

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)
)
Spirit AeroSystems, Inc.)
3810 S. Oliver)
Wichita, Kansas 67210)
)
EPA ID Number: KSR000503961)
)
Respondent.)
)
Proceeding under Section 3008(a) and (g) of)
the Resource Conservation and Recovery)
Act as amended, 42 U.S.C. § 6928(a) and (g))
_____)

**ANSWER TO AMENDED COMPLAINT
AND REQUEST FOR HEARING**

Docket No. RCRA-07-2009-0012

COMES NOW Respondent, Spirit AeroSystems, Inc. ("Respondent"), and for its Answer to Complainant's Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing in the above-captioned matter alleges, states and requests as follows:

A. Preliminary Statement

1. Respondent admits Paragraph 1 of the Amended Complaint.
2. Answering Paragraph 2, Respondent admits it is a company incorporated under the laws of Delaware and authorized to conduct business in the State of Kansas. Respondent is without knowledge sufficient to admit or deny each and every other statement and allegation in Paragraph 2.
3. Respondent is without knowledge sufficient to admit or deny the statements and allegations in Paragraph 3.
4. Respondent admits Paragraph 4 of the Amended Complaint.
5. Answering Paragraph 5, Respondent denies that the penalty proposed to be assessed by Complainant in the amount of \$249,068 is appropriate and denies that Complainant is entitled to recover such penalty in this administrative adjudicatory proceeding. Respondent alleges that the penalty proposed is based, in whole or in part, on erroneous factual and legal contentions.

Respondent further denies that Complainant properly interpreted and applied the RCRA Civil Penalty Policy cited in this paragraph. Respondent affirmatively alleges that, in fact, Complainant improperly applied the factors discussed in the RCRA Civil Penalty Policy and abused its discretion in using that Policy to determine the penalty proposed in the Amended Complaint. Respondent admits the allegations contained in the first three sentences of Paragraph 5, but denies each and every other statement, allegation and inference contained in Paragraph 5.

B. Amended Complaint

Allegations Common to All Counts

6. Respondent admits Paragraphs 6, 7, 8, 9 and 10 of the Amended Complaint.
7. Answering Paragraph 11, Respondent admits only that it does not have a RCRA Permit or RCRA Interim Status to operate as a hazardous waste treatment, storage and disposal facility. Respondent denies each and every other statement, allegation or inference contained in Paragraph 11.
8. Respondent admits Paragraph 12 of the Amended Complaint.
9. Answering Paragraph 13, Respondent admits only that a compliance inspection was conducted by a representative of the U.S. E.P.A. between July 18-21, 2006 at Respondent's Wichita, Kansas facility; that at the time of the inspection, Respondent was an EPA generator of hazardous waste, including the wastes referenced in Paragraph 13; and, that on July 21, 2006 the EPA inspector issued a written Notice of Violation, the contents of which speak for themselves. Respondent denies any other statements and allegations contained in Paragraph 13.

Count I

Offering Hazardous Waste for Transport Without a Hazardous Waste Manifest

10. Answering Paragraph 14, Respondent hereby incorporates the answers and defenses contained in Paragraphs 1 through and including 9 above, as if fully set forth herein.
11. Answering Paragraph 15, Respondent admits that the referenced regulations address requirements related to the preparation of hazardous waste manifests. Respondent denies that the Complainant's inspector cited Respondent with a violation of these regulations as reflected by the Notice of Violation that was issued following the July 18-21, 2006 inspection, denies that it has received any prior notification of this alleged violation and denies that the referenced regulations have any relevance to and/or support the proposed penalty in this proceeding.

12. Answering Paragraph 16, Respondent admits only that the Complainant's inspector observed a very small amount of machine residue that had been placed in trash receptacles in the referenced locations by unknown employees contrary to Respondent's established procedure of collecting and recycling this machine residue as a non-waste material. Respondent denies each and every other statement and allegation in Paragraph 16.

13. Answering Paragraph 17, Respondent admits only that Complainant's inspector selectively removed certain pieces of the machine residue that had a paint coating and that were not representative of the residue material as a whole, and that this non-representative sample did not pass TCLP analysis for chromium and cadmium. Respondent denies any statement, allegation or inference that a representative sample of the machine residue would fail TCLP.

14. Answering Paragraph 18, Respondent denies that it was ever cited for violating regulations related to the preparation of hazardous waste manifests; denies that it has otherwise been provided any previous notification by Complainant of this alleged violation; denies that the machine residue is a hazardous waste; denies that it was legally obligated to prepare a hazardous waste manifest as alleged; and denies that Complainant is factually or legally entitled to seek and recover any penalty for the alleged violation identified in this Paragraph and in Count I generally. Respondent denies any other statement or allegation contained in Paragraph 18.

