



GC-C&F

3 December 2009

Helen S. Ferrara
Regional Judicial Officer
EPA Region II
US Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2009 DEC -9 PM 2:09
REGIONAL HEARING
CLERK

Re: In the Matter of U.S. Department of Army and Army and Air Force Exchange Service, West Garrison., Docket No. RCRA -02-2009-7507

Dear Ms. Ferrara:

Please find enclosed an original and one copy of an Answer and Request for Hearing on behalf of Respondent, Army and Air Force submitted pursuant to 40 C.F.R. § 22.15 regarding the above-captioned matter. Please have these documents marked *filed* and return a conformed copy to me along with a written response that the Request for Hearing has been granted.

Respondent AAFES also wishes to pursue the possibility of settlement and would like to schedule an informal conference with the EPA to discuss settlement options, including the use of Supplemental Environmental Projects as part of a negotiated settlement.

Please contact the undersigned at (214) 312-3067 or via electronic mail to WhittingtonM@aafes.com so that we may schedule a conference with the appropriate government representatives.

There are other Counsel who will be appearing and participating in the settlement process.

Sincerely,

MICHAEL C. WHITTINGTON
Senior Associate General Counsel
Commercial and Financial Law Division

CERTIFICATE OF SERVICE


I hereby certify that the Answer and Request for Hearing by myself, Michael C. Whittington, in the matter of Department of the Army, West Point Garrison; and the Army and Air Force Exchange Service, West Point, NY, Docket No. RCRA-02-2009-7507, was served on the parties as indicated below:

Certified Mail - Original:
Helen S. Ferrara
Regional Judicial Officer
EPA Region II
US Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

Copy:
Naomi Shapiro
Assistant Regional Counsel
Office of Regional Counsel, US EPA, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

First Class Mail - Copies:
Colonel Jill M. Grant
Chief, Litigation Division
Office of the Judge Advocate General
Department of the Army
901 North Stuart Street, USA Room 400
Arlington, VA 22203

Colonel Daniel V. Bruno
Commander, U.S. Army Garrison, West Point
681 Hardee Place
West Point, NY 10996

A handwritten signature in black ink, appearing to read "Michael Whittington", written over a horizontal line.

MICHAEL C. WHITTINGTON
Senior Associate General Counsel
Commercial & Financial Law Division
Army and Air Force Exchange Service
3911 S. Walton Walker Blvd.
Dallas, TX 75236-1598

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.1
2009 DEC -9 PM 2:09
REGIONAL HEARING
CLERY

In the Matter of

U.S. Department of the Army
and
Army and Air Force Exchange Service

West Point Garrison

Respondents

Proceeding Under Section 9006 of the
Solid Waste Disposal Act, as amended

ANSWER AND REQUEST FOR HEARING

Docket No. RCRA-02-2009-7507

ANSWER

Respondents, The Army & Air Force Exchange Service, hereinafter referred to as AAFES, by way of Answer to United States Environmental Protection Agency (USEPA) Complaint dated September 30, 2009, and received on October 8, 2009, hereby state:

1. Admitted as agreement with a statement in law.
2. Admitted.
3. Admitted.
4. Admitted, to the extent the facts pertain to the AAFES.
5. Neither admitted nor denied since this paragraph does not constitute a factual allegation and sets forth conclusions of law.
6. Neither admitted nor denied since this paragraph does not constitute a factual allegation.
7. Respondent AAFES is without knowledge pertaining to the factual allegations contained in this paragraph.
8. Admitted.
9. Admitted.
10. Admitted.
11. Admitted.
12. Admitted.
13. Admitted as to the NOV listing and to EPA conclusions.
14. Admitted.
15. Admitted.
16. Respondent AAFES is without knowledge pertaining to the factual allegations contained in this paragraph.

17. Admitted.

Count 1

Respondent Army's Failure to Triennially Test the Cathodic Protection System and to Maintain the Results of Testing

18. Answers to paragraphs 1 through 17 are incorporated by reference and as if set forth in their entirety herein.
19. Neither admitted nor denied since this paragraph does not constitute a factual allegation and sets forth statements or conclusions in law.
20. Neither admitted nor denied since this paragraph does not constitute a factual allegation and sets forth statements or conclusions in law.
21. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
22. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
23. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
24. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
25. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
26. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
27. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.

