

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
KANSAS CITY, KANSAS

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

In the Matter of:)
)
Learjet Inc.)
) RCRA-07-2005-0402
RCRA ID KSD007234313,)
)
Respondent)

**LEARJET INC.'S ANSWER TO COMPLAINT AND
COMPLIANCE ORDER AND REQUEST FOR
SETTLEMENT CONFERENCE AND HEARING**

Respondent Learjet Inc. (Learjet) (incorrectly identified in EPA's Complaint and Compliance Order as Learjet, Inc.) herein responds to the allegations of the Complaint and Compliance Order. To the extent possible, Learjet is structuring this answer to match the paragraph structure of the Complaint and Compliance Order, for ease of reference.

Learjet requests a public hearing on all matters raised by the EPA's Complaint and Compliance Order and Learjet's Answer.

I. PRELIMINARY STATEMENT

In answering the Preliminary Statement portion of the Complaint and Compliance Order, Learjet states that the Preliminary Statement contains extensive statements of law and does not appear to be part of the Complaint and Compliance Order itself. To the extent the Preliminary Statement is part of the Complaint and Compliance Order, however, Learjet denies each and every factual allegation contained in the Preliminary Statement, except Learjet admits the allegations of the fourth unnumbered paragraph of the Preliminary Statement that the United States has granted to Kansas authority to administer and enforce a hazardous waste program pursuant to RCRA. With

respect to EPA's statements of law and legal conclusions, Learjet states that the statutes and regulations speak for themselves and Learjet denies EPA's characterization of such provisions.

II. COMPLAINT

1. Learjet admits the allegations of Paragraph 1 as applied to Learjet Inc.

2. Learjet admits the allegations of Paragraph 2.

3. In answering the allegations of Paragraph 3, Learjet admits only that during times relevant to the Complaint and Compliance Order, Learjet generated solid waste from its operations in Wichita. The waste materials listed in Paragraph 3 are among the solid wastes Learjet generated, but Learjet denies that all identified wastes constituted hazardous wastes during this time period. Learjet admits that during this time period it generated and shipped for proper disposal other materials classified as hazardous wastes. Learjet denies all allegations of Paragraph 3 not specifically admitted herein.

4. In answer to Paragraph 4, Learjet states that the regulations speak for themselves and Learjet denies EPA's characterization of those regulations.

5. Learjet does not have sufficient information to admit or deny the allegations of Paragraph 5, and therefore denies such allegations.

6. Learjet admits the allegations of Paragraph 6.

7. Learjet admits the allegations of Paragraph 7.

8. Learjet admits the allegations of Paragraph 8.

9. Learjet admits the allegations of Paragraph 9.

COUNT I

10. Learjet incorporates its answers and responses to Paragraphs 1 through 9 of its Answer as if fully set forth herein.

11. Paragraph 11 contains solely a conclusion of law. The regulations speak for themselves, and Learjet denies EPA's characterization of the regulations.

12. In answer to Paragraph 12, Learjet admits the allegations of this paragraph, except Learjet denies any implication that there was only one grab sample analyzed as a composite sample of these waste streams when in fact there were seven samples analyzed by TCLP. Learjet denies all allegations of Paragraph 12 not expressly admitted herein.

13. Learjet admits the allegations of Paragraph 13 except as follows: a) Learjet denies any implication that Learjet conducted only one composite TCLP analysis of these waste streams when in fact it conducted seven TCLP analyses; and b) Learjet's employee, Dean Markham, using generator knowledge, initially determined that Learjet would manage these waste materials as hazardous wastes and later, based on TCLP analyses, determined that Learjet would manage these as non-hazardous wastes. Learjet denies all allegations of Paragraph 13 not expressly admitted.

14. In answer to Paragraph 14, Learjet admits only that at the time of the May 2004 inspection, Learjet generated rags containing MEK solvent in the Graphics Department located in Building 14, but this fact was not known to Learjet's Environmental Health and Safety Department. Further answering, Learjet states that the F005 listing under EPA's Hazardous Waste Regulations is for methyl ethyl ketone, not MEK-contaminated wiper rages. Wiper rags are not solid wastes when they come into contact with the MEK solvent; rather, they are products being used for their intended purpose and the mixture rule would not apply. The discarded wiper rags could be considered hazardous if they exhibited a hazardous waste characteristic such as toxicity. Learjet's employee, Dean Markham, using generator knowledge, initially determined that Learjet would manage these materials as hazardous wastes and later, based on TCLP analyses, determined that Learjet would manage them as non-hazardous wastes. Learjet admits that it conducted composite TCLP analyses

(seven in all) of the wastes in the rolloff container and managed the wastes as non-hazardous. Learjet denies all other allegations of Paragraph 14.