Count II

Failure to Conduct a Hazardous Waste Determination

15. Answering Paragraph 19, Respondent hereby incorporates the answers and defenses contained in Paragraphs 1 through and including 14 above, as if fully set forth herein.

16. Respondent admits Paragraph 20 and 21 of the Amended Complaint.

17. Answering Paragraph 22, Respondent admits only that, at the time of the inspection by Complainant's representative between July 18-21, 2006, Respondent was generating spent tetrachloroethylene and trichloroethylene from degreasing activities and that some quantity of these spent solvents had previously been placed into the facility's industrial wastewater system by a vendor without Respondent's knowledge and contrary to company procedures. Respondent denies any and all other statements and allegations in Paragraph 22.

18. Answering Paragraphs 23 and 24, Respondent incorporates by reference its answer to Paragraph 22 above and admits only that, at the time of the July 18-21, 2006 inspection, no determination of the industrial waste water had been made for F-Code waste because Respondent had no knowledge that its vendor had placed some amount of F-Code waste into the IWTP system contrary to Respondent's procedures. Respondent further alleges that, under the admitted facts, the penalty proposed for this alleged violation is inappropriate as a matter of law and contrary to EPA's RCRA Penalty Policy.

Count III

Operating as a Treatment, Storage or Disposal Facility Without a RCRA Permit or RCRA Interim Status

19. Answering Paragraph 25, Respondent hereby incorporates the answers and defenses contained in Paragraphs 1 through and including 18 above, as if fully set forth herein.

Failure to Meet Generator Requirements

20. Respondent admits Paragraph 26 of the Amended Complaint.

21. Paragraph 27 is an argument as opposed to a statement of facts and thus requires no response. To the extent a response is deemed necessary, Respondent denies Paragraph 27.

Failure to maintain facility to minimize the possibility of fire or release to the environment Inadequate secondary containment system

22. Answering Paragraph 28, Respondent admits only that the regulations at 40 C.F.R § 265.31 are incorporated by reference at K.A.R. 28-31-4(g)(4), which regulations speak for themselves.

23. Answering Paragraph 29, Respondent admits only that the regulations at 40 C.F.R §§ 265.193(e)(1)(iii) and 265.193(b) are incorporated by reference at K.A.R. 29-31-4(g)(1)(B), which regulations speak for themselves.

24. Answering Paragraph 30, Respondent admits only that, during the July 18-21, 2006 inspection, the EPA inspector observed “primer spillage outside 2-309” and that the inspector’s Notice of Violation states that such spillage constituted a violation of Respondent’s obligation to make a hazardous waste determination with respect to the primer paint as required by K.A.R. 28-31-4(b). Defendant denies that it had not made a hazardous waste determination as alleged in the Notice of Violation and as otherwise continually alleged by Complainant prior to the filing of this Amended Complaint. Defendant further denies the allegation now being raised for the first time in this Amended Complaint that the identified paint spillage constitutes a violation of 40 C.F.R. § 265.31 rather than a violation of K.A.R. 28-31-4(b).

25. Respondent is without knowledge sufficient to admit or deny the statements and allegations in Paragraph 31 and therefore denies the same.

26. Answering Paragraph 32, Respondent denies that Complainant’s inspector observed cracks and gaps violating the requirements of 40 C.F.R. §§ 265.193(e)(1)(iii) and 265.193(b) and

denies that Respondent's inspection records for this area established the presence of cracks and gaps violating these regulatory requirements. Respondent further denies that the inspector observed "releases" of hazardous waste sludge in the secondary containment, as opposed to observing the presence of a miniscule amount of sludge pellets properly contained. Respondent is without knowledge sufficient to admit or deny the remaining statements and allegations in Paragraph 32 and therefore denies the same.

27. Answering Paragraph 33, Respondent denies any statement, allegation or inference that releases into the secondary containment area were forced, by washing or otherwise, into an unspecified drain or into cracks and gaps resulting in the migration of waste sludge pellets into the environment. Respondent affirmatively alleges that any cracks and gaps present in the secondary containment area observed by the inspector were surficial cracks and/or normal and anticipated surface gaps in concrete expansion joints that did not allow the release of any sludge material into the environmental. Respondent thus denies any statement, allegation or inference that the observed cracks and gaps violated the requirements of the cited regulations. Respondent is without knowledge sufficient to admit or deny the remaining statements and allegations in Paragraph 33 and therefore denies the same.

