

FB 2003

Glenn
ENTERED



STATE OF NEW MEXICO
SECRETARY OF THE 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 REPLY TO UNITED STATES ARMY AIR DEFENSE ARTILLERY CENTER AND FORT BLISS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

INTRODUCTION

The New Mexico Environment Department ("NMED" or "Respondent") files this Reply in support of its Motion to Dismiss For Failure to State a Claim ("Motion to Dismiss") and in opposition to the United States Army Air Defense Artillery Center And Fort Bliss' ("Complainant") Response To Respondent's Motion To Dismiss For Failure To State A Claim ("Response"). For the purposes of this Reply Complainant's Unit I.D. Nos. 21, 22, 27B, 66, 76 and 78 are referred to as "the 6 units." References to "Complainant's Exhibit" mean Exhibits attached to Complainant's Answer, which was previously filed in this matter.

ARGUMENT

I. Complainants Procedural Argument Does Not Support Denial of NMED's Motion to Dismiss.

In its Response, Complainant suggests that NMED's Motion to Dismiss should be denied because NMED did not seek its concurrence before filing. This argument ignores the fact that the Motion to Dismiss stated that it was made pursuant to Rule 1-012(B)(6) NMRA (1989) because 20.1.5 NMAC lacked a specific provision regarding motions to dismiss. In light of that fact, it is unsurprising that 20.1.5 NMAC also lacks provisions as to whether a party must seek concurrence before filing a motion to dismiss. Conversely, Rule 1-007.1(C) NMRA (1989) provides that opposition to motions to dismiss is presumed. Because NMED filed its motion pursuant to provisions of the NMRA, the specific provisions of the NMRA that apply directly to motions to dismiss should also apply.

The exception to the requirement that concurrence be sought before filing a motion when that motion is to dismiss is undoubtedly based on the common sense assumption that such motions will always be opposed, as this one is. Complainant cites no regulation or case law providing for denial of a motion to dismiss because the filing party did not seek concurrence. Additionally, Complainant has not alleged that it was in any way prejudiced by having the Motion to Dismiss filed without having had the opportunity to inform NMED that it would be in opposition. Because NMED's choice to not seek concurrence before filing its motion did not violate any laws or notions of equity there is no procedural basis upon which to deny the Motion to Dismiss.

II. Looking at the Facts and Law in a Light Most Favorable to Complainant Its Case Should be Dismissed.

After evaluating Complainant's material allegations in a light most favorable to Complainant, it is apparent that it is entitled to no relief. During the 2002 calendar year the 6 units fell squarely within the definition of a corrective action unit. On January 14, 2002, NMED found the 6 units qualified for a No Further Action ("NFA") determination. However, it did not make a final agency decision because submission of additional materials was deemed necessary. Complainant's Exhibit D. Because the NFA petition was not approved the 6 units were corrective action units as defined at 20.4.2.7.E NMAC. Because the 6 units were corrective action units each of them was identified in the Annual Unit Audit for 2002. Finally, 20.4.2.200.A(1) NMAC requires that annual fees be paid for each unit identified in the Annual Unit Audit. Complainant offers no valid reason as to why the Secretary should find that this set of law and facts should result in a waiver of fees.

The only legal argument made by Complainant, that no hazardous waste management activities took place at the site or unit during any part of the calendar year, is inapposite to the 6 units. 20.4.2.200.H(1) NMAC merely states that fees shall be paid in full if hazardous waste management activities took place during a given calendar year. Respondent is aware that no hazardous waste management activities took place at any of the 6 units during calendar year 2002. However, the regulations require that fees must be paid for any corrective action unit listed in the Annual Unit Audit. 20.4.2.200.A(1) NMAC. The regulations therefore contemplate at least two different situations where

fees accrue, where permitted hazardous waste activities are conducted, and where corrective action units are listed on the Annual Unit Audit.

The reasoning behind this structure is that treatment, storage and disposal of hazardous waste is not permitted at corrective action units. Complainant's interpretation of the regulations thus ignores language indicating the difference between corrective action units, which are always invoiced, and other types of units, to which fees might not apply if they were not used for permitted hazardous waste management activities during a calendar year. Presumably, the policy behind this distinction is to encourage facilities to move corrective action units into NFA status.

Complainant's Response to the Motion to Dismiss claims that NMED stated that it would waive fees for "*corrective action units*" that did not manage hazardous waste during the calendar year. Complainant's Response, Pg. 10 (emphasis added). However, the letter referred to actually said that if Complainant submitted an affidavit stating that the facility had "*operating* unit(s) that did not manage hazardous waste for the entire 2002 calendar year" then fees would not be invoiced for those units. Complainant's Exhibit C (emphasis added). NMED did not state that it would waive fees for corrective action units under any circumstance. This comports with the regulations, which provide that all corrective action units listed on the Annual Unit Audit will be invoiced, regardless of whether permitted hazardous waste management activities were conducted.¹

Complainant's disagreements with NMED regarding the NFA process cannot change the fact that no relief from the fees is available to it under regulations relevant to this matter. More importantly, even if NMED had approved Complainant's NFA petition

¹ Additionally, no affidavits stating that hazardous waste management activities did not take place during the calendar year were submitted to NMED.

the fees at issue here would still have accrued because the approval would have occurred after the beginning of calendar year 2002.²

III. No Hearing Is Necessary.

In its Response, Complainant requests a hearing on the Motion to Dismiss. Complainant's Response, Pg. 11. NMED opposes that request.

CONCLUSION

For the reasons above, and those set forth in NMED's Motion To Dismiss For Failure To State A Claim, NMED respectfully requests that the Hearing Officer dismiss Complainant's appeal with prejudice.

Respectfully submitted,



Timothy A. Dolan
Assistant General Counsel
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, New Mexico 87505
Phone (505) 827-6891
Fax (505) 827-1628

² Despite Complainant's contentions, NMED did not violate the regulatory time schedules referenced in the Response. Complainant's Response, Pg. 7. An NFA petition is a request for a Class 3 permit modification to which corrective action document review timelines do not apply. See 20.4.1.900 NMAC, incorporating 40 C.F.R. § 270.42(c); See also 20.4.2.7(T) NMAC.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing New Mexico Environment Department's Reply to United States Army Air Defense Artillery Center and Fort Bliss' Response to Respondent's Motion to Dismiss For Failure to State a Claim was sent via first class mail, this 31st day of October, 2003, to Captain James M. Pakiz, Department of Army, Office of Staff Judge Advocate, Administrative Law ATZC-JA, Building 13, Pershing Road, Fort Bliss, Texas, 79916, counsel for Complainant.



Timothy A. Dolan
Assistant General Counsel