IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE: AQUEOUS FILM-FORMING FOAMS PRODUCTS LIABILITY LITIGATION	)	No. 2:18-mn-2873-RMG
	)	**This Document Relates to**
	)	*Dorene Dairy Gen. P'Ship*, 2:20-cv-04263
	)	*Schaap*, 2:19-cv-03288
	)	*Teune*, 2:19-cv-03290
	)	*Vander Dussen*, 2:20-cv-04191
	)	*New Mexico*, 2:20-cv-02115

UNITED STATES OF AMERICA'S MEMORANDUM OF LAW
IN SUPPORT OF SITE-SPECIFIC MOTION TO DISMISS
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

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INTRODUCTION

The Court should dismiss tort claims asserted against the United States under the Federal Tort Claims Act ("FTCA") related to Cannon Air Force Base ("CAFB"). These FTCA Plaintiffs cannot identify any mandatory and specific directive that the Air Force ("USAF") violated in using or handling aqueous film-forming foam ("AFFF") at CAFB. The only conceivably relevant federal directive at CAFB is Operating Instruction 32-11 ("OI 32-11"). OI 32-11, which was first issued in 2002 and relates solely to hangar discharges, gave employees multiple choices in responding to releases and always yielded to base mission considerations, as its author John Rebman has testified. Moreover, OI 32-11—and the USAF's use and handling of AFFF at CAFB overall—was subject to policy considerations in furtherance of the USAF's military mission. The decisions challenged in this case are therefore protected by the FTCA's Discretionary Function Exception ("DFE"). 28 U.S.C. § 2680(a).

The Court should also dismiss New Mexico's claims against the United States for lack of subject-matter jurisdiction, under section 113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). New Mexico's claims constitute an impermissible challenge to a CERCLA response action because they seek relief that would interfere with the Air Force's ongoing investigation and remediation efforts at CAFB.

FACTUAL BACKGROUND

I. The FTCA Plaintiffs Seek Money Damages Stemming from the Use and Handling of AFFF at CAFB, and New Mexico Seeks Injunctive Relief Ordering Remediation.

The FTCA Plaintiffs at issue in this Motion are four dairy and agricultural farms adjacent to the southeastern corner of CAFB: Highland Dairy, Day Star Dairy, Rajen Dairy, and the former Dorene Dairy. These Plaintiffs assert claims for money damages under the FTCA.

New Mexico's complaint asserts claims under the "citizen suit" provision of the federal Resource Conservation and Recovery Act ("RCRA") and an analogous provision in the state Hazardous Waste Act ("HWA"). 42 U.S.C. § 6972(a)(1)(B); NMSA § 74-4-13. Both provisions authorize injunctive relief against certain persons who have contributed to the "imminent and substantial endangerment to health or the environment" from solid or hazardous waste. New Mexico asserts that releases of PFAS at CAFB have caused such endangerment and seeks injunctive relief ordering "abatement" of the alleged endangerment. *New Mexico v. United States*, No. 2:20-cv-02115, Dkt. 9 ¶¶ 138-39, 143 & p. 33.

II. CAFB Provides Air Readiness to Achieve National Security Objectives.

CAFB became a military airfield during World War II, and following the war, the base came under the control of the Air Force's Tactical Air Command. *See* **Ex. A**, Excerpts from CAFB Webpage; **Ex. B**, CAFB Fact Sheet. From 1959 to 2007, CAFB housed the Air Combat Command's 27th Fighter Wing, which conducted combat missions and other special operations. In 2007, the USAF transitioned CAFB from the Air Combat Command to the Air Force Special Operations Command and re-designated it as the "27th Special Operations Wing." Since 2007, CAFB has served as one of only eight special operations wings for the entire USAF. *Id*. CAFB conducts "sensitive special operations missions including close air support, unmanned aerial vehicle operations, non-standard aviation in response to the Secretary of Defense." **Ex. C**, U.S. Department of Defense, *Cannon Air Force Base Profile*; *see also* **Ex. D**, Final Site Inspection Report (Aug. 2018) ("SI") at § 2.2.

