



COMMONWEALTH OF PUERTO RICO
 PUERTO RICO NATIONAL GUARD
 JOINT FORCE HEADQUARTERS
 THE ADJUTANT GENERAL'S OFFICE
 P.O. BOX 9023786, SAN JUAN, PUERTO RICO 00902-3786



Hon. Luis G. Fortuño Buset
 Governor

(787) 289-1400

PR-SJA

4 December 2009

U.S. ENVIRONMENTAL
 PROTECTION AGENCY-REG. II
 2009 DEC -9 PM 3:56
 REGIONAL HEARING
 CLERK

Karen Maples
 Regional Hearing Clerk
 United States Environmental Protection Agency
 Region 2
 290 Broadway, 16th Floor
 New York, NY 10007-1866

RE: In the matter of Puerto Rico Air National Guard et al.,
 Docket No. RCRA-02-2009-7506

Dear Ms. Maples:

Please find enclosed an original and one copy of our Answer and Request for Hearing on behalf of respondent Puerto Rico Air National Guard submitted pursuant to 40 C.F.R. § 22.15 regarding the above captioned matter. Please have this document marked *filed* and return a conformed copy to me along with a written response that the request for hearing has been granted.

Respondent PRANG also wish 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 (787) 289-1489 or via e-mail at william.e.oconnor@us.army.mil so that we may schedule a conference with the appropriate government representatives at your earliest convenience.

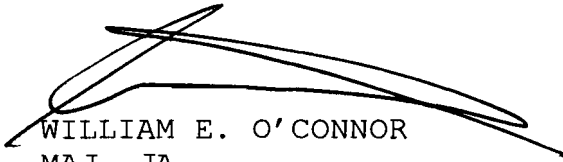
There are other counsel who will be appearing and participating in the hearing and settlement process.

For the National Guard Bureau

WTO

Randy Chambers
Attorney Advisor
Office of the Chief Counsel
National Guard Bureau
Jefferson Plaza 1, Suite 11300
1411 Jefferson Davis Hwy
Arlington, VA 22202-3231
Randy.chambers2@us.army.mil
(787) 607-2729

Please include the listed counsel in the communications regarding this matter.



WILLIAM E. O'CONNOR
MAJ, JA
Full Time Judge Advocate
Attorney for the PRNG

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. ENVIRONMENTAL
PROTECTION AGENCY-RCRA
2009 DEC -9 PM 3:56
REGIONAL HEARINGS
CLERK

In the Matter of

Puerto Rico Air National
Guard, U.S. Air Force

Respondents

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

ANSWER AND REQUEST FOR HEARING

Docket No. RCRA-02-2009-7506

ANSWER

Respondents, Puerto Rico Air National Guard (PRANG), by way of Answer to United States Environmental Protection Agency (USEPA) Complaint dated 24 September 2009 and received on 6 October 2009, hereby state:

1. Admitted.
2. Admitted. However, Respondent PRANG states, by way of clarification that the Puerto Rico Air National Guard is part of the Puerto Rico National Guard as created by Law No. 62 of 23 June 1969 also known as the Puerto Rico Military Code. As such the Air National Guard, as the Army National Guard, has a dual role. The first one as part of the Commonwealth's Militia under the command of the Governor as Commander in Chief. It also has a Federal role, as it is part of the Reserve component of the Air Force and therefore subject to call to federal active duty by the President of the United States.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted in part. Respondent admits as being the operator of the UST. The Federal Government is the owner of the equipment.

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8. Admitted in Part. The PRANG operates the Facility through a license granted by the Secretary of the Air Force. The Federal Government is the owner of the land in which the facility is located.
9. Admitted.
10. Admitted.
11. No admission is required since this paragraph does not constitute a factual allegation.
12. No admission is required since this paragraph does not constitute a factual allegation.
13. Admitted. This fact was also admitted in the 15 May 2009 Response to the 19 March 2009 USEPA Notice of Violation and its Information Request.
14. Admitted.
15. Admitted.
16. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
17. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
18. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
19. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
20. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
21. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
22. Admitted in part. Respondent admits that the UST Systems at the Facility stored either diesel or gasoline for use in military vehicles. The rest of the paragraph constitutes a statement or conclusion of law.
23. Admitted.
24. Admitted. However, as to the content of the letter, Complainant's NOV document speaks for itself.
25. No admission is required since the Complainant's NOV document speaks for itself.
26. No admission is required since the Complainant's NOV document speaks for itself.
27. Admitted.
28. Admitted. As for the complete statement regarding this particular issue please refer to Respondent's NOV response. In

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said document, Respondent informed that " In December 2008, the PRANG determined that Punta Salinas Radar Site no longer required a fuels station, and therefore would also not need UST Systems. This was mainly due to mission changes and reduction of equipment. This was validated in our Facility Utilizations Board held on 4 February 2009". This statement was part of Respondent's answer regarding the use of alternate form of leak detection method (Manual Tank Gauging) and the record keeping of said monitoring.

29. Admitted. As for the complete statement regarding this issue please refer to Respondent's NOV response. In said document, Respondent stated that "After EPA's inspection the tanks have been emptied and de-gassed. Also a tank tightness test was performed to verify integrity of the tank (passed). There were no indications of a suspected release or leaks. Process for temporary closure is in progress with the PREQB. Currently, PREQB does not have a formal temporary closure procedure. After consultation with a PREQB technician, he recommended submitting the certificate request with the actual status of the empty and degassed tanks with the annual request".

30. Admitted.

31. Admitted.

32. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.

Count 1

Respondent Failure to Notify the Puerto Rico Environmental Quality Board of Required Information For UST Systems 1 and 2.