28. Answering Paragraphs 34 and 35, Respondent denies the Complainant's inspector's Notice of Violation finding of smoking near flammable waste at Building 3-191M and the inlet/outlet area of the hazardous waste oil tanks and further denies the inference contained in Paragraph 34 that the observed presence of cigarette butts is evidence of smoking in these areas. Respondent affirmatively alleges that, in fact, the observed cigarette butts were blown into these areas from other locations and do not establish the violation cited.

29. Respondent denies Paragraph 36 of the Amended Complaint.

Failure to properly close and label hazardous waste accumulation containers

30. Respondent admits Paragraph 37 of the Amended Complaint.

31. Respondent admits Paragraph 38 of the Amended Complaint, but denies that the penalty proposed for this alleged violation is appropriate as a matter of law and and/or appropriate under EPA's RCRA Penalty Policy.

32. Respondent admits Paragraph 39 of the Amended Complaint.

33. Respondent admits Paragraph 40 of the Amended Complaint, but denies that the penalty proposed for this alleged violation is appropriate as a matter of law and and/or appropriate under EPA's RCRA Penalty Policy.

Failure to properly label, date and close hazardous waste storage containers

34. Respondent admits Paragraphs 41 and 42 of the Amended Complaint.
35. Respondent admits Paragraph 43 of the Amended Complaint, but denies that the penalty proposed for this alleged violation is appropriate as a matter of law and and/or appropriate under EPA's RCRA Penalty Policy.
36. Respondent admits Paragraph 44 of the Amended Complaint.
37. Answering Paragraph 45, Respondent denies that the storage containers located in the Outside Berm Area contained hazardous waste but, rather, alleges that those containers were temporary storage for certain paint grates that were in process awaiting cleaning and thus not subject to the regulations cited. Respondent admits the remaining allegations in Paragraph 45 of the Amended Complaint but denies that the penalty proposed for this alleged violation is appropriate as a matter of law and and/or appropriate under EPA's RCRA Penalty Policy.
38. Respondent admits Paragraph 46 of the Amended Complaint.
39. Answering Paragraph 47, Respondent denies that the storage containers located in the Outside Berm Area contained hazardous waste but, rather, alleges that those containers were temporary storage for certain paint grates that were in process awaiting cleaning and thus not subject to the regulations cited. Respondent admits the remaining allegations in Paragraph 47 of the Amended Complaint but denies that the penalty proposed for this alleged violation is appropriate as a matter of law and and/or appropriate under EPA's RCRA Penalty Policy.

Failure to maintain overfill protection controls

40. Respondent admits Paragraphs 48 and 49 of the Amended Complaint.
41. Respondent admits Paragraph 50 of the Amended Complaint, but denies that the penalty proposed for this alleged violation is appropriate as a matter of law and and/or appropriate under EPA's RCRA Penalty Policy.

Failure to update contingency plan

42. Respondent admits Paragraphs 51 and 52 of the Amended Complaint.
43. Answering Paragraph 53, Respondent denies that the referenced contingency plan deficiency related to the listing of emergency equipment constitutes a violation of the cited regulation. Respondent affirmatively alleges that, although the arrangements made with local police had not been specifically described in the contingency plan, such arrangements had in fact

been made. Respondent denies that the penalty proposed for these alleged violations is appropriate as a matter of law and and/or appropriate under EPA's RCRA Penalty Policy.

*Failure to document training
Failure to provide introductory and continuing training*

44. Respondent admits Paragraphs 54 and 55 of the Amended Complaint.
45. Answering Paragraph 56, Respondent admits only that it was unable to locate and produce at the time of the inspection documentation of training of the referenced personnel. Respondent denies that the penalty proposed for this alleged violations is appropriate as a matter of law and and/or appropriate under EPA's RCRA Penalty Policy.
46. Respondent is without knowledge sufficient to admit or deny the statements and allegations in Paragraph 57 and therefore denies the same. Respondent further denies that the penalty proposed for this alleged violations is appropriate as a matter of law and and/or appropriate under EPA's RCRA Penalty Policy.
47. Answering Paragraph 58 of the Amended Complaint, Respondent incorporates by reference its answers to Paragraphs 1 through 46 above and denies the statements in Paragraph 58 as broadly alleged.

C. Compliance Order

48. Paragraphs 59 through and including 68 of the Amended Complaint constitute an Order directing Respondent to pay a penalty in the amount of \$240,167.00 and directing Respondent to conduct certain specified corrective and investigative actions related to the secondary containment area at which cracks and gaps were allegedly observed by Complainant's inspector during the July 18-21, 2006 inspection. As these paragraphs contain the provisions of a compliance order being issued by Complainant, as opposed to statements of facts and conclusions of law alleged in support of the proposed penalty, they require no answer by Respondent. To the extent a response or answer is deemed necessary, Respondent denies Paragraphs 59 through and including 68 of the Amended Complaint and alleges that Complainant has failed to establish a factual or legal basis for the issuance of the compliance order specified or for the recovery of a penalty in the amount of \$240,167.00.