III. The USAF Used AFFF at CAFB in Carrying Out Its Mission.

The FTCA Plaintiffs' Complaints implicate four categories of conduct relating to the use and handling of AFFF at CAFB since 1970: (1) mandatory fire training, (2) fire-suppression

systems in hangars, (3) fire emergency responses, and (4) equipment testing for preparedness. *See*, *e.g.*, *Teune v. United States*, 2:19-cv-03290, Dkt. 1 at ¶¶ 5-6; *see also* **Ex. E**, Final AFFF Release Area Phase 1 Remedial Investigation Workplan for CAFB, (Aug. 2021) ("RI") at § 2.5.1.

Fire Training. From 1970 to 1985, fire training at CAFB was conducted multiple times per year in unlined pits, consisting of igniting a mock jet fuselage with 300 gallons of jet fuel and using AFFF to extinguish the fire. RI at §§ 3.5.3 to 3.5.3.2. In 1985, CAFB, like other USAF bases, stopped using jet fuel for fire training, switched over to propane, and installed a liner in the recovery pit of the fire training area. *Id*. In 1997, the USAF installed a new lined fire training area at CAFB, which used propane and had a lined recovery pit (and still operates today). *Id*. at § 3.5.3.1. Consistent with former USAF Chief Fire Protection Engineer Frederick Walker's testimony regarding the USAF's global reduction in AFFF use in fire training in the 1990s (*see* Memo. ISO Omnibus Motion (Dkt. 4548-1) at pp.11–12), once the pits shifted to propane, CAFB voluntarily shifted to largely training with water, and stopped training with AFFF altogether no later than 2011. **Ex. F**, CAFB Chart on AFFF Use (estimating 1997); RI at § 3.5.3.2.

Fire-Suppression Systems in Hangars. From 1970 through roughly 1998, AFFF was used in fire-suppression systems in hangers at CAFB. RI at § 2.5.1-2, § 3.5.2, § 3.5.4. Regardless of how a hangar release of AFFF occurred, the AFFF/water mixture could reach three locations: (1) the solar evaporation pond; (2) the main base drainage basin; or (3) the sanitary sewer system. *Id*. The base sanitary sewer system consisted of two unlined sewage lagoons that ultimately discharged to an unlined storage basin known as North Playa Lake, which the base used for irrigation. *Id*. Plaintiff Rajen Dairy drew irrigation water from the storage basin for several years in the mid 1990's under a Utility Agreement with CAFB that included an unambiguous hold harmless clause. **Ex. G**, CAFB Utility Agreement with Rajen Dairy. Consistent with Air Force

Policy, in 1998 CAFB constructed a new water treatment plant and a 9 million gallon holding tank for AFFF and other materials that could then be metered into the new plant. RI at § 3.5.4.2 (describing valves in hangar trenches to send to WWTP); *see* Walker Decl., Dkt. 4548-67, ¶ 28 & Ex. 14 thereto, ETL 1110-3-481 (Nov. 19, 1997) ¶¶ 3, 6.

Fire Emergency Responses. AFFF has been used at CAFB in response to fire emergencies, including in response to fires stemming from three separate plane crashes on the runway involving F-16 and F-111 aircraft, as well as a large fuel spill by a tanker truck. SI at pp. 7-10, § 2.3.

Equipment Testing for Preparedness. Since 1997, annual mandatory fire vehicle checks have occurred at the fire training area, but no information is available for locations where foam checks occurred for the 27 years prior. RI at § 3.5.3.2. Beginning in 2016, the USAF deployed new foam testing equipment that no longer released AFFF into the environment. Wagner Decl., Dkt. 4548-49, ¶¶ 21-22 & Ex. 14 thereto; Walker Decl., Dkt. 4548-67, ¶ 59. In 2019, the USAF prohibited all fire training with AFFF. Wagner Dec., Dkt. 4548-49, ¶ 22 & Ex. 15 thereto. But CAFB is authorized to use AFFF for fire emergency purposes, as needed. *Id*. at ¶¶ 17, 26; RI at §2.5.1, § 3.1, § 3.5.3.2.

