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STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

UNITED STATES ARMY, AIR DEFENSE,
ARTILLERY CENTER AND FORT BLISS,

 ENTERED



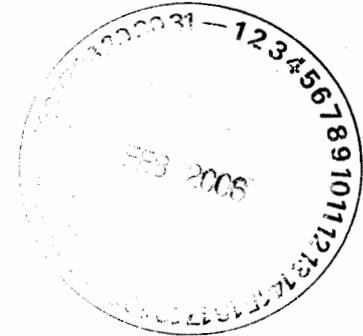
Complainant,

v.

No. HWB 03-03 (FEE)
No. HWB 04-08 (FEE)

WATER AND WASTE MANAGEMENT DIVISION
OF THE NEW MEXICO ENVIRONMENT DEPARTMENT

Respondent.



SETTLEMENT AGREEMENT

I. Introduction

A. Complainant holds a permit ("Permit") for the Air Defense Artillery Center and Fort Bliss (EPA I.D. Number NM4213720101) under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* ("RCRA"), and the Hazardous Waste Act, NMSA 1978 §§ 74-4-1 *et seq.* ("HWA"), for treatment of hazardous waste. This permit includes a HSWA module containing corrective action requirements for releases from SWMUs pursuant to 42 USC § 6924(u), NMSA 1978, § 74-4-4.2(B), and 20.4.1.500 NMAC (incorporating 40 CFR § 264.101(a). NMED is the administrative authority authorized to enforce this permit under 40 CFR § 272.1601.

B. On June 30, 2003, the Hazardous Waste Bureau ("HWB" or "Bureau") of the Water and Waste Management Division ("Respondent") of the New Mexico Environment Department ("NMED" or "Department") issued Annual Unit Audit Invoice ("AUA") # HWB-FB-AUA-02, dated July 1, 2003, to the United States Army, Air Defense Artillery Center and Fort Bliss ("Complainant") assessing Annual Hazardous

Waste Business Management Fees (“annual fees”) for calendar year 2002 pursuant to 20 NMAC 4.201.1 and 20 NMAC 4.2.301.1 (1998) and § 74-4-4.2(J) of the HWA.

C. On July 30, 2003, Complainant, an agency of the federal government, timely filed a Request for Hearing appealing Invoice # HWB-FB-AUA-02 pursuant to 20.4.2.302 NMAC (1998), which was docketed as HWB 03-03 (FEE).

D. On July 1, 2004, the Bureau issued Annual Unit Audit Invoice # HWB-FB-AUA-03, to Complainant assessing annual fees for calendar year 2003 pursuant to 20 NMAC 4.201.1 and 20 NMAC 4.2.301.1 (1998) and §74-4-4.2(J) of the HWA.

E. On July 27, 2004, Complainant timely filed a Request for Hearing appealing Invoice # HWB-FB-AUA-03 pursuant to 20.4.2.302 NMAC (1998), which was docketed as HWB 04-08 (FEE).

F. For the purpose of effecting the terms of the negotiated settlement of this consolidated action, Respondent and Complainant enter into this Settlement Agreement (“Agreement”) pursuant to 20.1.5.600.B NMAC (1995)

II. Jurisdiction and Authority

A. For the purpose of this Agreement only, and without waiving any future defense of sovereign immunity or any other jurisdictional defense, Complainant admits and agrees to NMED jurisdiction and authority over Complainant regarding this action pursuant to RCRA the HWA and 20.4.2.NMAC (1998). Further, Complainant will not contest NMED jurisdiction to compel compliance with this Agreement in any enforcement proceedings, either administrative or judicial, or to impose sanctions for violations of this Agreement as provided in section IV.H below.

III. HWB's Invoices and Complainant's Appeals and Requests for Hearing

A. In its Request for Hearing appealing Invoice # HWB-FB-AUA-02, Complainant asserted that six corrective action units, (SWMUs 21, 22, 27B, 66, 76, and 78) which were included in the invoice, should have been granted NFA status by the Bureau, should not have been included in the invoice, and should not have been subject to annual fees.

B. In its Request for Hearing appealing Invoice # HWB-FB-AUA-03, Complainant re-asserted its claims regarding the six corrective action units which are the subject of HWB 03-03 (FEE). In addition, Complainant challenged the fee assessment for five additional corrective action units (SWMUs 18, 20, 27, 29, and 81). Complainant stated that voluntary corrective action reports had been filed for each of the five units and that because the Bureau had not taken action on the reports in a timely manner, the five units should not have been included in the invoice, and should not be subject to annual fees.

C. Respondent filed various motions to dismiss the fee appeal docketed as HWB 03-03 (FEE), which were ultimately denied by the Hearing Officer by Order dated July 16, 2004. On October 14, 2004, the Hearing Officer granted a Joint Motion staying the proceedings in HWB 03-03 (FEE) and HWB 04-08 (FEE) pending settlement negotiations.

D. On December 15, 2004, the Bureau granted NFA status to four SWMUs which were the subject of both appeals (SWMUs 21, 22, 66, and 78) through an agency initiated permit modification pursuant to 20.4.1.900 NMAC (incorporating 40 CFR §

270.41).

