read section 120(a) to express an "an unequivocal waiver of sovereign immunity" and said that although CERCLA provides a narrow exception from liability for those who act in a remedial capacity and are not otherwise liable under CERCLA, the statute as a whole "suggests rather powerfully that there is no overarching, unexpressed remedial immunity for state and federal agencies." *Id.* at 1444. According to the court, "[w]here a governmental entity's regulatory or remedial activities, of whatever nature, bring the entity within the definition of the terms owner, operator, arranger, or transporter, as those terms are applied to private parties, the government will be liable." *Id.*; *see also Indian Towing v. United States*, 350 U.S. 61 (1955) (finding that if the

United States operates a hazardous waste facility or arranges for the treatment or disposal of solid wastes, it should be liable for cleanup costs just as a private business).

Because Defendants have expressly waived sovereign immunity for each of the State's claims, including RCRA and the New Mexico HWA, dismissal is not appropriate and the Motion to Dismiss should be denied.

B. Plaintiffs' Motion for Preliminary Injunction Should Be Granted

New Mexico has made the requisite "strong showing" of the likelihood of success on the merits and the balance of harms required by *O Centro*, 389 F.3d 973, to grant preliminary relief. Defendants have not only acknowledged the presence of these toxic constituents at levels even above the guidance from EPA but also that risks associated with this contamination was known to the UAF as far back as 2010. Further, Defendants admit that despite confirmed releases off site at both Bases that have impacted and continue to impact drinking water and other state environmental resources, Defendants do not intend to even begin a remedial *investigation*, let alone containment, abatement and/or removal measures until at least two years from now (at Cannon) and four years from now (at Holloman) and subject to unknown contingencies such as funding. Defendants concede that PFOA and PFOS have been found at levels higher than the Health Advisory issued by the EPA and that these toxic chemicals pose risk to the public. Defs.' Brief, at 2, 10, 14. Finally, Defendants admit to the planned continued use of AFFF containing these toxic chemicals for an indeterminate amount of time. Defs.' Brief, at 7 (citing Howard Decl. ¶ 11). These circumstances warrant the entry of a preliminary injunction.

The United States also argues that New Mexico may not obtain past and future monitoring costs as RCRA does not provide for cost recovery, however, such costs fall within the ambit of any injunctive relief requiring the Air Force to comply with any and all relevant

laws and regulations and to remediate the environmental damage and risks to human health it has already and will continue to cause until such a time that remediation and abatement is complete. For example, courts have the discretion to determine whether or not monitoring programs are appropriate. *See Easler v. Hoechst Celanese Corp.*, No. 7:14–00048–TMC, 2014 WL 3868022 (D. S.C. Aug. 5, 2014) (finding that a medical monitoring program was within the realm of possibilities for injunctive relief).

The United States itself admits that it may not even begin a remedial investigation of the Bases until 2021 and 2023 respectively, an investigation that will further prolong cleanup efforts at the sites. This weighs in favor of New Mexico when considering a balance of harm. Allowing for the natural resources of the State to remain contaminated for at least another year before the United States takes meaningful remediation action is unacceptable and certainly harms the interests of the State.

1. Plaintiffs have Shown that they Will Suffer Irreparable Harm in the Absence of Immediate Injunctive Relief.

Plaintiffs have shown that in the absence of injunctive relief, the health of New Mexicans and New Mexico's environment will both continue to suffer irreparable harm. ECF Doc. 11, at 21-23. Defendants' Brief in opposition has a glaring defect: it focuses solely on immediate harms to human health. Defendants also ignore all future risks that present contamination at Cannon and Holloman pose to human health and the environment, particularly where PFAS do not easily break down in the environment and bioaccumulate. *See* Amended Complaint, ¶¶ 21-23. Defendants' argument is contrary to the law and facts of this case.