DoD Clean-Up Efforts at CAFB Under CERCLA. While the USAF continues to investigate the entire base for potential PFAS contamination, it has already begun work on a pump and treat system for PFAS in groundwater in the area closest to the fire training, at a current estimated cost of over $20,000,000. Long Decl., Dkt. 4548-47, ¶ 41; **Ex. H**, Figures from SI; **Ex. I**, CAFB Public Meeting Update (Nov. 14, 2023), at 12-13. The USAF has also allocated an additional $30,000 for a treatment system to address contamination near the old sewage lagoons and discharge pond. Long Decl. ¶ 42; CAFB Public Meeting Update (Nov. 14, 2023) at 24.

Additionally, the United States has already paid Plaintiff Highland Dairy over $15,000,000 for losses sustained due to PFAS from the base. **Ex. J**, Marlow Decl. ¶ 5. The Department of Agriculture recently awarded Highland Dairy an upward adjustment, at an amount yet to be determined.

ARGUMENT

I. The Plaintiffs' FTCA Claims Are Barred by the DFE.

To establish subject-matter jurisdiction, Plaintiffs must prove that CAFB's use and handling of AFFF violated specific and mandatory federal directives, or that the challenged conduct was not grounded in policy considerations. *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988). Plaintiffs were given additional time to conduct discovery on CAFB, to enable them to carry their evidentiary burden. *See* CMO 25, ECF No. 3030; Anwar Decl., Dkt. 4548-4, ¶¶ 8, 9, 11. Jurisdictional discovery is now closed. The record confirms that the USAF exercised considerable discretion to use and handle AFFF at CAFB, and that its decisions were imbued with sensitive policy considerations. As such, the FTCA's DFE bars Plaintiffs' FTCA claims against the United States.

A. The FTCA Plaintiffs Fail to Identify Any Mandatory Federal Directive that Specifically Dictated How the USAF Was to Use or Handle AFFF at CAFB.

Plaintiffs cannot point to any federal directive that mandated, in specific terms, how the military was to use and handle AFFF at CAFB. The only relevant federal directive is Operating Instruction ("OI") 32-11, which first issued in 2002 and was revised in 2014. *See* **Ex. K**, CAFB Civil Engineer OI 32-11 "Aqueous Film Forming Foam Activations" (Jun. 1, 2002); **Ex. L**, CAFB Civil Engineer Operating Instruction 32-11 "Hangar Fire Fighting Foam Activations" (Feb. 1, 2014).

Although OI 32-11 related to AFFF generally, it did not have anything to do with PFAS contamination. Rather, it existed only because (i) "AFFF entering the sanitary sewer system can upset the biological treatment process of the Cannon wastewater treatment plant ('WWTP') due to its *foaming* characteristic," and (ii) at various points in time, CAFB's WWTP had a discharge permit with EPA that prohibited "visible foam" from being discharged to the North Playa Lake after treatment.[1] OI 32-11 ¶ 4.d. (2002) (emphasis added); **Ex. M**, CAFB NPDES Permit (Sept. 24, 1999) at 16.1.5 (FF-AF36-110200000732); *see also* Walker Decl., Dkt. 4548-67, ¶ 28 & Ex. 14 thereto, ETL 1110-3-481 (Nov. 19, 1997) ¶¶ 3, 6 ("A concern of AFFF systems is the discharge of AFFF foam…from unwanted activations and from periodic testing.").

To address excess foaming, OI 32-11 "establish[ed] **policy** and **guidance** associated with the release of AFFF under the following scenarios: (1) testing and/or purging, (2) actual firefighting [in hangars] and (3) accidental release," by providing "**guidance** to minimize or eliminate environmental consequences." OI 32-11 ¶ 1 (2002).[2] Moreover, OI 32-11 spoke solely to hangar discharges of AFFF. Nor, of course, could OI 32-11 have governed ***any*** uses of AFFF before 2002 (when it issued).

