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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In the Matter of: The United States Air Force and Arizona Air National Guard, Respondents. Tucson International Airport Area Superfund Site, Pima County, Arizona	Docket No. PWS-AO-2024-10

THE DEPARTMENT OF THE AIR FORCE'S NOTICE IN RESPONSE TO EPA REGION 9'S UNILATERAL ADMINISTRATIVE ORDER AND REQUEST TO WITHDRAW THIS UNAUTHORIZED ORDER

On July 11, 2024, EPA Region 9 (EPA) issued a Decision finalizing its Emergency Administrative Order (Order) under Section 1431(a) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300i(a), to the United States Air Force and the Arizona Air National Guard (collectively, the Department of the Air Force or Air Force). This Order concerns the Tucson International Airport Area (TIAA) Superfund Site (TIAASS), including the Tucson Airport Remediation Project (TARP). The Order requires, among other things, the Air Force design in 90 days "a long-term water treatment method to . . . allow the use of TARP water as a source of drinking water." (Order ¶ 57). As directed by Order ¶70, the Air Force hereby timely submits this Notice.

As a starting point, the City of Tucson consistently reports the TARP treated water meets all applicable drinking water standards, including for PFAS. Moreover, the Air Force is fully committed to its ongoing PFAS response actions under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), including robust interim actions to address PFAS. In 2022, the State of Arizona received a $25 million federal grant to design and build a new PFAS pretreatment plant for the TARP. In June 2024, the City of Tucson completed the design for this new PFAS plant, and the State is reviewing the design with construction slated to begin this quarter. Further, the Air Force has been fully engaged in the restoration of the Tucson aquifers. In

1991, the Air Force paid $35 million for the initial TARP plant. In 2016, the Air Force paid $17 million for the new Advanced Oxidation Process facility at TARP. Like the other contaminants that have been addressed at the TIAASS, multiple potentially responsible parties are involved in PFAS releases, including the Tucson International Airport. We recommend a continuing technical engagement among all stakeholders who used and released PFAS to discuss ongoing PFAS investigations and data gaps. We also request EPA continue to address the draft third Consent Decree that will provide the allocation for increased changeout of the current granular activated carbon (GAC) filtration system that is successfully capturing PFAS along with other constituents at the TARP.

EPA's Order imposing a 90-day requirement on the Air Force does not comport with EPA's recently promulgated National Primary Drinking Water Regulation for PFAS that provides public water systems until 2029 to implement solutions to reduce regulated PFAS in supplied drinking water. This new SDWA rule provides public water systems, such as Tucson Water, a five-year period to resource, design and build an effective drinking water treatment system. And in fact, here the City of Tucson is already doing just that, as noted above.

For the reasons set forth below, the Air Force believes that EPA is legally without jurisdiction to issue this Order and that, in any event, EPA's ordered "Regional Solution" within 90 days is impossible. In light of the information in this Notice, as well as our prior June 24, 2024 Response, the Air Force respectfully requests that EPA reconsider its July 11, 2024 decision and withdraw its Order. The Air Force will continue to comply with its statutory obligations in every way, just as it has been doing for decades. The Air Force provides the discussion below to foster clarity and collegiality.

I. AIR FORCE'S COMMITMENT TO CLEANUP UNDER CERCLA

The Air Force has been addressing ongoing PFAS-related response actions at Air Force Plant 44 (AFP 44) and Morris Air National Guard Base (Morris ANGB).[1] As EPA is aware, the Air Force has identified that both locations have used and potentially released PFAS substances and has begun the Environmental Restoration Process under its authority under Executive Order 12580, the Defense Environmental Restoration Program (10 U.S.C. §§ 2700-2715), CERCLA and the respective Federal Facility Agreements. Further, the Air Force has completed significant PFAS-related actions at both AFP 44 and Morris ANGB, including completing the CERCLA Preliminary Assessments and Site Inspections for AFP 44 and Morris ANGB.[2] The Air Force is currently

[1] Appendix B DAF0310 (Ms. Michelle J. Brown Statement, Director, Environmental Policy & Programs, Office of the Deputy Assistant Secretary of The Air Force, Department of the Air Force ("Air Force leadership is committed to addressing these issues expeditiously and in accordance with CERCLA.")). Appendix documents are bates-stamped in the upper right-hand corner and consecutively marked DAF0001-DAF0709. The Air Force expressly reserves the right to assert any applicable jurisdictional arguments or defenses and to supplement this Notice.

[2] Appendix D DAF0317-DAF0323 (detailed summary of Air Force's response actions).

conducting CERCLA Remedial Investigations for both installations.[3] The Air Force has also taken proactive steps in advance of the applicable National Defense Authorization Act requirement, including ceasing all use of Aqueous Film Forming Foam (AFFF) containing PFAS for testing and training and transitioned to water only.[4]

The Air Force has a compelling interest in expeditiously addressing and resolving these issues because the Air Force, our service members, civilian employees, and their families are also part of the Tucson community. The Air Force recognizes that PFAS is a matter of public concern and that data and science driven solutions are necessary. Significantly, however, such solutions require the data of other relevant stakeholders, who may have used or released, and that data has not yet been identified or collected.[5] The Air Force has for decades cooperated in implementing successful remediation efforts at TIAA, and the Air Force welcomes further and continued discussion with EPA, Arizona Department of Environmental Quality (ADEQ), City of Tucson, and other stakeholders toward solutions with respect to PFAS.