E. By letter dated November 12, 2004 the Bureau informed Complainant that with respect to SWMU 81, the voluntary corrective actions Complainant had performed were adequate, requiring no additional investigation or corrective measures. Respondent further informed Complainant that SWMU 81 had been erroneously included on the AUA invoices since the year 2000 because Respondent had never added the SWMU to the Ft. Bliss permit. As a result, Respondent has agreed to credit Complainant for the AUA fees imposed for SWMU 81 for the years 2002 and 2003 as the AUA fees imposed for these two years are the subject matter of the action. The total amount of this credit is \$500.00 and will result in the reduction of the 2002 and 2003 invoices by same.

IV. Settlement of the Appeal and Request for Hearing

A. In compromise and settlement of Complainant's Appeals and Requests for Hearing, Complainant and Respondent (the Parties) agree that this Agreement should be adopted as the Final Order in this matter. The Parties request that the Secretary approve this Agreement as the Final Order in this case in the form of the Stipulated Final Order attached as Exhibit A. The Parties further agree that the terms of the Agreement shall take full force and effect upon approval by the Secretary.

B. Invoice # HWB-FB-AUA-02 is revised for a total amount of \$3,250 (by removing SWMUs 21, 22, 27B, 66, 76, 78 and 81 from those billed in the invoice).

C. Invoice # HWB-FB-AUA-03 is revised for a total amount of \$3,250 (by removing SWMUs 21, 22, 27B, 66, 76, 78 and 81 from those billed in the invoice).

D. The revised liability for AUA fees for 2002 and 2003 amounts to a total of \$6,500. This amount will be reduced by credits for payments received from Complainant in the amount of \$3,500 for 2002 and \$2,250 for 2003 for a total credit of \$5,750. As a result, Complainant agrees to pay a total of \$750.00 as final satisfaction of the AUA fees for calendar years 2002 and 2003, within sixty (60) days of adoption of the Agreement as a Final Order.

E.. Under the terms of this Agreement and pursuant to 20.4.2.301 NMAC (1998) NMED grants Complainant an extension for payment of the invoiced fees. The new due date shall be sixty (60) days after adoption of the Agreement as a Final Order. Late charges pursuant to 20.4.2.401 NMAC (1998) may be imposed if Army does not pay the invoiced fees within the required sixty (60) day period.

F. Under the terms of this Agreement and pursuant to 20.4.2.301 and 401 NMAC (1998), NMED waives the \$100 billing charge that would be imposed for failure to pay fees within sixty (60) days of the date of the original invoice. A billing charge may be imposed if Army does not pay the revised invoice as agreed in paragraph IV.E above.

G. Within ninety (90) days after adoption of this Agreement as a Final Order pursuant to paragraph IV.A above, NMED shall begin an agency initiated permit modification pursuant to 20.4.1.900 NMAC (incorporating 40 CFR 270.41) and 20.4.1.901 NMAC, to grant NFA status to SWMUs 27B and 76. Provided that Complainant is discharging its obligations under this Agreement, NMED will agree to fully grant the NFA status permit modification if upon the expiration of the public comment period as authorized by statute, all public concerns submitted during that period

have been addressed by NMED as required.

Complainant agrees and understands that the grant of NFA of these two SWMUs is conditioned upon its continued fulfillment of the monitoring and sampling requirements as set forth herein. Upon the grant of NFA status as indicated, Complainant in turn agrees to immediately begin implementing the provisions set forth in items one through three of this section accordingly. Complainant understands and agrees that retention of the permit NFA status is subject to the continued monitoring of the influent and voluntary sampling of the groundwater associated with these units as indicated below as they continue to exist in their current state. In the event that said units become permanently closed or otherwise modified, the terms of this agreement with respect to monitoring and sampling will terminate rendering the need for further action or inaction to be determined by the parties. Monitoring and sampling events will be conducted by Complainant as follows:

1. Semi-annual sampling of influent content entering SWMUs 27B and 76 will incorporate the target analyte list for metals (TAL), EPA method 8260 for VOC and EPA method 8370 or 8310 for SVOC. Reports of the sampling events are to be submitted to NMED as soon as practicable thereafter,

2. Monthly measurement of influent quantity entering SWMUs 27B and 76, with reports to be submitted to NMED as soon as practicable thereafter,

3. One groundwater sample will be extracted from the regional aquifer beneath SWMUs 27B and 76, sometime in 2007. An additional groundwater sample will again be extracted from the regional aquifer beneath SWMU 27B and SWMU 76 once every five years thereafter as required depending upon the status of the units. Sampling

will be performed in accordance with the test methods outlined in paragraph 1, with a report to be submitted to NMED as soon as practicable thereafter,

4. Submittal of a plan for effluent sampling and groundwater sampling as outlined above to NMED for approval to implement items one through three of this section, is to be submitted within one hundred twenty (120) days after adoption of this Agreement as a Final Order pursuant to paragraph IV.A above. H. Complainant agrees to accept the permit conditions upon which NFA status will be granted and retained with respect to SWMUs 27B and 76, provided that the conditions are consistent with the terms as they are specified in paragraph IV.H above.