OI 32-11 was not, at any point in time, a mandatory and specific directive which left the CAFB employees "no rightful option but to adhere to the directive." *Berkovitz,* 486 U.S. at 536. To begin with, the version of OI 32-11 in effect from 2002 to 2014 was not mandatory and specific at all. Under the 2002 version of OI 32-11, "[g]enerally, AFFF should be kept from entering the

[1] The last time CAFB renewed its five-year permit with EPA for the WWTP was 2013. **Ex. S**, CAFB Letter re NPDES Permit (Jun. 3, 2013). However, the WWTP ceased being subject to the CWA in 2018. **Ex. T**, March 18, 2018, Letter from EPA

[2] The United States is aware of two hangar fires that triggered the release of AFFF. In May 2002, a hangar caught fire, triggered sensors to release 800 gallons of AFFF. **Ex. U**, CAFB Spill Spreadsheet. And, in 1999, another hangar fire resulted in system activation where 500 gallons of AFFF was released. **Ex. V**, Preliminary Assessment, at p. 3-2-1 to 3-2-2.

storm and wastewater sewer systems." OI 32-11 ¶ 10 (2002). OI 32-11 also provided that "generally," only storm water could reach storm drains. *Id*. at ¶ 4b. If a release occurred, and **mission allowed**, base personnel had several options. If the release resulted from "firefighting activities," the hanger could discharge to the storm drain. *Id*. ¶¶ 4b, 7b. If a release occurred by some other means, there were several options from which to choose, including discharging to the "surrounding area," the sanitary sewer, or the WWTP, as well as involving the WWTP contractor to use a product to liquify the foam if it reached the plant directly. *Id*. ¶ 6. This was particularly important in advance of full-scale in-house testing of the entire AFFF hangar systems, which was required every three years. *Id*.

The discretionary guidance in OI 32-11 contained a "Decision Matrix" which allowed decision-making by the actor at every step, including the overarching decision to do nothing based on the mission considerations. OI 32-11, ¶ 8 (2002); *see Seaside Farm, Inc. v. United States*, 842 F.3d 853, 859 (4th Cir. 2016) (holding that emergency response plan containing language that "'the exact activities performed ... will vary by the type and severity of the emergency'" is not mandatory and specific). Specifically, OI 32-11 allowed personnel to exercise judgment in terms of when they needed to act in certain instances, and various actions they could choose to take. In all instances, personnel could drain the AFFF on to the pavement, and action was to be taken only if "Mission Permitting." 2002 OI 32-11, ¶ 8 (2002). OI 32-11 further provided guidance in a variety of different circumstances. *Id*. ¶ 6.c. (if AFFF enters certain floor trenches, "pump contents into surrounding area" or if "mission constraints" would not accommodate, send directly to WWTP).

Like the 2002 version, the 2014 version of OI 32-11 was not mandatory and specific. Indeed, the principal change from the earlier version was to broaden the scope by including not

only AFFF but also High Expansion Foam ("HEF"); thus, the title of OI 32-11 changed to "Hangar Firefighting Foam Activations." OI 32-11 at 1 & 4 (2014).[3] Although the 2014 version of OI 32-11 stated that "Compliance With This Publication is Mandatory," it continued to provide discretion to CAFB personnel as to what action to take: "Generally, foam should be kept out of the storm and wastewater sewer system." *Id*. ¶¶ 1, 10. It further stated: "**Generally**, only storm water can enter the storm sewer drainage system, however, water associated with firefighting activities is authorized to enter storm drain inlets." *Id*. ¶ 4.a (emphasis added); *see also id*. ¶ 4.b. ("**efforts should be made** to keep foam from reaching these inlets[ ]") (emphasis added)). Also, while the goal was to keep foam out of storm drain inlets and the sanitary sewer system, the 2014 version of OI 32-11 acknowledged that, "water associated with firefighting activities is authorized to enter storm drain inlets" and that, if "mission constraints" required, the spent AFFF "may be released to the sanitary sewer system" or diverted to the 9-million-gallon holding tank to be bled into the WWTP. *Id*. ¶ 4. Finally, the 2014 version of OI 32-11 noted that stormwater basin, South Playa Lake was no longer subject to the CWA NPDES permitting system for surface water. *Id*. ¶ 4.b.; *see also* fn. 1*, supra*.