II. THERE IS NO IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HUMAN HEALTH, AND ARIZONA AND THE CITY OF TUCSON HAVE COMPREHENSIVELY ACTED TO PROTECT HUMAN HEALTH

A. The Statutory Standard Imposed By SDWA Section 1431(a)

Congress imposed three conditions for EPA to use its SDWA Section 1431(a) emergency authority.[6] First, there must be "information that a contaminant [] is present in or likely to enter a public water system or an underground source of drinking water." 42 U.S.C. § 300i(a). That PFAS is present in the water is not in dispute here.

Second, the contaminant must be such that it "may present an imminent and substantial endangerment to the health of persons." *Id.* These terms, "imminent" and "substantial endangerment," are also used in Section 7003 of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6972(a)(1)(B), and were addressed in *Meghrig v. Kfc W.*, 516 U.S. 479, 485-486 (1996). In *Meghrig*, the Supreme Court ruled that "[a]n endangerment can only be 'imminent' if it 'threaten[s] to occur immediately,' . . . and the reference to waste which 'may present' imminent harm quite clearly excludes waste that no longer presents such a danger." (Citation omitted). *Meghrig* adopted the Ninth Circuit's formulation in *Price v. United States*

[3] Appendix D DAF0329 (Air Force has invested over $20.9M on PFAS work at AFP 44 and Morris ANG sites).

[4] Appendix B DAF0310 (Ms. Brown's Statement).

[5] Appendix D DAF0324.

[6] The Air Force's June 24, 2024 Response provided a detailed statutory and regulatory background, as well as relevant history regarding TIAASS, the Air Force's prior settlements, and ongoing PFAS-related actions. Appendix A DAF0005-0012 and attachments.

Navy, 39 F.3d 1011, 1019 (1994), noting that "this language 'implies that there must be a threat which is present *now*, although the impact of the threat may not be felt until later.'" 516 U.S. at 486 (emphasis in original).

Third, EPA action may be taken under Section 1431(a) only if the "appropriate State and local authorities have not acted to protect the health of such persons." *Id.* EPA's authority is thus expressly limited by the text of Section 1431(a) and each of these prerequisites must be met for EPA to have jurisdiction to issue an emergency order. We note that the Air Force is subject to these administrative proceedings only because Congress has waived the agency's sovereign immunity in 42 U.S.C. § 300j-6(a). As such, these jurisdictional requirements imposed by Section 1431(a) are strictly and narrowly construed when applied to the Air Force. *See*, *e.g.*, *FAA v. Cooper*, 566 U.S. 284 (2012); *United States v. Nordic Vill., Inc*., 503 U.S. 30, 34 (1992).

For the reasons set forth in the Air Force's June 24, 2024 Response and presentations at the June 26, 2024 Conference, and as further discussed below, EPA's Order fails to meet the requirements of "an imminent and substantial endangerment to the health of persons" and that "appropriate State and local authorities have not acted to protect the health of such persons." In this respect, the Supreme Court's recent decision in *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2261 (2024), makes clear that EPA's interpretation of these statutory terms is not entitled to deference. *Id*. (The Administrative Procedure Act "makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are not entitled to deference.")

B. No Imminent and Substantial Endangerment: The Treated Water Meets All Drinking Water Standards And Is Not Used As Drinking Water

First, "EPA must demonstrate the 'imminent likelihood' that the public may consume contaminated water unless prompt action is taken to 'prevent' a 'potential hazard from occurring.'" *Trinity Am. Corp. v. EPA*, 150 F.3d 389, 399 (4th Cir. 1998) (citing the SDWA House Report,[7] 1974 U.S.C.C.A.N. at 648). Thus, "the EPA cannot order cleanup under section 1431 of SDWA when there is no threat to the public's health."[8] *W.R. Grace & Co. v. EPA*, 261 F.3d 330, 340 (3d Cir. 2001). While there is certainly ample evidence of PFAS contamination in the TIAASS aquifers and these aquifers appear to be a "public water system," there is no "imminent and

[7] *See* H. Comm. On Interstate and Foreign Commerce, Safe Drinking Water Act, H. Rep. 93-1185, at 35 (1974), reprinted in 1974 U.S.C.C.A.N. 6454, 6487-88 ("In using the words 'imminent and substantial endangerment to the health of persons,' the Committee intends that this broad administrative authority not be used when the system of regulatory authorities provided elsewhere in the bill could be used adequately to protect the public health.").

[8] There is no emerging change in circumstances. As EPA recognized, the TARP-treated water accounts for only 8% of the City of Tucson's water supply. EPA Ltr. at 4. And the City of Tucson shifted to using water from the Colorado River almost 25 years ago. Appendix F DAF0337 (City of Tucson Annual Water Quality Rept ("Starting in 2001, Tucson Water began transitioning from groundwater reliance to a renewable supply from the Colorado River.")).

substantial endangerment" to human health because there is no "'imminent likelihood' that the public may consume contaminated water."[9] *Trinity*, 150 F.3d at 399.