15. In answer to Paragraph 15, Learjet admits only that at the time of the May 2004 inspection, it generated alodine solution rags and wipes. Learjet admits that these materials were collected in 55-gallon hazardous waste satellite accumulation containers and were placed in the waste rolloff container. Learjet's employee, Dean Markham, using generator knowledge, initially determined that Learjet would manage these materials as hazardous wastes and later, based on TCLP analyses, determined Learjet would manage these as non-hazardous wastes. Further answering, Learjet denies that the alodine rags and wipes meet the definition of a RCRA D002 hazardous waste for the reason that they are not aqueous. Learjet denies all other allegations of Paragraph 15 not specifically admitted herein.

16. In answering Paragraph 16, Learjet admits that at the time of the May 2004 inspection, it generated a paint masking waste, which was collected in 55-gallon hazardous waste satellite accumulation containers and placed in the rolloff waste container. Further answering, Learjet's employee, Dean Markham, based on generator knowledge, initially determined that Learjet would manage these waste materials as hazardous wastes and later, based on TCLP analyses, determined that Learjet would manage them as non-hazardous wastes. Learjet denies any implication that there was only one grab sample and one composite sample of these waste streams, when in fact there were seven. Learjet denies all other allegations of Paragraph 16.

17. Learjet denies the allegations of Paragraph 17.

18. Learjet denies the allegations of Paragraph 18.

COUNT II

19. Learjet incorporates its answers and responses to Paragraphs 1 through 9 of its Answer as if fully set forth herein.

20. Paragraph 20 states only a legal conclusion. The regulations speak for themselves, and Learjet denies EPA's characterization of those regulations.

21. In answer to Paragraph 21, Learjet admits that it sent used rags to the Clean Harbors Lone Mountain Facility in Waynoka, Oklahoma and that Learjet utilized a hazardous waste manifest for each such shipment. Learjet denies that the F005 hazardous waste code under 40 C.F.R. § 261.31 applies to these shipments of rags, and Learjet denies that the manifests were not properly completed. Learjet denies all allegations of Paragraph 21 not specifically admitted herein.

22. Learjet denies the allegations of Paragraph 22. Further answering, Learjet states that the events alleged in Paragraphs 20 through 22 of the Complaint and Compliance Order are a consequence of the waste characterization decisions EPA uses as the basis for its allegations of violations found in Count I. Their use here constitutes impermissible double-counting of the same events as if they were separate violations. Learjet's employee, Dean Markham, using generator knowledge, determined from TCLP analyses and his knowledge of the site's waste generation processes that these wastes did not meet the definition of a characteristic waste. He was not aware of the MEK rags being used in the Graphics Arts Department at the time of his determination. Mr. Markham made a good faith effort to ensure there were no volatile or semi-volatile chemicals present in the wastes after his initial determination that the wastes were not hazardous, and he ran analyses on samples in an attempt to assure there were no regulated waste chemicals present. All his actions being considered, Mr. Markham would not have provided hazardous waste-required proper shipping descriptions on the manifests based on his determination the waste was not hazardous.

23. The allegations of Paragraph 23 contain solely conclusions of law. Learjet states that these regulations speak for themselves, and Learjet denies EPA's characterization of these regulations.

24. Learjet denies the allegations of Paragraph 24. Further answering, Learjet states that its employee, Dean Markham, using generator knowledge, made a good faith determination that the wastes were not hazardous and the TCLP analyses of samples were representative of the wastes in question. The waste in question was shipped as non-hazardous waste for which LDR notice is not required, but at the TSD facility the waste was managed as if it were a RCRA hazardous waste, including compliance with all LDR treatment requirements.

25. Learjet denies the allegations of Paragraph 25. Further answering, Learjet states that the events alleged in Paragraphs 23 through 25 of the Complaint and Compliance Order are a consequence of the waste characterization decisions EPA uses as the basis for its allegations of violations found in Count I. Their use here constitutes impermissible double-counting of the same events as if they were separate violations.