D. Notice of Opportunity to Request a Hearing

49. Paragraphs 69, 70 and 71 contain Complainant's summary of Respondent's legal rights regarding the filing of an answer and request for hearing and related administrative matters. As such, these paragraphs do not require an answer. To the extent an answer is deemed necessary, Respondent admits only that the summary provided appears to be generally accurate but that the source statutes and regulations speak for themselves.

50. Answering Paragraph 72, Respondent admits only that the total penalty being proposed by Complainant is \$240,167.00. Respondent is without knowledge sufficient to admit or deny the remaining statements and allegations in Paragraph 72.

E. Settlement Conference

51. Paragraphs 73 through and including 75 contain Complainant's summary of Respondent's ability to request an informal settlement conference to discuss the issues raised by the Amended Complaint. As such, these paragraphs do not require a response.

52. Paragraph 76 contains Complainant's summary of the legal consequences of a failure to file an answer or request a hearing in response to this Amended Complaint. As such, these paragraphs do not require an answer. To the extent an answer is deemed necessary, Respondent admits only that the summary provided appears to be generally accurate but that the source statutes and regulations speak for themselves.

F. Effective Date

53. Paragraphs 77 and 78 contain Complainant's summary of unspecified statutes, regulations and/or policies related to the effective date of the Amended Complaint and the termination of the compliance order. As such, these paragraphs do not require an answer. To the extent an answer is deemed necessary, Respondent admits only that the source statutes, regulations and/or policies speak for themselves.

ADDITIONAL DEFENSES AND ALLEGATIONS

54. Respondent affirmatively alleges that the penalty proposed to be assessed by Complainant in the amount of \$249,068 is inappropriate, excessive, unreasonable and inequitable under the facts alleged and is contrary to applicable laws and regulations.

55. Respondent affirmatively alleges that Complainant improperly interpreted and applied the RCRA Civil Penalty Policy provisions in proposing the penalty sought in the Amended Complaint and, in fact, abused its discretion in applying that Policy to the alleged facts to determine the proposed penalty amount.

56. Respondent affirmatively alleges that Complainant's inspector did not cite Respondent as being in violation of the hazardous waste manifest requirements of K.A.R. 28-31-4(d)(1) and 40 C.F.R. § 262.20 as alleged in Count I of the Amended Complaint. In addition, prior to the filing of this Amended Complaint and during the course of several months of pre-filing negotiations, Complainant never stated, claimed or inferred that Respondent had unlawfully failed to prepare a hazardous waste manifest for the observed machine residue in violation of the cited regulations. The regulatory violations cited and relied upon in Count I of the Amended Complaint have no factual basis in the Notice of Violation issued contemporaneous with the inspection of Respondent's facility. Rather, the allegations of Count I are being asserted for the first time in the Amended Complaint without any factual relationship to the inspection of Respondent's facility or the subsequent identification by Complainant of the alleged violations for which the proposed penalty is being sought. Respondent alleges that Complainant should not legally or equitably be allowed to assert new violations not observed during the inspection, not cited in the Notice of Violation and not identified by Complainant in other post-inspection communications, for the apparent purpose of avoiding meritorious defenses to liability or to attempt to now justify an improper application of the RCRA Civil Penalty Policy.

57. Respondent affirmatively alleges that the machine residue that is the subject of Count I of the Amended Complaint is not a hazardous waste and, in fact, is not handled as a solid waste upon collection pursuant to Respondent's established procedures, but is recycled in accordance with the applicable regulations.

58. The allegations in Count II of the Amended Complaint that Respondent did not make a F-Code waste determination of the industrial wastewater sludge, even if not legally excused because the omission was the result of vendor conduct contrary to Respondent's procedures, do not support the significant penalty determination made by Complainant, as the alleged failure to make hazardous waste determination did not impact in any way how the waste sludge material was handled and disposed of by Respondent.

59. Respondent affirmatively alleges that, even if cracks and gaps were observed during the inspection in the IWTP sludge secondary containment area, the cracks and gaps that were observed were surficial in nature and would not have resulted in the release of any waste material into the environment. Thus, Complainant has not established a violation of 40 C.F.R. §§ 265.193(e)(1)(iii) and 265.193(b) as alleged in Count III of the Amended Complaint.