It is undisputed that the TARP-treated water meets all drinking water standards, including the recently imposed standards for PFAS.[10] The current TARP system addresses volatile organic compounds, including trichloroethylene (TCE) and DX, and uses GAC filters. As a Tucson water specialist recently stated in a May 20, 2024 National Public Radio article, "[t]he good news for Tucson now, though, is that the techniques used to treat previous water contamination can also remove PFAS."[11] GAC filtration is considered a state-of-art method to remove PFAS from groundwater. As a result, Ms. Guzman, Regional Administrator for EPA Region 9, stated, "[T]he story here is even better. They're going to be able to bring back that supply into their system.").[12] Moreover, the City of Tucson has long reported that its treated water complies with all applicable drinking water standards,[13] including EPA's June 25, 2024 Maximum Contaminant Levels (MCLs) for PFAS. There is no threat, "imminent" or otherwise, to the public from the treated water.[14]

C. Arizona and the City of Tucson Have Acted to Protect Public Health

Second, under SWDA § 1431(a), "action by the EPA is only authorized when state and local authorities have not acted first." *W.R. Grace*, 261 F.3d at 339. EPA cannot show that

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[9] The City of Tucson does not serve the water to the public, instead, the City discharges it to the Santa Cruz River or plans to use it for reclamation. *See*, *e.g.*, Appendix H DAF0395 (City of Tucson's TARP Semi-Annual Status Rept (rev. Feb 2024) (Consumer Confidence Report (CCR)); Appendix K DAF0667 (City of Tucson July 17, 2024 UCAB Presentation).

[10] City of Tucson has consistently reported that the treated water meets all applicable drinking water standards. *See e.g.,* Appendix H DAF0395 (City of Tucson TARP Semi-Annual Status Report, ("During the September 2022 through February 2023 reporting period, no reportable concentrations of volatile organic compounds (VOCs), including TCE, DX, or PFAS were detected in treated water samples of the discharge authorized under AZPDES Permit No. AZ0026417."). *See also*, Appendix A

[11] Appendix L DAF0707, https://www.npr.org/2024/05/20/1252537887/tucson-is-one-of-the-first-places-in-line-for-money-to-clean-up-pfas.

[12] Appendix L DAF0708, https://www.npr.org/2024/05/20/1252537887/tucson-is-one-of-the-first-places-in-line-for-money-to-clean-up-pfas.

[13] Appendix A DAF0064 (City of Tucson's Presentation, Impact of PFAS on TARP (Apr. 17, 2024) at 37 ("All sample results indicate that water delivered was below the EPA HAs or more conservative water quality operational targets")). This document is in EPA's Administrative Record (AR) for the SDWA Order, EPA AR 100036952.

[14] *See*, *e.g.*, Appendix F DAF0339 (City of Tucson Annual Water Quality Report) ("Our water quality specialists work continually to make sure the water we deliver to you is fresh, clean,

"appropriate State and local authorities have not acted to protect the health of such persons" because, as further detailed below, the record demonstrates that the State of Arizona and the City of Tucson have consistently taken robust and comprehensive actions to protect human health at the TIAASS, including with the TARP system.[15] The City of Tucson's TARP Advanced Oxidation Process facility successfully treats the water to fully meet all applicable drinking water standards, including EPA's recently promulgated PFAS standards. The City of Tucson uses its acclaimed AOP treatment in concert with GAC filters to treat other contaminants, and this process, specifically the GAC filters, also successfully treats PFAS.[16]

In addition, to perform this work, ADEQ and the City of Tucson have obtained tens of millions of dollars in federal grants, loans, and loan forgiveness. For example, in December 2022, Arizona received a federal grant of $25 million under the American Rescue Plan Act to design and build a PFAS pretreatment facility at the TARP.[17] Since that time, the City of Tucson has reported its PFAS pretreatment facility design process is complete and currently being reviewed by ADEQ.[18] In addition to the $25 million grant, Arizona and the City of Tucson have received other federal funding, "[T]he Tucson area is receiving $12,000,000 from the new fund EPA has set aside to clean up PFAS contamination. That's on top of another $30 million from the [Infrastructure

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and safe to use. We currently monitor for approximately 90 regulated and 103 unregulated contaminants.").

[15] *See*, *e.g.*, Appendix F DAF0340 ("Annually, Tucson Water conducts hundreds of rigorous tests for PFAS across our system. Tucson Water has delivered and will continue to deliver water that exceeds the U.S. Environmental Protection Agency's (EPA's) health advisory level. In fact, we go above and beyond federal guidelines by also removing wells that have detectable amounts of PFOA or PFOS from service. PFAS are found in specific areas within Tucson's groundwater. Tucson Water avoids pumping from these areas. PFAS have not been detected in Colorado River water, which provides most of Tucson's overall water supply.")

[16] Appendix J DAF0607 (The City of Tucson's website provides: "Tucson Water's Advanced Oxidation Process (AOP) Water Treatment Facility uses state-of-the-art technology to effectively remove 1,4-dioxane from water. The facility operates in conjunction with the adjacent Tucson Airport Remediation Project (TARP) facility to produce up to 7 million gallons of purified water a day. Construction of the Advanced Oxidation Process Water Treatment Facility began in July 2012 and was completed in January 2014. The facility was awarded the 2015 Grand Prize in Design from the American Academy of Environmental Engineers and Scientists."), https://www.tucsonaz.gov/Departments/Water/Water-Quality/Treatment.

[17] *See* Appendix A DAF0016-0017 & DAF0239-DAF0244.

[18] Appendix K DAF0671.

Investment and Jobs Act] passed in 2021."[19] Appendix A DAF0015-DAF0018; *see also* APPENDIX E DAF0330-DAF0332.