The assessment reports provided by Defendants clearly show that there are multiple exposure pathways for both humans and biota that have caused and will continue to cause

environmental harm.[21] Environmental harm is, by its nature, generally irreparable. *Valley Cmty. Pres. Comm'n*, 373 F.3d at 1086 (citation omitted). "[W]hen a case is brought pursuant to an environmental or public health statute, including RCRA and the CWA, the primary focus shifts from irreparable harm to concern for the general public interest. . . . Thus, although it is not appropriate to dispense with the required showing of irreparable harm, it is permissible as part of the traditional balancing process to lessen the weight attributable to that usually dispositive factor." *Wilson v. Amoco Corp.*, 989 F. Supp. 1159, 1171 (D. Wyo. 1998).

The circumstantial evidence for exposure and subsequent harm is compelling and indicates direct contamination pathways for PFAS to burrowing animals, birds, aquatic species, and plants. Defendants fail to address these wildlife exposure pathways at the bases. For example, the September 2015 *Final Preliminary Assessment Report* states that wildlife and birds make use of Lake Holloman, representing both surface water and sediment exposure pathways. Defendants' reports also identify exposure pathways to burrowing animals at Cannon. Defendants do not contest that species exposed to PFAS compounds, including PFOA and/or PFOS, will suffer negative impacts.

The contamination at Cannon also presents exposure pathways to environmental resources. In asserting that the surface water features at Cannon do not present exposure pathways to humans, *see* Declaration of William Howard, at 3, Mr. Howard fails to address ecological receptors and potential exposure pathways to them. Mr. Howard instead focuses on only drinking water and human receptors. However, the October 2015 *Final Preliminary Assessment Report* identified potential exposure pathways for environmental resources through surface water at North Playa Lake – "The potential of exposure to burrowing animals would be

[21] Where such pathways have not been clearly established, this is due to incomplete data, caused by Defendants' failure to examine identified risks.

present" for soil and air contamination—and at South Playa Lake – "The potential of exposure to burrowing animals would be present" for soil and air contamination. *See* Attachment 1 to Kottkamp Decl. (Doc 31-3), at 17, 19.

The 2015 Report identifies the Federally Endangered bald eagle and black-footed ferret as having the potential to occur in wildlife areas around the base along with other unspecified animal species. The Report also states that "[i]n addition, wetland areas have been identified adjacent to the surface water migration paths 15 miles downstream of the Base." This indicates a potential for species to move off and on the base through these corridors. Further, simply focusing on listed threatened and endangered species in the Report misses the broader suite of impacts to wildlife, aquatic biota, and plant species that, while not listed, are exposed to perfluorinated compounds due to Defendants' actions.

The September 2015 *Final Preliminary Assessment Report* also states that "[c]urrently, the WWTP [waste water treatment plant] discharges effluent to the one uncovered lagoon (Lagoon G) to maintain habitat for wildlife and bird species. Effluent from the WWTP may contain AFFF." This presents a surface water exposure pathway.

As to the surface water at Holloman, Defendants argue that all surface water flow remains within base boundaries. *See* Declaration of Robin Paul, at 2. However, the hydrologic setting is more complex than implied by this comment which seems to suggest that Holloman is self-contained with no groundwater or surface water movement offsite. This simply is not true based on the November 2018 *Final Site Inspection* and a review of the National Hydrography Dataset (United States Geological Survey). Multiple intermittent/ephemeral stream systems intersect the Holloman property, primarily in the north, and the flow of both surface and groundwater is toward the southwest.

Defendants also assert that, according to their own site investigations, there are no human health exposure pathways at Holloman due to the groundwater not being used for drinking water. The Tularosa Basin where Holloman is located is a closed system, not the groundwater basin specifically beneath the base. Irrespective, perfluorinated compounds are migrating through and remaining within the ecosystem with ample exposure points to biota. While there are no domestic water supply wells downgradient of Holloman, the November 2018 *Final Site Inspection* indicates there is a dairy supply well downgradient. Potential exposure to livestock is an exposure that warrants action to protect those resources.

