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STATE OF NEW MEXICO  
SECRETARY OF ENVIRONMENT



UNITED STATES ARMY AIR DEFENSE  
ARTILLERY CENTER AND FORT BLISS

Complainant,

v.

No. HWB 03-03 (Fee)

WATER AND WASTE MANAGEMENT DIVISION  
OF NEW MEXICO ENVIRONMENT DEPARTMENT



Respondent.

**NEW MEXICO ENVIRONMENT DEPARTMENT'S  
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

COMES NOW, the Water and Waste Management Division ("WWMD") of the New Mexico Environment Department ("Respondent" or "NMED"), on behalf of the Hazardous Waste Bureau ("HWB") of NMED (collectively "NMED"), and moves the Hearing Officer to dismiss with prejudice, pursuant to 20.1.5.106 NMAC (recompiled as 20.1.5.100.A NMAC), 20.1.5.203 NMAC (recompiled as 20.1.5.200.D NMAC), and Rule 1-012(B)(6) NMRA, for failure to state a claim upon which relief can be granted, Complainant's "Annual Hazardous Waste Management Business Fee - NM421372101, Request for Hearing and Answer" ("Answer"), filed on July 31, 2003, appealing from its 2002 Invoice for Annual Hazardous Waste Management Business Fees.

**Basis for Dismissal**

1. Section 106 (recompiled as Section 100.A) of 20.1.5 NMAC, the adjudicatory procedures of NMED, states, "In the absence of a specific provision in this

Part governing an action, the New Mexico Rules of Civil Procedure...may apply as necessary in the discretion of the Secretary or Hearing Officer."

2. 20.1.5 NMAC lacks a specific provision governing a motion to dismiss for failure to state a claim upon which relief can be granted, so NMED makes this motion pursuant to Rule 1-012 (B)(6) NMRA.

3. A motion to dismiss pursuant to Rule 1-012 (B)(6) NMRA is properly granted when it appears the complainant is not entitled to relief under any state of facts provable under the claim. Buhler v. Maruhjo, 86 N.M. 399, 524 P.2d 1015 (Ct. App. 1974).

4. Complainant is not entitled to any relief, including the relief requested in its Answer, under any state of facts provable under its Answer, and this motion to dismiss should therefore be granted.

#### **Argument in Support**

5. Complainant, United States Army, is an agency of the federal government, and is owner and operator of the U.S. Army Air Defense Artillery Center and Fort Bliss ("Fort Bliss").

6. Complainant holds a permit jointly issued by NMED and EPA Region 6 for treatment, storage, and disposal of hazardous waste, Permit No. NM4213720101-01, which includes a HSWA module containing corrective action requirements, pursuant to 40 C.F.R. Part 264, incorporated by New Mexico at 20.4.1.500 NMAC. NMED is the administrative authority authorized to enforce the entire permit.

7. 20.4.2 NMAC, the Hazardous Waste Fees regulations of NMED, provides a schedule of fees for facilities permitted or undergoing corrective action for past or

present hazardous waste management activities. 20.4.2.106 NMAC (recompiled as 20.4.2.6 NMAC).

8. 20.4.2.107.3 NMAC (recompiled as 20.4.2.7.C NMAC) defines "Annual Unit Audit" as "a tabulation of each operating unit, unit undergoing closure or scheduled for closure, post closure care unit, and corrective action unit."

9. 20.4.2.107.5 NMAC (recompiled as 20.4.2.7.E NMAC) defines "Corrective Action Units" as solid waste management units that are included...in the HSWA Module of the permit...and *have not been approved by [NMED] for No Further Action (NFA) Status.*" [emphasis added]

10. 20.4.2.201.1 NMAC (recompiled as 20.4.2.200.A(1) NMAC) requires every permitted facility to pay NMED an Annual Hazardous Waste Management Business Fee (AHWMBF) "for each unit as identified by the Annual Unit Audit (AUA)." It states that "[c]orrective action units for which fees are assessed are only those units which are identified by the AUA."

11. 20.4.2.201.2 NMAC (recompiled as 20.4.2.200.A(2) NMAC) requires NMED to each year conduct an AUA in cooperation with each facility required to pay fees. It states that "[t]he AUA shall be used to determine if the facility's permit accurately and appropriately lists the facility's operating, post closure care, and corrective action units. It requires the AUA to be completed each year no later than July 1.

12. 20.4.2.208.1 NMAC (recompiled as 20.4.2.200.H(1) NMAC) provides that the AHWMBF "shall be paid in full if permitted hazardous waste management activities took place at the site or unit *during any part of the calendar year.*" [emphasis added]

13. 20.4.301.1 NMAC (recompiled as 20.4.2.300.A(1) NMAC) requires NMED to invoice each facility within thirty (30) days after completion of its AUA.