EPA has described the City of Tucson's masterplan as a "model for the nation."[20] DAF0710-0712. Yet, none of the documents relating to the over $67 million in federal funding appear in the SDWA Administrative Record nor does EPA's July 11, 2024 Letter address the State of Arizona and the City of Tucson's receipt of these federal funds. Instead, EPA states, "EPA supports the initial steps State and local authorities have taken thus far, nevertheless, as stated in the UAO, 'Arizona and the local authorities **have not acted sufficiently to address all measures covered under this Order** that are necessary to protect the health of persons.'" EPA Ltr. at 5 (emphasis added). That statement is unsupported. The Order does not identify any specific measures that local authorities have not taken. Instead, the Order imposes "a PFAS Water Treatment Plan" that is a "long-term water treatment method to ensure water extracted from the TARP well field meets the promulgated MCLs to allow for the use of TARP water as a source of drinking water by Tucson Water." Order ¶ 57. That is exactly what "local authorities" are currently doing.

These facts make plain that local authorities have in fact "acted first," and effectively, to protect the health of persons, and as a result, EPA lacks authority to issue this SDWA Section 1431 Order.[21] There is no evidence to support a finding that there is imminent and substantial endangerment to human health or that the appropriate state and local authorities have not acted to protect human health.

III. THE EPA MAY NOT REQUIRE THE IMPOSSIBLE

We also note that the Order's mandated 90-day deadline to develop and submit a regional aquifer solution for PFAS is simply not possible. EPA may not require the impossible of the Air Force any more than EPA can be required to do the impossible. *See, e.g.*, *New York v. EPA*, 716 F.2d 440, 443 (7th Cir. 1983) ("we cannot require the EPA to do the impossible"). Basic notions of fairness and due process require no less. *See, e.g.*, *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 15 (1976) (noting a due process violation is established where "the legislature has acted in an arbitrary and irrational way").

EPA's letter does not respond to that point other than to assert that "EPA cannot wait for any and all alleged data gaps to be filled."[22] EPA Ltr. at 6. That response does not comport with

[19] https://www.npr.org/2024/05/20/1252537887/tucson-is-one-of-the-first-places-in-line-for-money-to-clean-up-pfas

[20] https://www.azcentral.com/story/news/local/arizona-environment/2023/11/16/epa-announces-30m-grant-for-pfas-treatment-in-tucson/71598423007/

[21] The Air Force's submitted Conference materials are included in Appendices A-C.

[22] *But see* Appendix D DAF0324-DAF0328 (map identifying significant data gaps).

the ongoing technical work, including the newly formed Technical Working Group. EPA suggests "that it is common to devise an interim response based on the currently available information, and that response may be revised as more detailed information becomes available." *Id*. But, as explained, Arizona and the City of Tucson are currently making use of millions of dollars of federal money to implement precisely such a response and that response will successfully treat PFAS. The Order never explains how or why that response is insufficient. Any further "interim response" needs supporting data to proceed. *See* Addendum A DAF0018-DAF0019 & n.36 (referencing the Air Force's requested pause while the Technical Working Group was being implemented). A further interim response done without such data would be both unreliable and wasteful of scarce resources, including taxpayer dollars.

A. The Order Conflicts with EPA's New PFAS MCL Regulation That Provides Public Water Systems 5 Years to Comply

Moreover, the Order's open-ended requirement to develop a "Regional Solution" is not something that anyone could do in 90 days. EPA's Order is contradicted by EPA's recently promulgated National Primary Drinking Water Regulation for PFAS[23] that **provides public water systems five years, or until 2029, to implement solutions to reduce regulated PFAS** in supplied drinking water.[24] Addressing PFAS in groundwater is a complicated issue, and as a result, EPA has provided that public drinking water systems have five years to meet MCLs. EPA's Order does not explain why this five-year time frame for the remediation of PFAS does not apply here. That absence of a reasoned explanation is not consistent with "reasoned decision-making," *Loper Bright*, 144 S.Ct. at 2263, or with EPA's duty to "explain" its reasoning and conclusions. *Ohio v. EPA*, 144 S.Ct. 2040, 2054 (2024). *Ipse dixit* will not do. *Id*. at 2053 (an agency must offer "'a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made'"). (Citation omitted). Indeed, the City's carefully planned new PFAS pretreatment plant has been a project since Arizona obtained the federal funding in December 2022. As EPA's letter notes, "it will take at least two years to construct that system." EPA Ltr. at 5. Thus, assuming *arguendo* that EPA had satisfied the statutory criteria to issue an Order, EPA's Order did not identify any reasonable next steps that could be done or even addressed (much less

[23] EPA, *PFAS National Primary Drinking Water Regulation*, 89 Fed. Reg. 32532, 32620 (Apr. 26, 2024). This Final Rule has been challenged. *Am. Water Works Ass'n, et al. v. EPA*, (D.C. Cir. Petition for review filed June 7, 2024) & consolidated with *Nat'l Ass'n of Mfrs. and Am. Chemistry Council v. EPA*, No. 24-1191 (D.C. Cir. petition for review filed June 10, 2024). In addition, EPA's PFOS-related CERCLA Final Rule, *Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanatesulfonic Acid (PFOS) as CERCLA Hazardous Substances*, 89 Fed. Reg. 39,124 (May 8, 2024), has also been challenged. *Chamber of Com. v. EPA*, No. 24-1193 (D.C. Cir. petition for review filed June 10, 2024).