The 2018 Final Report does not address ecological risk and exposure, and thus, the actual harm to these resources is still unknown. Although Defendants are aware of many potential exposure pathways, including the presence of multiple surface waterbodies at Holloman (most notably Lake Holloman) that attract waterfowl, aquatic biota, and all types of plant biological resources, Defendants claim that because they have placed signs around the Lake warning the public not to swim in the water, further studies of the risks are not necessary. Wildlife do not tend to pay attention to signage regarding contamination, and there is clearly an unstudied risk occurring as a result of Defendants' contamination at Holloman.

The United States is correct in stating that there is no federal regulatory limit. Defs.' Brief, at 8. However, the standard for imminent and substantial endangerment under the HWA and RCRA is not whether a regulatory standard has been violated.[22] *See* 42 U.S.C. § 6972(a)(1)(B) (as distinguished from § 6972(a)(1)(A), which expressly requires a violation "of a permit, standard, regulation, condition, requirement, prohibition or order"). The inquiry under § 6972(a)(1)(B) focuses on the real and potential risks to human health and the environment from

[22] Additionally, Defendants attempt to escape liability based on the United States' own failure to adopt a regulatory standard is not compelling.

hazardous wastes discharged by a polluter. Regardless, PFOA and/or PFOS have been found in excess of this level at both Cannon and Holloman.

Additionally, contrary to Defendants' arguments, there is a significant risk of harm related to recreation in Lake Holloman, where there are high levels of PFAS contamination. *See* Amended Complaint, ¶ 108; Plfs.' Mtn. for Preliminary Injunction, at 11-12. There would be no risk of harm to residents and recreationalists if there were no contamination in the lake due to the United States' actions and failure to clean up PFAS compounds. While the loss of recreation is not a physical harm, per se, contamination by PFAS compounds diminishes the quality of life for New Mexico residents and has actual economic effects to the State.

To the extent that Defendants claim that harm to the environment has not been established, this is because Defendants have failed to conduct the appropriate studies that examine all potentially impacted species. Further, as explained below, actual harm is not required for relief under RCRA or for a preliminary injunction (although Plaintiffs have demonstrated actual harm to be present here).

2. Plaintiffs are Likely to Succeed on the Merits.

The State is likely to obtain relief on the merits of each of its claims, and Defendants have not presented any persuasive arguments to the contrary. Plaintiffs have made a showing of imminent and substantial endangerment caused by the conditions at Cannon and Holloman. An actual showing of injury is not required to succeed on this claim. As the court reiterated in *Tyson Foods*:

> *Burlington Northern and Santa Fe Railway Company v. Grant*, 505 F.3d 1013 (10th Cir. 2007), this court explained that "[a]s a threshold matter, it is well established that the operative word in § 6972(a)(1)(B) 'may present an imminent and substantial endangerment' clause] is 'may'; thus, [the plaintiff] must demonstrate that the [solid or hazardous waste] 'may present' such

> a danger." 505 F.3d at 1020. Adopting the language of the Second Circuit, we emphasized that "[t]his 'expansive language' is 'intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes.'" *Id.* (quoting *Dague v. City of Burlington,* 935 F.2d 1343, 1355 (2d Cir.1991), *rev'd in part on other grounds,* 502 U.S. 1071, 112 S.Ct. 964, 117 L.Ed.2d 130 (1992)). Furthermore, we explained in *Burlington Northern,* "the term 'endangerment' has been interpreted by courts to mean a threatened or potential harm[;] thus, it is *not necessary that [the plaintiff] show proof of actual harm* to health or the environment." *Id.* (emphasis added). Instead, "injunctive relief is authorized when there *may* be a risk of harm." *Id.* Similarly, a court's "finding of 'imminency' does not require a showing that actual harm will occur immediately as long as the risk of threatened harm is present." *Id.*

Tyson Foods, 565 F.3d at 776. Defendants' so-called investigations into the contamination at Cannon and Holloman have not altered the existence of an imminent and substantial endangerment. No meaningful actions have been taken to abate the dangers posed to human health and the environment in these locations, which is why the State's action is necessary.