John Rebman, the Water Quality Program Manager at CAFB from 1994 to 2017, authored both the 2002 and 2014 versions of OI 32-11. **Ex. N**, Rebman Dep., 27:24-28:9. Mr. Rebman testified that the OI was "not a step-by-step…building of Lego sets and you get an end product. It was policy and guidance for a myriad of people allowing a myriad of options and choices on how to deal with AFFF in the event…that AFFF was released." *Id*. at 246:24-247:17; *see also id*. at 207:8-207:22; 246:24-247:17; 249:7-21; 232:9-233:21, 234:17-235:11, 249:7-250:3 ("aspirational

[3] CAFB was converting more hangars to HEF. *Cf* 2002 OI 32-11 at p. 5 (9 hangars using AFFF), *with* 2014 OI 32-11 at p. 4 4 hangars using AFFF).

goal" was to keep AFFF out of sewers). Further, when CAFB was subject to the CWA, Mr. Rebman would report any potential excess foaming issues to EPA in so-called "non-compliance" reports, along with the response measures taken to address the issues. *Id*. at 98:21-99:13. Mr. Rebman explained that only regulators—like the EPA—had the ability to determine if any non-compliance issues he reported rose to the level of a "violation" of CAFB's permits. Notably, EPA **never issued a notice of violation to CAFB** for any issues relating to CAFB's use of foam. *Id*. at 129:14-130:1. Moreover, the response measures that Mr. Rebman reported to EPA mirror the panoply of options provided in OI 32-11. *Compare* OI 32-11 ¶¶ e & f (2002), *with* **Ex. O**, CAFB Non-Compliance Report.

Since OI 32-11 provided guidance and options for the civil engineering employee to take to prevent excessive foam, including yielding to mission constraints above all, it does not satisfy Prong 1 of DFE. *Indem. Ins. Co. of N. Am. v. United States*, 569 F.3d 175, 181 (4th Cir. 2009) (holding that Coast Guard inspector who "made a mistake" in performing a particular seaworthiness test resulting in many deaths when boat capsized was protected by DFE because testing manual stated that the manual was providing "policies and guidance issued herein" and "intended as a guide" and the test was only "recommended"); *accord Aragon v. United States*, 146 F.3d 819, 824–25 (10th Cir. 1998) (USAF manual on waste disposal that "specifically states it is 'intended for guidance'" and "'[b]ecause of the varied nature of industrial problems, principles rather than practices are emphasized' . . . weighs heavily against ruling the Manual prescribed mandatory directives for the Air Force to follow."); *Waverley View Invs., LLC v. United States*, 79 F. Supp. 3d 563, 571 (D. Md. 2015) ("To prove the Army lacked discretion, [plaintiff] must point to a directive that gave the United States *'specified* instructions that it [wa]s compelled to follow'" in handling waste.); *In re Camp Lejeune N. Carolina Water Contamination Litig*., 263 F. Supp. 3d

1318, 1350–51, 1354 (N.D. Ga. 2016), *aff'd sub nom. In re Camp Lejeune, N.C. Water Contamination Litig.*, 774 F. App'x 564 (11th Cir. 2019). Moreover, some mandatory language in a guidance document does not overcome DFE. *Seaside Farm,* 842 F.3d at 859.