[24] *PFAS National Primary Drinking Water Regulation*, 89 Fed. Reg. at 32620 ("EPA is exercising its authority under SDWA section 1412(b)(10) to implement a nationwide capital improvement extension to comply with the MCLs. All systems must comply with the MCLs by **April 26, 2029**") (emphasis added).

explained) why the new PFAS plant would be insufficient. The EPA may not "ignore[] 'an important aspect of the problem' before it." *Ohio*, 144 S.Ct. at 2054.

B. The Order Seeks a "Regional Solution" Without Providing For Supporting Data From Other PRPs

The Air Force is already involved in comprehensive sampling and interim response actions at their installations. It is impossible to discern exactly what EPA is seeking here, especially where the State and the City of Tucson are in fact implementing what appears to be a "Regional Solution." Additional steps require a rational scientific basis for any future response actions. This inability to proceed responsibly absent additional necessary data was the basis for the Air Force's requested pause in EPA's issuance of the SDWA Order so that the necessary technical work could be undertaken by all the stakeholders, including the State, the City of Tucson, and the Tucson Airport Authority which operates the Tucson International Airport. DAF0019, DAF0285-DAF0286. EPA declined the Air Force's requested pause for the creation and implementation of a Technical Working Group. EPA Ltr. at 2.

Any interim remedy requires sufficient knowledge of site conditions, including PFAS sources, PFAS levels and locations and hydrogeological information, before a "treatment plan" can be developed and an engineering solution implemented.[25] All potentially responsible parties (PRPs) would have to be involved in any regional approach, including the City of Tucson, the Tucson Airport Authority, and other industrial entities.[26] Most notably, EPA's Order relies on the 53,000 parts-per-trillion (ppt) PFAS sample from the Tucson International Airport. By any measure, the airport is a significant source of contamination. To date, the other PRPs have not collected the necessary data, leading to significant data gaps in any attempt to analyze PFAS distribution in groundwater.[27] In contrast, the Air Force has invested significant resources to

[25] Appendix I DAF0603 ("Understanding the fate and transport of a chemical in the environment is fundamental to the investigation and remediation of any contaminate.") https://safe.menlosecurity.com/doc/docview/viewer/docN59F7A9E626074c78c239ca79375acfa36966dddb709ea740948fb7734478ca48c93f4cbae7bc

[26] It is undisputed that the PFAS at issue comes from numerous sources and not just the Air Force. *Cf*. EPA Ltr. at 6. The City of Tucson identified some likely sources in its 2023 Annual Water Quality Report, stating "Per- and polyfluoroalkyl substances (PFAS) are synthetic chemicals used in a wide range of products, from fire fighting foam, to nonstick cookware, to waterproof clothing, to food packaging, to shampoo and more." Appendix F DAF0340, https://www.tucsonaz.gov/files/sharedassets/public/v/1/city-services/tucson-water/water-quality/report-archive/tucson_water_ccr_mainsystem_2023.pdf.

[27] Notwithstanding the significant regulatory uncertainty for PFAS, the Air Force has been actively engaged in addressing PFAS using EPA's required CERCLA process to ensure actions taken are in accordance with the National Contingency Plan. *See*, *e.g.*, AR 100036905 (Technical Memo: Final Site Inspection Report of Aqueous Film-Forming Foam Areas at Air Force Plant 44, including Air Force's Response to ADEQ's and EPA's comments) (Apr. 14, 2021); AR 100036907 (162nd Wing, Morris ANG Final Action Memorandum, Time-Critical Removal Action,

address PFAS at its installations and is leading the effort to develop a regional hydrogeologic conceptual site model.[28] The Air Force has spearheaded the effort to initiate a Technical Working Group to collaboratively identify and address these technical gaps and has asked EPA's Project Manager to co-lead this group. EPA never explains why such efforts are insufficient.

C. The Air Force's Ongoing PFAS-Related Response Actions

The Air Force's compliance efforts have been vigorous and have already been successful in addressing contamination in the TIAASS aquifers. Moreover, the Air Force has consistently provided data about PFAS. The Air Force has long supported restoration efforts at TIAASS, providing $35 million in 1991 to address TCE, and almost $17 million in 2016 to build the AOP plant as part of TARP to treat TCE and DX. As noted above, this same AOP plant successfully treats PFAS and is considered state-of-the-art for removing PFAS from groundwater.

The Air Force remains committed to its ongoing PFAS-related response actions at both AFP 44 and Morris ANGB and to partnering with EPA and ADEQ. In addition to conducting a robust CERCLA Remedial Investigation at both AFP 44 and Morris ANGB, the Air Force has undertaken several interim response actions and invested in studies that will aid in developing short- and long-term remedies.[29] As EPA is aware, the Air Force initiated and completed comprehensive private well-related surveys, sampling, and response actions, including providing bottled water and connecting private wells to the public water supply. The Air Force provides EPA with detailed weekly updates about ongoing PFAS-related actions, including the following significant projects: (a) TIAASS Hydrogeologic Conceptual Site Model; (b) PFAS Fingerprinting and Background Study to Characterize PFAS; (c) AFP 44 Non Time Critical Removal Action (NTCRA) to treat PFAS; and (d) Morris ANGB Treatability Pilot Study to treat PFAS.