26. Learjet denies the allegations of Paragraph 26.

COUNT III

27. Learjet incorporates by reference its answers and responses to Paragraphs 1 through 9 of its Answer as if fully set forth herein.

28. Paragraph 28 contains solely conclusions of law. Learjet states that the regulations speak for themselves, and Learjet denies EPA's characterization of those regulations.

29. Paragraph 29 contains solely conclusions of law. Learjet states that the regulations speak for themselves, and Learjet denies EPA's characterization of those regulations.

30. Paragraph 30 contains solely conclusions of law. Learjet states that the regulations speak for themselves, and Learjet denies EPA's characterization of these regulations.

31. Learjet denies the allegations of Paragraph 31.

32. Paragraph 32 contains solely conclusions of law. Learjet states that the regulations speak for themselves, and Learjet denies EPA's characterization of those regulations.

33. Paragraph 33 states solely conclusions of law. Learjet states that the regulations speak for themselves, and Learjet denies EPA's characterization of the provisions of those regulations.

34. Learjet denies the allegations of Paragraph 34. Further answering, Learjet states the satellite collection containers in the Compacting Building, Building 9 (WWTP), Building 14 (WWTP) and Building 7 (sandblast waste) had lids placed on the tops of the containers. The accompanying ring had not been securely affixed with the bolt tightened. As none of these wastes contain volatile materials, Kansas allows the drums to remain in this condition until the end of the shift (Technical Guidance Document HW-97-03). The containers identified in Building 7A (Jet Fuel Container) and Building 14 (Jet Fuel Container) were observed with attached funnels that had lids in a "closed" position but the locking clasps had not been engaged. All clasps were securely closed before the conclusion of the inspection. At the time of the inspection all containers listed in Paragraph 34 met the definition of a "closed container" pursuant to the Aerospace NESHAP under state and federal regulations, including those regulations' provisions allowing inadvertent small gaps in the seals when the lids are in the "closed position." (Aerospace NESHAP Q&A's [3/2001]).

35. [This paragraph apparently omitted from the Complaint and Compliance Order]

36. Paragraph 36 states solely conclusions of law. Learjet states that the regulations speak for themselves, and Learjet denies EPA's characterization of those regulations.

37. Learjet denies the allegations of Paragraph 37, and further states that the lab-pack containers had not been discarded or otherwise determined to be waste as of the date of the May 2004 inspection. They continued to contain useful and useable products.

38. Learjet denies Paragraph 38.

39. Learjet denies Paragraph 39.

COUNT IV

40. Learjet incorporates its answers and responses to Paragraphs 1 through 9 of its Answer as fully incorporated herein.

41. Paragraph 41 contains solely conclusions of law. Learjet states that the regulations speak for themselves, and Learjet denies EPA's characterization of those regulations.

42. Paragraph 42 contains solely statements of law. Learjet states that the regulations speak for themselves, and Learjet denies EPA's characterization of those regulations.

43. Paragraph 43 contains solely conclusions of law. Learjet states that the regulations speak for themselves, and Learjet denies EPA's characterization of those regulations.

44. Learjet denies Paragraph 44.

45. Paragraph 45 contains solely conclusions of law. Learjet states that the regulations speak for themselves, and Learjet denies EPA's characterization of those regulations.

46. Learjet denies the allegations of Paragraph 46. Further answering, Learjet states the containers plainly contained labels with the words "waste oil."

47. Paragraph 47 contains solely conclusions of law. Learjet states that the regulations speak for themselves, and Learjet denies EPA's characterization of those regulations.

48. Learjet denies Paragraph 48.

49. Learjet denies Paragraph 49.

50. Learjet denies Paragraph 50.

III. COMPLIANCE ORDER

Learjet denies each and every allegation of the Compliance Order portion of EPA's Complaint and Compliance Order and, further answering, states that Learjet has undertaken all activities set forth in the Compliance Order that it is required to undertake in that Learjet has determined that it will manage each of these waste streams as a RCRA hazardous waste and land

disposal restriction notifications as described in Paragraphs 4 and 5 of this part have been prepared and were provided to EPA in Learjet's response to the EPA's February 11, 2005, Letter of Warning/Request for Information.