B. Multiple Policy Considerations Pervaded the Air Force's Decisions Relating to the Use and Handling of AFFF at CAFB.

As explained in the United States' omnibus brief (ECF No. 4548), at, *inter alia*, 44 through 48, the Air Force's use and handling of AFFF, including at CAFB, was grounded in policy. Every *specific* decision challenged by Plaintiffs—the use of AFFF for fire training, for fire-suppression systems in hangars, for fire emergency responses, and for fire equipment testing—was objectively subject to sensitive policy considerations. *See, e.g.*, Wagner Decl., Dkt. 4548-49, ¶ 14, 23; **Ex. P**, Walker Dep. at 338:19–340:18. Moreover all decisions with regard to AFFF releases at hangars at CAFB expressly yielded to mission considerations. 2002 & 2014 OI 32-11; *see Pieper v. United States.*, 713 F. App'x 137, 141 (4th Cir. 2017) (per curiam) (Army is free to weigh environmental versus mission considerations in waste disposal); *Aragon*, 146 F.3d at 826 (USAF's alleged negligent "handling and disposal of wastewater from its aircraft washdown operations" is policy based because it was part of base-wide operations, which involve "policy choices of the most basic kind").

C. The Cannon Plaintiffs' Failure to Warn Claims Are Also Barred by the Discretionary Function Exception.

Plaintiffs also bring failure to warn claims. None of the complaints identify any federal mandatory and specific directives restricting the United States' discretion regarding warnings. *Clendening v. United States*, 19 F.4th 421, 435–36 (4th Cir. 2021). Moreover, despite no requirement to do so, base personnel did in fact promptly warn plaintiffs of PFAS contamination within a month of collecting sampling data from Plaintiffs' properties. *See* **Ex. Q**, Sheen Kottkamp Dep., 156:20-160:17; *see also* **Ex. R**, Notification Letters to Vander Dussens and Schaaps. The

base also holds public meetings regarding its CERCLA work. *See* Excerpts from CAFB Webpage; CAFB Public Meeting Update (Nov. 14, 2023). Where, as here, "the Government has provided some warning or disclosure the decision not to provide additional, earlier, or more urgent warnings may more clearly indicate the existence of policy choices than would a failure to provide any warning at all." *Clendening*, 19 F.4th at 436. For the foregoing reasons, the Court should dismiss the Cannon FTCA Plaintiffs' tort claims against the United States. *See Pieper*, 713 F. App'x at 137; *Seaside Farm*, 842 F.3d at 860.[4]

II. CERCLA Section 113(h) Bars New Mexico's Claims with Respect to CAFB.

Congress enacted CERCLA "to provide a mechanism for the prompt and efficient cleanup of" contaminated sites. *Cannon v. Gates*, 538 F.3d 1328, 1332 (10th Cir. 2008). Under section 104 of CERCLA, the DOD has broad authority to respond to releases from its facilities of any "pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare."[5] 42 U.S.C. § 9604(a)(1). These responses may take the form of "removal" actions designed to investigate, assess, and promptly alleviate the harm from a release, or "remedial action" designed to provide a permanent remedy. *Id.*; *see id.* § 9601(23), (24) (defining "removal" and "remedial action"). In order to insulate these response actions from collateral attack and "promote the timely cleanup of hazardous waste sites," CERCLA section 113(h) "strips [federal] courts of jurisdiction 'to review any challenges to removal or remedial action,' except in

[4] Since there is no mandatory and specific directive, we do not address the obvious problem of a failure to show that any "violation" of a directive that was (1) in place at the time the conduct occurred and that (2) caused plaintiffs' injuries. *Pieper*, 713 F. App'x at 137; *Loughlin v. United States*, 286 F. Supp. 2d 1, 18 (D.D.C. 2003), *aff'd*, 393 F.3d 155 (D.C. Cir. 2004) Plaintiffs have already elicited testimony that the WWTP did not treat for PFAS so whether a release was properly sent to the WWTP has no bearing on their claims of groundwater contamination due to AFFF use and handling at Cannon. Kottkamp Dep., 66:7-14.

[5] The DOD's CERLA response authority is set forth in more detail in the United States' Omnibus Motion to Dismiss for Lack of Jurisdiction Based on CERCLA Section 113(h).

five limited circumstances." *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1345-46 (2020) (quoting 42 U.S.C. § 9613(h)).