D. There is Already a Process in Place to Address Groundwater Response Actions

The Air Force is also an actively engaged participant in the UCAB that, since 1995, has ensured meaningful community involvement in connection with this Superfund site with quarterly presentations from EPA, ADEQ, the City of Tucson, AFP 44, Morris ANGB, and the Tucson Airport Authority. Further, the existing Federal Facilities Agreements (FFAs) already provide a process at both the AFP 44 and Morris ANGB installations to address groundwater response

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City of Tucson PFOS/PFOA Impacted Private Drinking Water Wells); AR 1000 36908 (162nd Wing Morris Air National Guard Base, Engineering Evaluation/Cost Analysis (EE/CA) For Off-Base Drinking Water Response Action, City of Tucson, PFOS/PFOA Impacted Private Drinking Water Wells); AR 100036908 (162nd Wing, Tucson ANGB Final Perfluorinated Compounds Preliminary Assessment Site Visit Report (May 2016)); AR 100036910 (Tucson ANGB, Final Site Inspection Report Air National Guard Phase 2 Regional Site Inspections For PFAS). As these documents uniformly establish, the Air force has been transparent about its efforts and has engaged EPA and ADEQ as part of this ongoing process.

[28] Appendix D DAF0321-0323.

[29] Appendix C DAF0314.

actions, including any disputes about appropriate response actions. These FFAs were approved by the State of Arizona and EPA and thus are the appropriate mechanism for EPA to initiate and address fully any requests for additional response actions, including modification of any existing remedy. This FFA process provides a complete mechanism by which the parties may address any cleanup disputes, review and comment on ongoing investigations, and request additional work.

We emphasize that the Air Force will continue to comply with its obligations under the applicable CERCLA framework, including the National Contingency Plan, the Defense Environmental Restoration Program (DERP), and the applicable Federal Facility Agreements. As we have previously noted, the Air Force is limited by the Congressional authorization set forth in the DERP, 10 U.S.C. § 2703. *See* Appendix A DAF0010-DAF0011.

IV. THE EPA'S ORDER CANNOT WITHSTAND REVIEW

A. The Standard of Review

The controlling statute, 42 U.S.C. § 300j-6(b)(3), accords the federal agency the right to seek a trial-type hearing on the record under chapters 5 and 7 of Title 5, which is the Administrative Procedure Act (APA). Section 554(a) of the APA, 5 U.S.C. § 554, provides: "This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Section 556(d), 5 U.S.C. § 556(d), provides that "the proponent of a rule or order has the burden of proof." Section 557, 5 U.S.C. § 557, then provides for further review of any initial decision by the hearing officer through additional levels within the administrative agency. In this case, that further view is governed by 40 C.F.R. Part 22. Under 40 C.F.R. § 22.24, "[t]he complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate." The EPA will not have the benefit of any "*Chevron* deference" in any such proceeding. *Loper Bright Enters.,* 144 S.Ct. at 2261 (abrogating the *Chevron* doctrine).

Section 300j-6(b) not only refers to chapter 5 of the APA, but also "chapter 7" of the APA. Section 702 of the APA, 5 U.S.C. § 702, provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Section 703 of the APA, 5 U.S.C. §703, then provides: "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute." In this case, 42 U.S.C. §300j-6(b)(4) supplies that "special statutory review proceeding" by providing: "Any interested person may obtain review of an administrative penalty order issued under this subsection."[30] That Section

[30] The EPA may lack the authority to impose administrative civil penalties in the wake of *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024). In that case, the Supreme Court invalidated the administrative civil penalty scheme created by federal statute, holding that under the Seventh Amendment civil penalties are a "form of monetary relief" and, where such penalties are "designed to punish or deter the wrongdoer," such civil penalties may be imposed only through proceedings conducted in a court of law. 144 S.Ct. at 2129. Here, Congress has provided that federal agencies are subject to SDWA civil penalties only "to the same extent as any person is subject to such requirements." 42 U.S.C. § 300j-6(a)(4). There is no apparent material difference between the SEC

specifies that such review may be "in the United States District Court for the District of Columbia or in the United States District Court for the district in which the violation is alleged to have occurred by the filing of a complaint with the court within the 30-day period beginning on the date the penalty order becomes final." The Air Force is statutorily defined as a "person" within the meaning of this provision and thus is entitled to these remedies. *See* 42 U.S.C. §300f(12) (defining "person" for purposes of "subchapter XII" of Title 42 as including a "Federal agency").

Congress has provided an APA-like standard of review in Section 300j-6(b)(4)(C), which provides: "The court shall not set aside or remand the order unless the court finds that there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or that the assessment of the penalty by the Administrator constitutes an abuse of discretion." Congress gave the agency the option of seeking judicial review of any final EPA action in federal district court in the District of Columbia, or in the applicable regional federal district court. The statutory standard applicable to those proceedings is virtually identical to the standard of review imposed by the APA under 5 U.S.C. §706(2)(A),(E) (authorizing a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute"). APA case law, such as the Supreme Court's recent decision in *Ohio v. EPA*, will thus be directly relevant.