60. Respondent affirmatively alleges that, as evidenced by the Notice of Violation at issue, Complainant's inspector did not cite Respondent as being in violation of 40 C.F.R. § 265.31 (failure to maintain facility to minimize the possibility of fire or release) with respect to the observed primer spillage outside of building 2-309. In addition, prior to the filing of this Amended Complaint, and during the course of several months of pre-filing negotiations, Complainant never stated, claimed or inferred that Respondent had violated the cited regulation

with respect to the small area of primer spillage observed during the inspection. The regulation cited and relied upon to support this alleged Count III violation has no factual basis in the Notice of Violation issued contemporaneous with the inspection at issue. Rather, this allegation comprising part of Count III is being asserted for the first time in the Amended Complaint without any factual relationship to the inspection of Respondent's facility or the subsequent identification by Complainant of the alleged violations for which the proposed penalty is being sought. Respondent alleges that Complainant should not legally or equitably be allowed to assert new violations not identified during the inspection, not cited in the Notice of Violation and not identified by Complainant in other post-inspection communications with Respondent, for the apparent purpose of avoiding meritorious defenses to liability or justifying an improper application of the RCRA Civil Penalty Policy.

61. Respondent affirmatively alleges that enforcement of this Amended Complaint and Compliance Order is barred under the doctrine of laches and equitable due process. Complainant's identification of the alleged regulatory violations occurred during an inspection in July 2006, with Respondent promptly taking certain responsive actions deemed acceptable to Complainant. Thereafter, Complainant waited approximately three years before taking any action whatsoever to commence an administrative civil penalty proceeding and/or issue a compliance order. Such unexplained, unjustified and unnecessary delay by Complainant in the filing of this Amended Complaint will significantly prejudiced Respondent's ability to accumulate and present relevant and credible evidence against Complainant's stale allegations that are based on observations made over three years ago.

62. Respondent affirmatively alleges that the proposed civil penalty was not determined in a manner consistent with the Section 3008 of RCRA, 42 U.S.C. §6928 in that the penalty determination did not properly take into consideration the seriousness of the alleged violations and Respondent's good faith efforts to comply with the applicable regulatory requirements.

63. Respondent affirmatively alleges that it derived no significant savings or profits from delayed or avoided costs with respect to any of the violations asserted in the Amended Complaint and that the economic benefit component of the proposed penalty is inappropriate and unsupported by the alleged facts and applicable law and/or provisions of the RCRA Civil Penalty Policy. In addition, no worksheet or other documentation supporting Complainant's proposed economic benefit penalty has ever been provided.

64. Respondent affirmatively alleges that, given the nature of the claimed violations, the Complainant abused its discretion in selecting the proposed penalty amount from within the range specified in the applicable penalty matrix cell of the RCRA Civil Penalty Policy.

65. Respondent affirmatively alleges that Complainant has not alleged facts to support and/or has not otherwise properly documented the number of days it claims that the multi-day violation included in Count III of the Amended Complaint persisted, contrary to law and the applicable provisions of the RCRA Civil Penalty Policy.

REQUEST FOR HEARING

Respondent hereby requests a hearing to contest the material facts contained in the Amended Complaint and otherwise contest the factual and legal appropriateness of the proposed penalty and/or Compliance Order in accordance with 40 C.F.R. § 22.15 of the Consolidated Rules of Practice and any and all other applicable statutes and regulations.

Respectfully submitted,



Charles P. Efflandt KS Sup. Ct. No. 09264

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ATTORNEYS FOR RESPONDENT
SPIRIT AEROSYSTEMS, INC.

Date: January 8, 2010

CERTIFICATE OF FILING AND SERVICE

The undersigned, one of the attorneys for Respondent Spirit AeroSystems, Inc., hereby certifies that, on this 8th day of January, 2010, the original and one true and correct copy of the above and foregoing **ANSWER TO AMENDED COMPLAINT AND REQUEST FOR HEARING** was filed with the United States Environmental Protection Agency, Region VII, by Fed Ex ® delivery, properly addressed, as follows:

Regional Hearing Clerk
U.S. EPA Region VII
901 N. 5th Street
Kansas City, Kansas 66101

and

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA/ Office of Administrative Law Judges
Mail Code 1900L
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

and served upon Complainant herein by Fed Ex ® delivery, properly addressed to Complainant's counsel of record, as follows:

Kristen Nazar
Assistant Regional Counsel
U.S. EPA, Region VII
901 N. 5th Street
Kansas City, Kansas 66101



Charles P. Efflandt KS. Sup. Ct. No. 09264