Defendants argue that the current "process" taking place at the Bases is sufficiently protective of New Mexico's environment and human health because the Air Force, if it determines "PFOS/PFOA levels exceed the LHA [lifetime health advisory] in drinking water[,] . . . will initiate a 'removal' action to reduce risk and, if needed, ensure an [sic] the availability of an alternative drinking water source." Howard Decl. ¶20. This assertion does not obviate the State's imminent and substantial endangerment claim for two primary reasons. First, exceedance of a standard (or in this case EPA guidance) is not required in order to demonstrate imminent and substantial endangerment under the citizen suit provision. 42 U.S.C. § 6972(a)(1)(B). Secondly, the State's concerns at issue here reach far beyond a compartmentalized view limited to exceedance of EPA's current health advisory in drinking water. As the State has demonstrated, available scientific information shows that the risk of harm to human health and the environment

in addition to exposure in drinking water is substantial at far lower levels than EPA guidance currently suggests. *See, e.g.,* Certification of M. Laska, ¶ 13 (ECF Doc. 13). Moreover, at the heart of Plaintiffs' request is a need to sufficiently characterize the spread of contaminants in all media to accurately address these impacts and risks.

Moreover, contrary to Defendants' suggestion, *see* Defs.' Brief at 22 n. 11, 33, costs, including attorney and expert fees, may be awarded to the prevailing or substantially prevailing party pursuant to RCRA, 42 U.S.C. §6972(e), which provides in part:

> The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.

Defendants' attempt to suggest otherwise is not supported by the cases it cites. Specifically, *Avondale Fed Savings Bank v. Amoco Oil Co.*, 170 F.3d 692 (7th Cir. 1999), involved a property owner's decision to remediate contaminated property it purchased and then seek an injunction for recovery of those costs. As an initial matter, the court found that such a claim sounded in restitution or damages, rather than one for costs associated with bringing the claim. The *Avondale* court, citing *Meghrig*, reasoned that such recovery was precluded in light of the citizen suit regime established under RCRA which:

> is not directed at providing compensation for past cleanup efforts. Instead, RCRA offers a private citizen a choice of two remedies: "a mandatory injunction, i.e., one that orders a responsible party to 'take action' by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, i.e., one that 'restrains' a responsible party from further violating RCRA." *Id*. "Neither remedy, however, contemplates the award of past cleanup costs, whether these are denominated 'damages' or 'equitable restitution.'"

Id. at 694 (quoting *Meghrig*, 516 U.S. 479).

Such a ruling does not bar the State's request here, which does not equate to a damages or restitution claim. Indeed, the Tenth Circuit has reversed a district court that failed to address a prevailing party's request for costs and fees under RCRA. *Browder v. City of Moab*, 427 F.3d 717, 720 (10th Cir. 2005) (remanding for a determination of appropriate fees and costs under fee shifting provision of RCRA). In doing so, the *Browder* court cited to *City of Burlington v. Dague*, 505 U.S. 557, 561–62 (1992), which found in part that:

> Section 7002(e) of the SWDA and § 505(d) of the CWA authorize a court to "award costs of litigation (*including reasonable attorney . . . fees*)" to a "prevailing or substantially prevailing party." 42 U.S.C. § 6972(e) (emphasis added); 33 U.S.C. § 1365(d) (emphasis added). This language is similar to that of many other federal fee-shifting statutes, *see, e.g.*, 42 U.S.C. §§ 1988, 2000e–5(k), 7604(d); our case law construing what is a "reasonable" fee applies uniformly to all of them. *Flight Attendants v. Zipes,* 491 U.S. 754, 758, n. 2, 109 S.Ct. 2732, 2735, n. 2, 105 L.Ed.2d 639 (1989).