Agency action that is beyond its legal authority will always be an "abuse of discretion." *See*, *e.g.*, *Berger v. North Carolina State Conference of the NAACP*, 597 U.S. 179, 200 & 214 n.* (2022) (under the abuse of discretion standard "a misunderstanding of applicable law generally constitutes reversible error"), citing *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."). The abuse of discretion standard also requires that the EPA's decision be "reasonable and reasonably explained" and be supported by "a rational connection between the facts found and the choice made." *Ohio*, 144 S.Ct. at 2053 (citations omitted). The substantial evidence standard requires "a court to ask whether a 'reasonable mind might accept' a particular evidentiary record as 'adequate to support a conclusion.'" *Dickinson v. Zurko*, 527 U.S. 150, 162 (1990). Substantial evidence review requires consideration of the whole record upon which an agency's factual findings are based, including "whatever in the record fairly detracts" from the evidence supporting the agency's decision. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). *See also Trinity*, 150 F.3d at 395 (EPA's order will be upheld only "if EPA 'fully and ably explains its course of inquiry, its analysis,

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civil remedy scheme struck down in *Jarkesy* and the civil penalty scheme provided by the SDWA. *Jarkesy* suggests that persons, including Federal agencies, are entitled to litigate EPA civil penalties in court rather than in administrative proceedings.

and its reasoning' sufficiently enough for us to discern a rational connection between 'its decision-making process and its ultimate decision'").

B. EPA's Order Does Not Meet the SDWA's Textual Requirements

EPA cannot meet these standards. As noted, it is undisputed that the TARP-treated water meets all drinking water standards, including for PFAS, and is discharged into a desert area riverbed such that no one could drink the water. In *Trinity*, EPA's order was sustained because there was substantial evidence that the defendant had dumped toxic waste into water that the neighbors were drinking. 150 F.3d at 396-397. There was also substantial evidence that the State had failed to act. *Id*. at 398-99 (The court listed the State's failure to act, failure to sample, and failure to use EPA approved processes).

Here, in contrast, ADEQ and the City of Tucson have taken comprehensive and robust efforts to manage the TARP. The City has consistently reported on its management efforts, including providing additional GAC units and GAC filter changeouts.[31] These actions fully treat PFAS contamination as measured by the standards established by the EPA's newly promulgated MCLs. The water thus treated cannot possibly pose an "an imminent and substantial endangerment to the health of persons" within the meaning of Section 1431(a). In addition, the City of Tucson is currently involved in a design and build PFAS pretreatment project that is fully funded by a $25 million federal grant, and the State of Arizona and City of Tucson have obtained another $42

[31] AR 100036928 at 1-5 (City of Tucson Semi-Annual Status Report for TARP (Mar 2023-Oct 2023 (Sept. 2023)), "although PFAS in groundwater is not addressed in the ROD or Consent Decree for TARP, PFAS concentrations are managed through operational strategies. The expanded AOP Facility includes twelve GAC contactors used to quench residual hydrogen peroxide in treated water from the UV-peroxide oxidation process. The GAC also effectively adsorbs PFAS compounds detected in water from the TARP remediation wells. Treated water from each of the operating GAC contactors is monitored regularly"). *See also* Appendix K DAF0686 (Tucson Water July 17, 2024 UCAB presentation) & Appendix A DAF0012-DAF0013.

million in federal funding.[32] Simply put, Arizona and the City of Tucson have done a meticulous and outstanding job in successfully treating PFAS.[33]

As the sole basis of its Order, EPA states that the PFAS could "breakthrough" the current system.[34] (Order ¶ 40 & EPA Ltr. at 5). But any such fear is likewise without factual support and at odds with the City of Tucson's quarterly reporting.[35] Breakthrough does not constitute breakdown. A breakthrough can occur in any remedial system and is typically addressed through appropriate engineering modification of the treatment system, such as what has been done successfully here, *i.e.*, adding additional treatment "train" and more frequent change of filtration media. The only source for EPA's concerns about "breakthrough" is "consult[ations] with ADEQ's and the City of Tucson's technical staff." EPA Ltr. at 5. "Consultations" are not facts or evidence. The EPA nowhere specifies any facts or evidence provided by these "consultations." EPA argues that "it will take at least two years to construct" the new ion exchange PFAS pre-treatment plant. EPA Ltr. at 5. However, EPA in no way explains why this ongoing design and construction project justifies the exercise of emergency jurisdiction under Section 1431(a). Indeed, if anything, the project demonstrates that the State and the local authorities have "acted" within the meaning of Section 1431(a).

There is likewise no "substantial evidence" that any such risk of breakthrough poses an "'imminent likelihood' that the public may consume contaminated water unless prompt action is taken to "prevent" a "potential hazard from occurring."[36] *Trinity*, 150 F.3d at 399. *See also*

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[32] Appendix M DAF0710-0712.

[33] EPA's statement that "EPA follows the polluter pays principle" (EPA Ltr. at 6), is irrelevant as a basis for finding imminent and substantial endangerment to human health or that the State and local authorities have failed to act. During the Conference, when counsel for the Air Force asked what more EPA thought that the State and City should be doing, the only response was that the Air Force should step forward and act as it did in funding both the initial TARP plant and the remodeled TARP AOP plant. In both of those instances, the Air Force paid $35 million and almost $17 million respectively. Thus, one clear inference is EPA is seeking to have the Air Force also pay for this *already fully federally* funded PFAS pretreatment plant. Hopefully this inference is not at the bottom of this Order as seeking a duplicate payment for a project that is already fully federally funded would be an abuse of discretion and grossly inappropriate. Without reaching the fiscal or grant law issues, we note Air Force funds have not been appropriated by Congress for such purposes. *See* 10 U.S.C. § 2703(g). *See also* Appendix A DAF0010-0011.

[34] The City of Tucson's Semi-Annual Status Report on TARP does not support this speculation. *See* Appendix H DAF0399 ("Treated water quality samples are collected from the GAC treated water "T-ports" of operating GAC contactors to evaluate PFAS breakthrough"); *See also* Appendix A DAF0013-DAF0014.

