



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

April 10, 2026

EIB Administrator (Ms. Pamela Jones)  
New Mexico Environment Department – Harold Runnels Building  
P.O. Box 5469  
Sante Fe, NM 87502  
pamela.jones@env.nm.gov

SUBJECT: Department of Air Force Comments on New Mexico Environmental Improvement Board Case Number 25-81; Adoption of Aqueous Film-Forming Foam Rules and Amendments

Dear Ms. Jones and members of the New Mexico Environmental Improvement Board,

In accordance with New Mexico Administrative Code (NMAC) 20.1.1.304, the Department of Air Force (DAF) hereby submits the following public comment to the record in Environmental Improvement Board (NMEIB) Rulemaking No. EIB 25-81 pertaining to the proposed new rules and amendments related to New Mexico's regulation of Aqueous Film-Forming Foam (AFFF) containing intentionally added per - or polyfluoroalkyl substances. The DAF takes seriously its dual responsibility of carrying out its military mission while protecting the environment in the process. I am the DAF Regional Environmental Coordinator (REC) for Federal Region 6, which consists of Texas, New Mexico, Louisiana, Arkansas, and Oklahoma. In my position I coordinate legislative and regulatory concerns within these states for the DAF.

The DAF understands the New Mexico Environment Department's (NMED) efforts to clarify the Hazardous Waste Management Regulations. However, NMEIB does not currently have statutory authority to enact the following proposed regulatory amendments and new regulations and as such DAF requests that they be withdrawn:

- (1) 20.4.1.201 (C), (D), (E), and (F);
- (2) 20.4.1.801 (C);
- (3) 20.4.1.902 (D);
- (4) 20.13.3.6 (D);
- (5) 20.13.3.12; and
- (6) 20.13.3.14.

NMEIB derives its authority to adopt rules for the management of hazardous waste, as may be necessary to protect public health and the environment, under New Mexico statutes annotated (NMSA) 74-4-4. The statute was recently amended and states that NMEIB "may adopt rules pertaining to aqueous film-forming foam containing intentionally added per - or polyfluoroalkyl substances pursuant to the Hazardous Waste Act. N.M. Stat. Ann. 74-4-4 (M).

However, NMSA 74-4-4 was not amended to remove the following condition precedent which prohibits NMEIB from identifying or listing any solid waste or combination of solid wastes as hazardous wastes that has not been listed and designated as a hazardous waste by the United States Environmental Protection Agency (USEPA) pursuant to the federal Resource Conservation and Recovery Act of 1976 (RCRA), as amended. The New Mexico statute states that the Board may adopt rules:

“for the identification and listing of hazardous wastes, taking into account toxicity, persistence and degradability, potential for accumulation in tissue and other related factors, including flammability, corrosiveness and other hazardous characteristics; provided that, except as authorized by Sections 74-4-3.3 and 74-8-2 NMSA 1978, the **board shall not identify or list any solid waste or combination of solid wastes as a hazardous waste that has not been listed and designated as a hazardous waste by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended.**” N.M. Stat. Ann. Section 74-4-4 (A)(1) (emphasis added).

The only two exceptions cited by the statute, Section 74-4-3.3 and Section 74-8-2, do not apply to this proposed rulemaking. The New Mexico legislature did not add any further exception to the language to address its amendments to the Hazardous Waste Act pertaining to AFFF containing intentionally added per – or polyfluoroalkyl substances. Further, this section was initially proposed to be removed from the statute in the original form of the bill. However, the amendments adopted by the legislature reinstated this provision, indicating their specific intent to ensure the Board did not identify or list a hazardous waste that had not been so designated by the USEPA.

Moreover, in 1997 New Mexico adopted the Uniform Statute and Rule Construction Act which states that “no rule is valid or enforceable if it conflicts with a statute. A conflict between a rule and a statute is resolved in favor of the statute.” N.M. Stat. Ann. Section 14-4-5.7(A). NMEIB’s adoption of the proposed amendments listed above which identifies and lists aqueous film-forming foam containing intentionally added per – or polyfluoroalkyl substances as hazardous wastes would directly conflict with N.M. Stat. Ann. Section 74-4-4 (A)(1).

While it has been recognized that N.M. Stat. Ann Section 74-4-4(M) provides that NMEIB “may” adopt rules pertaining to AFFF containing intentionally added per - or polyfluoroalkyl substances pursuant to the Hazardous Waste Act, subsection (A)(1) of that same statute, specifically states that that NMEIB “shall not” identify or list any solid waste as a hazardous waste that has not been so designated by the USEPA.