Section 113(h)'s "blunt withdrawal of federal jurisdiction" requires the dismissal of New Mexico's claims regarding CAFB.[6] *Cannon*, 538 F.3d at 1333 (quoting *APWU, AFL-CIO v. Potter*, 343 F.3d 619, 624 (2d Cir. 2003)). The USAF is currently performing response actions to address PFAS releases at CAFB, including preparation of a remedial investigation to characterize the site in detail and inform the USAF's ultimate selection of a final remedy for the site. New Mexico's claims under RCRA and the state HWA challenge these response actions by seeking relief that would interfere with the Air Force's ongoing response actions. Accordingly, the Court lacks jurisdiction to review these claims and must dismiss them.

A. CERCLA Section 104 Response Actions Are Ongoing at CAFB.

At CAFB, the CERCLA response process is well underway. Long Decl. ¶¶ 36-43. The USAF is responding to releases of two specific PFAS compounds, perfluorooctane sulfonate ("PFOS") and perfluorooctanoic acid ("PFOA"), as "pollutant[s] or contaminant[s]" under CERCLA section 104. *Id.* ¶ 19. Accordingly, the USAF is following the stepwise process set forth in the Environmental Protection Agency's regulations to investigate releases at CAFB, assess the risks to health and the environment, and evaluate remedial alternatives before proceeding to a final remedy for the site as appropriate. *Id.* ¶ 10; *see* 40 C.F.R. pt. 300. Pursuant to that process, the USAF completed a Preliminary Assessment and Site Inspection for CAFB in October 2015 and March 2019, respectively. Long Decl. ¶¶ 36-37; *see* 40 C.F.R. § 300.420(b), (c). In August 2020, the USAF commenced its remedial investigation for CAFB, which it plans to complete by August

[6] Because this Motion is limited to two specific jurisdictional issues pursuant to CMO 25, ECF 3030, it does not address (and the United States reserves) the argument that New Mexico's HWA claim is barred by sovereign immunity.

2026. Long Decl. ¶ 40. Through its ongoing CERCLA response, the USAF will perform a detailed investigation of site conditions and risks; identify any federal and state requirements that may inform the required level of cleanup for the site; and identify and evaluate various remedial options for the site. 40 C.F.R. § 300.430(d), (e).

The USAF also has taken several removal actions to contain or mitigate the effects of releases at CAFB. Based on sampling results from offsite drinking water wells, the USAF immediately offered alternative drinking water to residents with PFOS and/or PFOA in their drinking water above 70 parts per trillion, and subsequently offered filtration systems for those residents. Long Decl. ¶¶ 38, 40; **Ex. W**, "Final Site Inspection Report Addendum 01: Cannon Air Force Base, NM," at 19-20 (Mar. 2019). Moreover, the USAF has begun construction of a full-scale groundwater treatment system to test treatment technologies and capture PFAS-impacted water near the primary on-site source, and has entered a contract for construction of a second system. Long Decl. ¶¶ 41-42; **Ex. X**, "Cannon AFB PFAS Southeast Corner Pilot Study Design Package" (June 5, 2023). Between these removal actions and the ongoing investigative process, the USAF has spent or obligated $67,379,000 through fiscal year 2023 to respond to PFAS releases at CAFB, with estimated future obligations of $44,670,000. Long Decl. ¶ 43.

These response actions are "removal or remedial action" triggering section 113(h)'s protection against "challenges" to such actions. It is irrelevant whether the Air Force has or has not yet selected a final remedy for the site: section 113(h) applies "even if the Government has only begun to 'monitor, assess, and evaluate the release or threat of release of hazardous substances.'" *Cannon*, 538 F.3d at 1334 (quoting *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 239 (9th Cir. 1995)); *accord R.E. Goodson Const. Co. v. Int'l Paper Co.*, No. 4:02-cv-4184-RBH, 2005 WL 2614927 (D.S.C. Oct. 13, 2005).