I. Within thirty (30) days after adoption of this Agreement as a Final Order pursuant to paragraph IV.A above, NMED shall withdraw the Notice of Violation issued to Army on May 1, 2003 regarding SWMUs 19, 27B and 76.

V. Enforceability

This Agreement shall be enforceable by any of the parties by the filing of a civil action in the First Judicial District of Santa Fe, New Mexico, or other appropriate forum.

VI. Precedential Effect

The Parties enter into this Agreement solely for the purpose of settling this case. It does not establish any binding precedent, on any of the Parties involved in this case. The Parties specifically agree that this Agreement shall constitute neither an admission nor evidence of the truth of any statement contained in any party's pleadings, motions, responses or replies in this case. This Agreement is intended to resolve only the matters

specifically addressed in the Agreement, and is not a settlement of any fee issues except those specifically addressed in the Agreement. The parties further acknowledge that there may be some unresolved issues regarding waiver of federal sovereign immunity and that the terms of this Agreement are being entered into on a voluntary basis to advance a spirit of good faith and comity between the Parties and therefore will not be interpreted as a waiver of sovereign immunity.

VII. Reservation of Rights and Defenses:

A. This Agreement shall not be construed to limit in any way the rights of the Department to require Complainant to comply with applicable state or federal laws or regulations, except as to those matters specifically addressed and resolved by this Agreement. Except as to those matters specifically addressed and resolved by this Agreement, this Agreement shall not be construed to limit in any way the Department from raising any claims and defenses that may be available in law or in equity or seeking any relief authorized by the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* ("RCRA"), the Hazardous Waste Act, NMSA 1978 §§74-4-1 *et seq.* ("HWA"), the Federal Facilities Compliance Act of 1992, ("FFCA"), the Hazardous Waste Management Regulations, 20.4 NMAC ("HWMR"), or to permit violation of any applicable state or federal requirements.

B. This Agreement shall not be construed to limit in any way the rights of Complainant to raise claims or defenses available to it with respect to any future actions arising out of or related to enforcement of this Agreement under any of the foregoing state and federal acts and regulations or any other applicable statute or regulation

including the defense of sovereign immunity, nor does it limit Complainant rights to claims or defenses available in law or in equity to a Department action seeking relief under any of the foregoing acts and regulations or any other applicable statute or regulation.

VIII. Good Faith Performance

The Parties agree that they will act reasonably and in good faith at all times to accomplish the terms and conditions of this Agreement.

IX. Availability of Funds

No provision of this Settlement Agreement shall be interpreted as, or constitute, a commitment or requirement that the United States shall obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. Section 1341. Payment or obligation of funds by the United States is subject to the availability of appropriated funds.

X. Effective Date

This Agreement shall be effective upon execution by the Secretary or his designee, and Complainant through its designee.

XI. Binding Effect

This Agreement shall apply to and be binding upon NMED, Complainant and their respective successors and assigns.

XII. Authorities of Signatories

The persons executing this Agreement respectively represent that they have the requisite authority to bind NMED and Complainant to the terms of this Agreement, and further agree that this representation of authority as to each such entity shall be legally sufficient evidence of actual or apparent authority to bind each of them to all of the terms and conditions of this Agreement

XIII. Complete Agreement

This Agreement constitutes the final and complete settlement agreement between Army and NMED for this case. This Agreement may be modified only by written agreement of all Parties.

Approved by the New Mexico Environment Department:

Cindy Padilla

Date: 30 Jan '06

Cindy Padilla Director
New Mexico Environment Department, Water and Waste Management Division
1190 St. Francis Dr.
Santa Fe, New Mexico 87502-6110

United States, Department of the Army

R. T. Burns

Date: 19 JAN 06

Robert T. Burns
Colonel, U.S. Army
Garrison Commander

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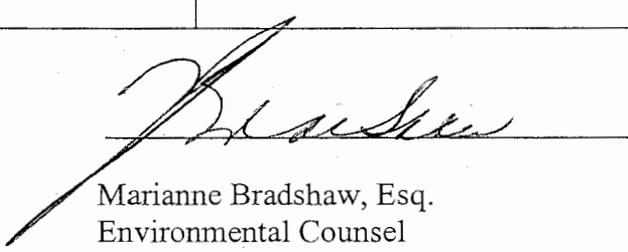
WATER AND WASTE MANAGEMENT DIVISION
OF THE NEW MEXICO ENVIRONMENT DEPARTMENT

Respondent.

CERTIFICATE OF SERVICE

I certify that on January _____, 2006, a true and correct copy of the attached
Settlement Agreement was mailed, by Federal Express, to:

Tracy Hughes, Esq. Attorney for Hazardous Waste Management Division Office of General Counsel New Mexico Environment Department 1190 St. Francis Drive, Suite N-4050 Santa Fe, New Mexico 87501	
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