NEW MEXICO ENVIRONMENT DEPARTMENT, and JAMES KENNEY, Secretary (in his official capacity),

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on cross-motions for summary judgment. Plaintiff United States first filed its Motion for Summary Judgment. (Doc. 58). Defendants New Mexico Environment Department and James Kenney, Secretary, responded and cross-motioned for summary judgment. (Doc. 59). Both parties, in turn, replied. (Docs. 60, 61). The Court, having considered the briefing and the applicable law, construing the matter as a state administrative appeal, and finding the New Mexico Hazardous Waste Act requires the case go before the New Mexico Court of Appeals, denies both motions and dismisses the case without prejudice.

I. *Background*

This case ascends from the runways of Cannon Air Force Base ("Cannon AFB" or "the Base") near Clovis, New Mexico, where the Air Force uses hazardous perfluoroalkyls chemicals, commonly referred to as PFAS, to extinguish jet fuel fires. The United States challenges certain terms in a hazardous waste permit issued by the New Mexico Environment Department (NMED) for violating the New Mexico Hazardous Waste Act (HWA), NMSA § 74-4-1 *et seq.*, and its implementing regulations.

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U.S. Department of Health and Human Services, Toxicology Profile for Perfluoroalkyls (2021), available at https://www.atsdr.cdc.gov/ToxProfiles/tp200.pdf.[1] Indeed, the Air Force acknowledged the Environmental Protection Agency's drinking water health advisory related to PFAS during the permitting process in this case. Administrative Record at 45, (Doc. 49) Ex. 3 at 45.

That Cannon AFB uses and disposes of PFAS is not in dispute—the underlying administrative record extensively covers releases of PFAS at the Base. AR 34–131; 686–10558. Around Cannon AFB, PFAS runoff has reportedly created a "plume" in the groundwater system, effectively destroying local dairy operations. Theresa Davis, *Cannon PFAS Destroyed Longtime Clovis Farmer's Dairy*, Albuquerque Journal, May 29, 2022, at https://www.abqjournal.com/2503560/cannon-pfas-destroyed-longtime-clovis-farmers-dairy.html. PFAS has also appeared in Clovis' municipal drinking water. Press Release, New Mexico Environment Department, PFAS Detected in Clovis Public Drinking Water System (Feb. 10, 2020), available at https://www.env.nm.gov/wp-content/uploads/2020/02/2020-02-10-Clovis-PR-final.pdf.

The Resource Conservation and Recovery Act (RCRA) is the primary federal statute regulating disposal of solid and hazardous waste. 42 U.S.C. § 6901 *et seq.* New Mexico can

[1] The court takes judicial notice of this and other facts. *See Van Woudenberg v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000) ("[T[he court is permitted to take judicial notice of . . . facts which are a matter of public record") abrogated on other grounds, *McGregor v. Gibson*, 248 F.3d 946, 955 (10th Cir. 2001).

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New Mexico hazardous waste program); NMAC § 20.4.1 (HWA implementing regulations).

In conjunction with that authorization, RCRA also contains an explicit waiver of federal sovereign immunity, making federal facilities "subject to" state requirements, "both substantive and procedural[,]… in the same manner, and to the same extent, as any person is subject to such requirements." 42 U.S.C. § 6961(a); *cf. United States v. Washington*, 142 S. Ct. 1976, 1982 (2022) ("The Constitution's Supremacy Clause generally immunizes the Federal Government from state laws that directly regulate or discriminate against it. Congress, however, can authorize such laws by waiving this constitutional immunity." (internal citations omitted)).

States are empowered to regulate above and beyond RCRA, which merely establishes minimum standards. 42 U.S.C. §§ 6926, 6929; 40 C.F.R. § 271.1(i) ("nothing in this subpart precludes a State from…[a]dopting or enforcing requirements which are more stringent or more extensive than those required under this subpart."); *United States v. State of Colorado*, 990 F.2d 1565, 1569 (10th Cir. 1993) ("RCRA sets a floor not a ceiling for state regulation of hazardous wastes.").[2]

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[2] At the time the Permit was issued, the HWA, NMSA § 74-4-4(A), required the New Mexico Environmental Improvement Board to promulgate regulations "equivalent to and no more stringent than federal regulations." 2010 N.M. Laws ch. 27 § 2 (emphasis added). In 2021, however, the legislature amended the HWA such that § 74-4-4(A) now requires the Board to adopt rules "that are equivalent to and at least as stringent as federal regulations." 2021 N.M. Laws ch. 133, § 3 (emphasis added).

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hazardous waste or constituents.…"). According to this legal authority, and against the backdrop of PFAS's known use and harmful impacts, when NMED renewed Cannon AFB's hazardous waste permit, it included PFAS as a hazardous waste requiring corrective action. Permit at § 1.12, AR 011349, (Doc. 49) Ex. 21 at 213.

The United States initiated this lawsuit to challenge that definition of hazardous waste. Critically, the nature of that challenge has evolved over the course of the litigation. Originally, the United States alleged that the Permit's definition of hazardous waste exceeded the scope of Congress' waiver of sovereign immunity in 42 U.S.C. § 6961(a). (Doc. 1) at ¶ 22. NMED filed a Motion to Dismiss, arguing for abstention in favor of the parallel state case[3] and testing the sufficiency of the Complaint generally. (Doc. 4) at 4–9. The Court denied the Motion, reasoning at that time that the abstention doctrines did not apply, the United States stated a plausible claim, and the Court had proper jurisdiction all because the important federal question—sovereign immunity—prevailed. *See generally* (Doc. 26); *also*, *id.* at 15 ("[T]he issue in this case will involve consideration of federal law in interpreting the contours of RCRA's waiver of sovereign immunity[.]").

Subsequently, the United States filed an Amended Complaint which substantially changed its claims. *See* (Doc. 56). The United States abandoned its sovereign immunity

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[3] That case, *United States v. N.M. Env't Dep't*, Case No. A-1-CA-37887 (N.M. Ct. App., filed Jan. 17, 2019), is currently stayed pending resolution of this case, *see id.* (Order filed April 10, 2019).

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> supported by substantial evidence in the record; or (3) otherwise not in accordance with law." [NMSA § 74-14-4(C)].

(Doc. 56) at ¶ 17; *see also id.* at ¶¶ 2–3, 25–31.

The United States seeks (1) a declaration that certain Permit terms are inconsistent with the scope of "corrective action" in the HWA and in its implementing regulations; and (2) a declaration that the terms are arbitrary, capricious, or an abuse of discretion, not supported by substantial evidence in the record, or otherwise not in accordance with the law. *Id.* at 7. It requests injunctive relief to set aside the allegedly unlawful terms of the Permit. *Id.* These claims bring the federal claims into alignment with the claims asserted in the state case. *See United States v. N.M. Env't Dep't*, Case No. A-1-CA-37887 (N.M. Ct. App., filed Jan. 17, 2019); *also* (Doc. 26) at 5 (describing the parallel state case).

In its Motion for Summary Judgment, the United States again urges this Court to construe the case as a state administrative appeal:

> Neither this Court nor the Tenth Circuit has addressed the standard of review for a motion for summary judgment on a claim under the HWA.... Under *Olenhouse* [*v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994)], a district court reviewing agency action "acts as an appellate court" and "employs summary judgment to decide, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the [Administrative Procedures Act] standard of review." *N.M. Health Connections v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1138, 1161 (10th Cir. 2019) (internal quotation marks and alteration omitted). This review is limited to the administrative record before the agency at the time the decision was made. *Id.* at 1161-62.

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