14. On March 5, 2003, NMED provided Complainant with a Request for Comments on Changes for the Annual Unit Audit for Calendar Year 2002. NMED attached 2001 AUA Tables A, B, and C for Fort Bliss and asked Complainant to "identify any changes that should be reflected in the AUA tables for calendar year 2002." Table B contained Corrective Action Units. Letter dated March 5, 2003, from James P. Bearzi, Chief, Hazardous Waste Bureau, to Major General Stanley E. Green, Commander-USAADACENFB, "Exhibit C" to the Answer (hereafter "Complainant's Exhibit C").

15. On March 10, 2003, NMED denied Complainant's No Further Action Petition for Six New Mexico Sites, in which Complainant had requested NFA determinations for six Corrective Action Units ("the six Units"). NMED denied the Complainant's NFA Petition for all six Units. Letter dated March 10, 2003, from James Bearzi, Chief, Hazardous Waste Bureau, to Major General Green, Commander-USAADACENFB, "Exhibit E" to the Answer (hereafter "Complainant's Exhibit E").

16. On March 21, 2003, Complainant provided its comments on the draft AUA to NMED. Letter dated March 21, 2003, from Keith Landreth, Director, Directorate of Environment, to Mr. James P. Bearzi, Chief, Hazardous Waste Bureau, "Exhibit B" to the Answer (hereafter "Complainant's Exhibit B").

17. In Complainant's Exhibit B, Complainant requested that the AUA fees for the six Units be held in abeyance.

18. In Complainant's Exhibit B, Complainant did not identify any changes that it thought should be reflected in the 2002 AUA tables.

19. On June 30, 2003, NMED completed the Final AUA for calendar year 2002 for Fort Bliss. Letter dated June 30, 2003, with attachments including invoice, Table A, Table B, and Table C, from John E. Kieling, Manager, Permits Management Program, to Major General Stanley E. Green, Commander-USAADACENFB, "Exhibit A" to the Answer (hereafter "Complainant's Exhibit A").

20. Complainant's Exhibit A states, "Enclosed are the AUA Tables only for those units that will be billed. The Tables were developed from the recent *draft* Annual Unit Audit, dated March 5, 2003, and any comments received from your facility."

21. The invoice assesses \$250.00 for each of 14 Corrective Action Units, including the six Units, for a total cost of \$3,500.00. The total AUA fee amount is \$5,000.00. Complainant's Exhibit A.

22. On July 31, 2003, Complainant filed its Answer, disagreeing with the assessment of fees for the six Units. Answer at 1.

23. In its Answer, Complainant relies upon a statement included in a letter from NMED to Complainant in support of its assertion that the six Units should not be included on the AUA. Answer at 2, citing letter dated January 14, 2002, from John E. Kieling, Program Manager, RCRA Permits Management Program, "Exhibit D" to the Answer (hereafter "Complainant's Exhibit D").

24. Complainant's Exhibit D explicitly does not contain an approval by NMED of Complainant's NFA request for any of the six Units.

25. As noted above, NMED denied NFAs for the six Units in March of 2003. Complainant's Exhibit E. Those units are therefore Corrective Action Units which must

be included on the AUA. 20.4.2.107.5 NMAC (recompiled as 20.4.2.7.E NMAC);  
20.4.2.107.3 NMAC (recompiled as 20.4.2.7.C NMAC).

26. Even if NMED had approved NFAs for all six Units on January 14, 2002, the date of Complainant's Exhibit D, all six Units would be included on the 2002 AUA because the NFAs would have been approved after the beginning of calendar year 2002. 20.4.208.1 NMAC (recompiled as 20.4.2.200.H(1) NMAC) .

27. Any disagreement Complainant may have with NMED's decision to deny NFAs for the six Units is completely irrelevant to this matter.

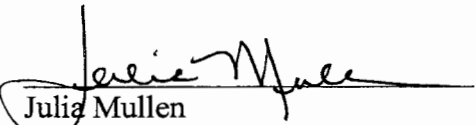
28. Opposition by opposing counsel to this motion is presumed pursuant to Rule 1-007.1 (C) NMRA.

**Prayer for Relief**

WHEREFORE, for all of the foregoing reasons, NMED respectfully prays the Hearing Officer to dismiss Complainant's appeal with prejudice for failure to state a claim upon which relief can be granted and to grant such other relief as she may deem just and proper.

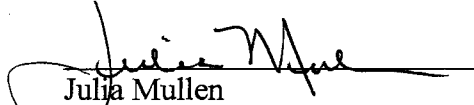
Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT

By:   
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing New Mexico Environment Department's Motion to Dismiss for Failure to State a Claim was sent via first class U.S. mail, this 10<sup>th</sup> day of September, 2003, to Myles S. Hall, Environmental Counsel, Office of the Staff Judge Advocate, ATZC-JA, Building 13, Fort Bliss, Texas 79916, counsel for Complainant.

  
Julia Mullen  
Assistant General Counsel