Browder v. City of Moab, 427 F.3d 717, 720 (10th Cir. 2005).[23]

3. The Balance of Equities and the Public Interest Weigh in Favor of a Preliminary Injunction.

The final factors, the balance of equities among the parties and the public interest, weigh heavily in support of an injunction. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (stating that when the federal government is the opposing party of a preliminary injunction, the balance of equities and public interest factors merge). In their Brief, Defendants ask that the safety of other citizens be prioritized over those of New Mexico. This bold assertion forms the basis of Defendants' claim that the balance of equities weighs in favor of allowing further delays in relief from dangerous contaminations for the State of New Mexico. However, protection of the citizens of the State, as well as its natural resources, from dangers such as those posed by the

[23] Additionally, in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court recognized that as a general matter, "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Id.* at 429.

contamination at Cannon and Holloman, is of upmost importance to the State,[24] and the State's claims brought here are no less valid or any less serious because Defendants also face liability related to other properties.

Citizens and the environment in the State of New Mexico have suffered for years as a result of Defendants action, even though the extent of those injuries are just now coming to light. Defendants suggest that they have known of the PFAS contamination since 2010, yet still have not conducted a single action that would remove any of the contamination from either Cannon or Holloman, nor can they point to any material plan to do so. Defendants merely state that they will possibly look at what action may be needed sometime in the next five years, and they believe that this is enough. However, such a delay is inconsistent with state and federal law, which prohibit any person from causing an imminent and substantial endangerment to human health and the environment, and Defendants cannot ignore their liability for creating such conditions at Cannon and Holloman because it would be costly or inconvenient for them to act. Granting the State a preliminary injunction here would serve the purposes of RCRA: "to minimize the present and future threat to human health and the environment." *Meghrig*, 516 U.S. at 483.

Finally, Defendants' assertion that what it describes as the State's "delay" in seeking a preliminary injunction is factually incorrect and also not supported by the legal authority they cite. *See* Defs.' Brief, at 36. Initially, Defendants' suggestion that the State of New Mexico should have sought injunctive relief as early as 2015 is disingenuous under the circumstances. Defendants have, at every turn, and as is evident here, challenged the State's authority to regulate and/or take action at the Bases. As part of this, Defendants have routinely

[24] *See* Article XX, Section 21 of the New Mexico Constitution ("[P]rotection of the State's beautiful and healthful environment is . . . declared to be of fundamental interest to the public interest, health, safety and the general welfare.").

withheld information in connection with its investigations. In addition, the circumstances presented in the cases cited by Defendants, where the timing issues that have been found are "eleventh-hour" in nature, are quite distinct from what has transpired here. For example, in *Justice v. Hosemann*, 829 F. Supp. 2d 504, 520-21 (N.D. Miss. 2011), where plaintiffs challenged election disclosure, reporting, and registration regulations as violating rights of free speech and association, the court described the timing issue as one of "lateness of the Plaintiffs' motion, filed nineteen days before the election, weighs against granting the extraordinary remedy of injunctive relief." The concern raised by the court was the imminence of the election and the disruption any injunctive relief would cause. The *Respect Maine Pac v. McKee*, 622 F.3d 13 (1st Cir. 2010), ruling, also relied upon by Defendants, raised the same issue with respect to timing. The preliminary injunction was sought on the eve of the election and as described by the court, became an emergency of the plaintiffs' own making. *Id.* at 16. This is distinctly not the case here. Because Plaintiffs have satisfied the requirements for granting a preliminary junction, such relief should be granted here.

IV. Conclusion

For the reasons stated herein, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss and grant Plaintiffs' Motion for Preliminary Injunction.

Dated: September 27, 2019

Respectfully submitted:

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CERTIFICATE OF SERVICE

I CERTIFFY that, on September 27, 2019, I filed the foregoing using CM/ECF which cause the parties of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Allan Kanner
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