[35] Appendix A DAF0012-DAF0013 & notes 15-17.

[36] This speculation is also contrary to EPA's Office of Research and Development who provides research and training, identifying GAC as an "Effective Treatment Technologies for

Meghrig, 516 U.S. at 485 ("an endangerment can only be 'imminent' if it 'threaten[s] to occur immediately'"). That lack of any imminent endangerment to human health is especially obvious where, as here, it is undisputed that the treated water meets all drinking water standards but is not being consumed by the public. Nor did EPA report any such concerns in the Interim ROD Amendment issued in March 2023. The EPA's stated fear of a breakthrough is thus speculation, and speculation is not evidence, much less "substantial evidence."

Likewise insufficient is EPA's conclusory statement that ADEQ's and the City of Tucson's "efforts were not sufficiently effective to protect the public health." EPA Ltr. at 5. EPA does not explain that conclusion or cite any evidence to support that statement, stating only "[t]he limits of state and local actions to sufficiently address the problem is underscored by the Arizona Department of the Environmental Quality ("ADEQ") and the City of Tucson support for EPA's UAO." *See id*. In fact, the evidence is to the contrary.[37] As provided in the City of Tucson's independent water quality reports, "[t]he Arizona Department of Environmental Quality (ADEQ) is working with Tucson Water to eliminate the threat to our drinking water supply from PFAS. This includes plans to install new groundwater monitoring wells and design and construct preventative measures to stop PFAS-contaminated groundwater from migrating. New technologies and innovations are being used to remove PFAS from groundwater and limit its movement to other groundwater sources." Appendix F DAF0340.

EPA states that "State and local authorities should not bear the sole burden of building a solution for the PFAS contamination." EPA Ltr. at 6. The short answer to this assertion is that local authorities are, in fact, not bearing the "sole burden." Quite to the contrary. The EPA's assertion fails to address the over $67 million in federal funding that the State of Arizona and the City of Tucson have already received. EPA has not provided any evidence to suggest that the City of Tucson's new ion exchange system is "not sufficiently effective." *See* EPA Ltr. at 5. The City of Tucson and ADEQ have reported on the status of this project each quarter during the UCAB meetings and the April 2024 Tech Exchange. *See*, *e.g.*, Addendum A DAF0004.[38]

Arizona's and the City of Tucson's progress, and the UCAB oversight, have been impressive and comprehensive.[39] The new ion exchange system remedy suggests that the State

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PFAS." Appendix G DAF0363 (EPA Office of Research) ("'Granular Activated Carbon (GAC)'" is identified as 'Most studied technology Will remove 100% of the contaminants, for a time Good capacity for some PFAS'").

[37] Appendix F DAF0337 (City of Tucson Water Quality Report) ("We monitor water quality at hundreds of locations across our system— from our wells to your homes and businesses—and conduct tens of thousands of water quality tests every year.")

[38] *See also* Addendum A DAF0006 ("Quarterly meetings have focused on updates as to TCE, DX, and PFAS." Citing DAF0072-DAF0131 (Attachment 2 (UCAB presentations (Jan. 17, 2024))) & DAF0142-0237 (Attachment 4 (UCAB presentations (Apr. 17, 2024))).).

[39] The City of Tucson reported on design plan milestones, project status, and the pilot study. *See*, *e.g.*, Appendix A DAF0004.

and the local authorities have indeed "acted" comprehensively to protect the health of persons, thereby negating a mandatory basis for EPA's Section 1431(a) jurisdiction. In these circumstances, requiring the impossible of the Air Force is an abuse of discretion.

V. CONCLUSION

For all the legal and factual issues set forth above, the EPA should withdraw its Order. The Air Force will continue to focus its resources on identifying the nature and extent of PFAS contamination, filling data gaps, and addressing expeditiously any contamination at its AFP 44 and Morris ANGB installations. The EPA's Order will not and cannot result in the elimination of PFAS contamination in the aquifer any faster than the ongoing CERCLA process, nor any faster than the City of Tucson's ongoing project to design and build a PFAS Pretreatment plant.[40] Any enforcement of the Order will not survive review, either in an administrative process or in federal court. The Order cannot and will not result in the Air Force funding local authorities for projects that are already fully federally funded.

As it has for over 30 years, the Air Force looks forward to continuing its productive partnership with EPA, ADEQ and the City of Tucson. The Air Force will continue to follow the CERCLA process and execute all actions required to address PFAS impacts attributable to our operations in accordance with the law.

DATED: July 18, 2024

Respectfully Submitted,

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APPENDIX:
APPENDICES A-M

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[40] *See* Appendix K DAF0672 (City of Tucson construction schedule for the new PFAS Pretreatment plant).

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of July, 2024, a copy of the foregoing "The Department of the Air Force's Notice in Response to EPA Region 9's Emergency Administrative Order and Request to Withdraw this Unauthorized Order," and Department of the Air Force's Appendix was submitted by sending a copy via email to the following:

Andrew Helminger
Jon Owens
Rich Campbell
EPA Region 9
Office of Regional Counsel
Owens.jon@epa.gov
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Helminger.andrew@epa.gov

In addition, a courtesy copy of this Notice, including Appendix, was sent to Counsel for the Arizona Department of Environmental Quality:

Edwin Slade
Administrative Counsel
Arizona Department of Environmental Quality
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Robin M. Richardson

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