Count 2

**Respondent Army's Failure to Monitor for Releases Every 30 Days
and to Maintain the Results for 12 Months**

USTs #648B and #716B

28. Answers to paragraphs 1 through 29 are incorporated by reference and as if set forth in their entirety herein.
29. Neither admitted nor denied since this paragraph does not constitute a factual allegation and sets forth statements or conclusions in law.

30. Neither admitted nor denied since this paragraph does not constitute a factual allegation and sets forth statements or conclusions in law.
31. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
32. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
33. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
34. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
35. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
36. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
37. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
38. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
39. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
40. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
41. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
42. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
43. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
44. Neither admitted nor denied since Respondent AAFES is without knowledge of the facts involved, which do not pertain to AFES and since the paragraph sets forth conclusions of law.

Count 3
Respondent Army's Failure to Respond Appropriately
to Indications of Release from UST System
UST # 716B

45. Answers to paragraphs 1 through 46 are incorporated by reference and as if set forth in their entirety herein.
46. Neither admitted nor denied since this paragraph does not constitute a factual allegation and sets forth statements or conclusions in law.
47. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.

48. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
49. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
50. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
51. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
52. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
53. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
54. Admitted to the extent it pertains to AAFES.
55. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
56. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
57. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.

Count 4

Respondent Army's Failure to Provide Adequate Spill Prevention

UST #616A and UST# 845F

58. Answers to paragraphs 1 through 59 are incorporated by reference and as if set forth in their entirety herein.
59. Neither admitted nor denied since this paragraph does not constitute a factual allegation and sets forth statements or conclusions in law.
60. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
61. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
62. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
63. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
64. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
65. Neither admitted nor denied, as Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES.
66. Neither admitted nor denied since Respondent AAFES is without knowledge of the facts involved, which do not pertain to AAFES and since the paragraph sets forth conclusions of law.

Count 5

67. Answers to paragraphs 1 through 68 are incorporated by reference and as if set forth in their entirety herein.
68. Admitted in part and denied in part. AAFES admits that “[a]n annual test of the operation of the leak detector must be conducted in accordance with the manufacturer’s requirements.” AAFES admits that the results of any test conducted in accordance with the manufacturer’s requirements must be kept for one year.
69. Admitted.
70. Admitted.
71. Admitted.
72. Admitted to the extent the paragraph applies to AAFES.
73. Admitted, as to tests prior to April 2009.
74. Admitted to the extent that the contractor performed tests after the date of the EPA inspection.
75. Admitted.
76. Denied. AAFES conducted all line leak detector tests required by the manufacturer.

REQUEST FOR HEARING AND AFFIRMATIVE DEFENSES

A. REQUEST FOR HEARING

Respondents hereby request a hearing to contest factual issues and penalty assessments as set forth in the Complaint and raise the following defenses:


B. AFFIRMATIVE DEFENSES

1. AAFES has complied with 40 CFR 280.44 in that the equipment manufacturer does not recommend or require annual testing of its automatic line leak detectors.
2. EPA’s penalty assessment matrix does not comport with the requirements of the Administrative Procedures Act, 5 U.S.C. §§ 500-576, is not promulgated pursuant to regulation, and therefore, is not enforceable. The administrative rulemaking process has not been followed and there has been no opportunity for public comment and input. At best, the penalty matrix should be used for guidance purposes only.
3. Economic benefit is not properly assessable against any governmental agency. EPA guidance states: “The economic benefit component represents the economic advantage that a violator has gained by delaying capital and/or non-depreciable costs and by avoiding operational and maintenance costs associated with compliance”. Respondents do not and did not realize or gain any economic advantage. Respondents are not in a “for profit” enterprise whereby savings could be made. There is no provision for assessment of economic benefit under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. or the UST Regulations, 40 C.F.R. Part 280.
4. AAFES has either corrected or taken the necessary steps to correct the alleged violations.

5. The gravity based component has been improperly weighted.
6. Respondents reserve the right to amend and supplement this Answer up until the time of hearing.

Dated: 3 December 2009

Respectfully submitted by:



MICHAEL C. WHITTINGTON
Attorney for Respondent
Senior Associate General Counsel
Commercial & Financial Law Division
Army & Air Force Exchange Service
3911 S. Walton Walker Blvd.
Dallas, TX 75236-1598
Whittingtonm@aafes.com
214-312-3067
Fax 214-465-2267