The Uniform Statute and Rule Construction Act further states that “shall” expresses a “duty, obligation, requirement or condition precedent,” while “may confers a power, authority, privilege or right.” N.M. Stat. Ann. Section 12-2A-4.

Therefore, the statute prohibiting NMEIB from identifying or listing a solid waste as hazardous waste if the USEPA has not yet done so, will take precedence and become a condition precedent to NMEIB’s ability to adopt rules that identify or list AFFF containing intentionally

added per - or polyfluoroalkyl substances as a hazardous waste. Thus, DAF requests that the proposed regulatory amendments or new regulations listed above be withdrawn since they list, identify or prescribe requirements that apply to AFFF containing intentionally added per - or polyfluoroalkyl substances as a hazardous waste and/or a hazardous constituent that have not been so designated by the USEPA.

Accordingly, the NMEIB lacks the authority to list discarded AFFF containing PFAS as a hazardous waste under the New Mexico Hazardous Waste Act. The USEPA has not listed any PFAS compounds as hazardous waste. The USEPA also has not designated any PFAS compounds as hazardous constituents, a preliminary step to listing a hazardous waste under RCRA. The proposed rulemaking would therefore exceed NMEIB's authority to implement these rule changes and amendments.

The DAF further requests the proposed changes to NMAC 20.13.3.12 be withdrawn because it attempts to regulate the "storage of AFFF products containing intentionally added PFAS." There is no authority under RCRA to regulate any product until it becomes a solid waste as defined in RCRA and its implementing regulations and products containing intentionally added PFAS are not solid waste.

The DAF also requests the proposed changes to NMAC 20.13.3.6 and 20.13.3.14 be withdrawn to avoid overlapping and/or conflicting regulatory oversight that would delay ongoing PFAS remediation efforts and may result in conflict outcomes and direction.

At the direction of Congress, the DAF applies CERCLA when investigating and addressing releases of per - or polyfluoroalkyl substances on and from its installations. In doing so, the DAF works closely with the USEPA and state regulators nationwide to assess and manage restoration activities, while also ensuring community involvement in the CERCLA cleanup process. The Department of War (DoW) has invested billions of dollars to protect the environment through our environmental restoration efforts, including in response to per - or polyfluoroalkyl releases at DoW installations in New Mexico. The DAF alone has spent over \$143 million dollars on environmental restoration activities in New Mexico since the start of fiscal year 2020 to fund past and on-going investigations, which includes two on-going groundwater pilot treatment projects, and interim measures to provide real time mitigation for landowners. Hundreds of thousands of gallons of water each day are being treated in New Mexico by DoW to remove PFAS and more treatment capacity is being constructed in the coming year. To reduce duplicative and costly oversight by a similar regulatory program, these amendments and new regulations should be amended to exclude entities that are already pursuing cleanup under Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA.

Finally, in the alternative, if NMEIB determines to approve the proposed regulations, the DAF would request that 20.4.1.301 be amended to state:

"Except as otherwise provided, the following modifications, exceptions, and omissions are made to the incorporated federal regulations:

(A) 40 CFR 261.2(a)(2)(i) (E) is amended to include: aqueous film-forming foam containing intentionally added per - or polyfluoroalkyl substances that was not used in accordance with the manufacturers guidelines as a fire suppressant or during training activities in preparation of such use.”

This amendment would ensure that AFFF when used in accordance with its label would not become a RCRA release, since it would not be considered a solid waste under those specific circumstances. This would then allow a more site-wide comprehensive cleanup approach under CERCLA to address any human health or environmental concerns posed by the presence of AFFF in the environment.

Thank you for considering the DAF’s comments. If you have any questions or would like to discuss the DAF’s comments in more detail, please contact me at (443) 756-1475 or at michael.ackerman.2@us.af.mil.

Sincerely,



MICHAEL ACKERMAN  
DAF Regional Environmental Coordinator  
Federal Region 6

cc:

Mr. John D. Nance, NMED Hazardous Waste Bureau Chief  
Ms. Neelan Dhawan, NMED Hazardous Waste Bureau  
Mr. Greg Lyssy, EPA Region 6  
Mr. Travis Tucker, EPA Region 6  
Ms. Laurie Kink, EPA Region 6  
Mr. Terry Bowers, Office of the Deputy Assistant Secretary of War  
Mr. Michael Khamayzer, Army Headquarters (Env. Compliance and Mission Readiness)