33. Answers to paragraphs 1 through 32 are incorporated by reference and as if set forth in their entirety herein.

34. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.

35. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.

36. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.

37. Admitted.

38. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.

39. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.

40. Admitted.

41. Admitted.

42. Denied.

43. Denied.

44. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.

Count 2

Respondent Failure to Provide Required Release Detection, Monitoring and to Maintain Release Detection Records, For Tanks 1 and 2.

45. Answers to paragraphs 1 through 44 are incorporated by reference and as if set forth in their integrity herein.

46. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions in law.

47. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.

48. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.

49. Admitted.

50. Admitted. See Respondent's 15 May 2009 NOV Response.

51. Admitted. See Respondent's 15 May 2009 NOV Response.

52. Admitted. See Respondent's 15 May 2009 NOV Response and paragraph 50.

53. Admitted, as stated in the Respondent's NOV Response dated 15 May 2009.

54. Admitted, although this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law. However, Respondent, as a good faith gesture admitted in its 15 May 2009 NOV Response that it was now aware that Manual Tank Gauging was authorized in tanks no greater than 2000 gallons.

55. Admitted. See Respondent's 15 May 2009 NOV Response.

56. Admitted. See Respondent's 15 May 2009 NOV Response.

57. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.

58. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
59. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
60. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
61. Admitted. See Respondent's 15 May 2009 NOV Response.
62. Admitted in Part. As explained in Respondent's 15 May 2009 NOV Response, once the system became inoperable Respondent conducted Manual Tank Gauging to ensure that no spillage nor leakage occurred thus discharging in good faith its duties and responsibilities to ensure protection of the environment.
63. Admitted. See Respondent's 15 May 2009 NOV Response.
64. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
65. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.

Count 3

Respondent's Failure To Provide Required Release Detection Monitoring, and to Maintain Release Detection Records, for Piping for UST System 1 and 2.

66. Answers to paragraphs 1 through 65 are incorporated by reference and as if set forth in their integrity herein.
67. No admission is required since this paragraph does not constitute a factual allegation and sets forth a statement or conclusion in law.
68. Admitted.
69. Admitted. See Respondent's 15 May 2009 NOV Response.
70. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
71. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
72. Admitted.
73. Admitted.
74. Admitted.
75. Admitted. See Respondent's 15 May 2009 NOV Response.
76. Admitted.

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77. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
78. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
79. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
80. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
81. Admitted. However, Respondent did conduct a Precision Tank Tightness Test on 8 April 2009 and the report demonstrated that the Tanks passed the test.
82. Admitted in part. Respondent did regularly perform Manual Tank Gauging tests as described in its 15 May 2009 NOV Response.
83. Admitted.
84. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
85. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.

Count 4

Respondent Failure to Conduct an Annual Test of the Operation of the Automatic Line Leak Detectors (ALLDs) for Piping of UST Systems 1 and 2 and to Maintain Records of the Test

86. Answers to paragraphs 1 through 85 are incorporated by reference and as if set forth in their integrity herein.
87. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
88. Admitted.
89. Admitted.
90. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
91. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
92. Admitted. See Respondent's 15 May 2009 NOV Response.
93. Admitted, as stated in Respondent's NOV Response dated 15 May 2009.

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94. Admitted. At the time of the inspection, Respondent representative did not have the information at hand.
95. Admitted.
96. Admitted. See Respondent's 15 May 2009 NOV Response.
97. Admitted.
98. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
99. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
100. No admission is required since this paragraph does not constitute a factual allegation and sets forth statements or conclusions of law.
101. Admitted.
102. Admitted.
103. No admission is required since this paragraph does not constitute a factual allegation and sets forth a statement or conclusion in law.
104. No admission is required since this paragraph does not constitute a factual allegation and sets forth a statement or conclusion in law.

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. The violations alleged in the Complaint are technical and/or administrative in nature and did not result in any discharge of regulated substances into the environment. There was not, at any time, a real or perceived threat to human health or the environment. No clean up actions were required as a result of any of the alleged violations.
2. On 15 September 2009 the Federal Facilities Program Manager for EPA Region 2 expressed in her letter that at the time of the Inspection the EPA found that no conditions at the facility presented an imminent and substantial threat to public health and the environment.
3. EPA's penalty assessment matrix does not comport with the requirements of the Administrative Procedure Act, 5 U.S.C. 55

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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.

4. 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.

5. Respondents have demonstrated good faith by the response provided in both the NOV and RFI. That good faith should be considered here as a factor. Accordingly, a 25% reduction should be taken in the violator specific adjustments to matrix value for degree of cooperation.

6. Respondents reserve the right to amend and supplement this Answer up until the time of hearing.

DATED: *4 December 2009*

BY: 

William E. O'Connor, Esq
Attorney for Respondent
Puerto Rico National Guard

Transmission Log

prjag

Friday, 2009-12-04 12:30

7872891493

Date	Time	Type	Job #	Length	Speed	Station Name/Number	Pgs	Status
2009-12-04	12:28	SCAN	00099	2:17	26400	1 212 637 3202	11	OK -- V.34 AM31

FAX



JAG

To:

Karen Maples

**ENVIRONMENTAL
PROTECTION
AGENCY
REGION 2**

From:

Puerto Rico National Guard
Staff Judge Advocate's Office
PO Box 9023786
San Juan, Puerto Rico 00902-3786
POC: SGT Javier Fontáñez, JAGC
javier.fontaneznunez@ng.army.mil

Fax: 212-637-3202 **Phone:** (787) 289-1490 [Commercial]
(787) 289-1493 [Facsimile-FAX]

Phone: **Pages:** 2 (INCLUDING COVER)

Re: ANSWER TO COMPLAINT **Date:** 2009-12-04



Puerto Rico National Guard