B. New Mexico's Claims Challenge the Air Force's CERCLA Response.

A claim "challenges" a removal or remedial action if it "is related to the goals of the cleanup," *Razore*, 66 F.3d at 239, or if the relief requested "interferes with the implementation of a CERCLA remedy" by "impact[ing] the remedial action selected," *Broward Gardens Tenants Ass'n v. EPA*, 311 F.3d 1066, 1072 (11th Cir. 2002). Here, New Mexico's RCRA and HWA claims plainly would interfere with the response at CAFB—indeed, New Mexico seeks a complete takeover of the Air Force's investigation and remedial action.

Among other relief, New Mexico seeks "immediate injunctive relief requiring the abatement of ongoing violations of the HWA and RCRA," as well as "abatement of the conditions creating an imminent and substantial endangerment" at CAFB. Am. Compl. ¶¶ 141, 149, Prayer for Relief, ECF 9, *New Mexico v. United States*, No. 2:20-cv-02115-RMG. This relief undeniably relates to the goals of the Air Force's cleanup—*i.e.*, containment and abatement of the PFAS releases from Cannon AFB. Moreover, any injunctive relief granted pursuant to New Mexico's broad requests would necessarily interfere with the Air Force's conduct of its CERCLA response. *See Anacostia Riverkeeper v. Wash. Gas & Light Co.*, 892 F. Supp. 2d 161, 173 (D.D.C. 2012) (holding where plaintiffs sought order directing defendant to "take all such actions as may be necessary to eliminate any endangerment," any relief fashioned by the Court "would most certainly interfere with implementation of" CERCLA remedies).

New Mexico's earlier motion for a preliminary injunction in this case illustrates the extent to which its requested relief would interfere with the Air Force's response. Mot. for Prelim. Inj., ECF 66-1, *New Mexico v. United States*, No. 2:20-cv-02115-RMG ("PI Motion"). In its PI Motion, New Mexico sought to compel implementation of a sampling plan consisting of ongoing, quarterly sampling of *all* PFAS (not just PFOS and PFOA) from all water wells within a set radius of CAFB, as well as resampling of on-base water wells the USAF *already tested*. *Id.* at 1-2. The PI Motion

also sought provision of alternative drinking water to individuals with *any detectable PFAS* in their water supplies (rather than individuals with PFOS and/or PFOA above specific thresholds of concern). *Id.* at 2; *compare* Long Decl. ¶¶ 24, 26. In short, New Mexico is seeking in this action to redo the Air Force's CERCLA response on New Mexico's timeline under New Mexico's preferred terms.

Section 113(h) prohibits New Mexico from pursuing that goal through this litigation. "CERCLA 'trumps' RCRA and other statutes when CERCLA remediation is under question or attack," *Anacostia Riverkeeper*, 892 F. Supp. 2d at 170, and there is no reason why New Mexico's state law HWA claim—which closely mirrors its RCRA claim and seeks the same relief—should be treated any differently. Indeed, RCRA itself makes the very citizen suit claim New Mexico is asserting unavailable wherever "the Administrator [of EPA] … is actually engaging in a removal action under section 104 of [CERCLA]." 42 U.S.C. § 6972(b)(2)(B)(ii). While this provision refers to response actions by EPA, this Court and others have applied it to bar RCRA claims challenging CERCLA responses by other agencies as well. *R.E. Goodson*, 2005 WL 2614927 at *25-26; *Reynolds v. Lujan*, 785 F. Supp. 152, 154-55 (D.N.M. 1992). Even if the Court does not read this provision to directly prohibit New Mexico's RCRA claim, at a minimum, it demonstrates that Congress did not intend to allow RCRA citizen suits that would interfere with CERCLA responses.

Accordingly, New Mexico's claims are precisely the kind of interference that section 113(h)'s jurisdictional bar precludes. Because they challenge the Air Force's ongoing CERCLA response at CAFB, this Court lacks jurisdiction, and they must be dismissed.

Respectfully submitted,

Dated: February 26, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2024, a copy of the foregoing was filed via the Court's ECF system and served on counsel of record through the ECF system.

Dated: February 26, 2024 */s/Christina Falk*