IV. HEARING

Learjet denies each and every factual allegation and legal conclusion of law contained in Part IV of the Complaint and Compliance Order.

Learjet requests a public hearing on all matters raised by the Complaint and Compliance Order.

V. SETTLEMENT CONFERENCE

Learjet denies each and every factual allegation and legal conclusion contained in Part V of the Complaint and Compliance Order. Learjet requests an informal settlement conference.

VI. EFFECTIVE DATE

Learjet denies each and every factual allegation and legal conclusion contained in Part VI of the Complaint and Compliance Order.

APPLICABLE TO ALL PARTS

These allegations by Learjet are applicable to all portions of the Complaint and Compliance Order, including preliminary statement, all counts, and all other portions.

1. Learjet denies each and every allegation not specifically admitted herein.
2. The Complaint and Compliance Order fail to state a claim upon which relief can be granted.

AFFIRMATIVE DEFENSES

Further answering the Complaint and Compliance Order and as defenses thereto, Learjet states and alleges as follows:

1. By virtue of the approvals identified and described in the Preliminary Statement to EPA's Complaint, the United States has delegated to the State of Kansas the authority to administer and enforce the RCRA Hazardous Waste Program as it applies to the facts and circumstances alleged in EPA's Complaint and Compliance Order. EPA's efforts to enforce state and federal laws through this Complaint and Compliance Order are barred, both on statutory grounds and because such enforcement actions violate the principles of federalism, separation of powers, and due process contained in the United States Constitution. Additionally, EPA's enforcement efforts here potentially expose Learjet to separate enforcement actions by both the United States and by Kansas for the same facts and circumstances. As a matter of law EPA's enforcement efforts are barred.

2. The Kansas Department of Health & Environment (KDHE) administers the Kansas RCRA Hazardous Waste Program and has been delegated the authority to do so from the United States Environmental Protection Agency. Over the years, KDHE has visited the Learjet Wichita facility numerous times and inspected it thoroughly. Inspectors observed the conditions of the facility, including all matters alleged in EPA's complaint. They issued no citations or letters of warning. Learjet relied on these inspections, and the lack of any resulting warnings or citations, to confirm its belief that it was handling its waste in accordance with RCRA requirements. Such reliance was reasonable and appropriate. The violations alleged against Learjet largely are due to differing interpretations of complex and unclear environmental regulations and any enforcement activities under these circumstances are barred as a matter of law.

3. At the Clean Harbors Lone Mountain Facility, the waste materials described in Paragraphs 21-25 were handled as hazardous wastes and were treated as required by federal regulations as if they had been hazardous wastes under RCRA, including land disposal treatment

requirements. As a matter of law, therefore, penalties for the alleged violations associated with the facility's management of the Learjet waste streams are barred as a matter of law.

4. Learjet implemented and had certified an environmental management system (EMS) in 2000 to the ISO 14001:1996 standard. The certification was conducted by Intertek Testing Services NA Ltd., a third-party registered auditor to the international standard. Since that time, the Learjet EMS has successfully passed four additional surveillance audits and one additional full certification audit. The EMS requires Learjet to meet certain environmental standards and continuously improve its environmental performance in all areas of its operations. As a result of the EMS, Learjet has improved its performance in reducing wastes, increasing recycling activities, reducing air emissions, reducing utility usage, and improving environmental operating processes and product design. Learjet's ISO 14001 certification demonstrates Learjet's continuing commitment to enhancing the environment, and demonstrates that the violations charged against Learjet largely are due to differing interpretations of complex and unclear environmental regulations. Any enforcement activities as a result of such circumstances are barred as a matter of law.

PRAYER FOR RELIEF

Learjet requests a public hearing on all matters raised by EPA's Complaint and Compliance Order and Learjet's Answer.

Having answered all allegations of the Complaint and Compliance Order, Learjet prays both be dismissed, for its costs, and for such other relief as is just and proper.

Respectfully submitted,

SPENCER FANE BRITT & BROWNE LLP



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ATTORNEYS FOR LEARJET INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2006, the original and one copy of the foregoing Learjet's Answer to Complaint and Compliance Order and Request for Settlement Conference and Hearing were hand-delivered to:

Regional Hearing Clerk
United States Environmental Protection Agency
Region VII
901 N. 5th Street
Kansas City, KS 66101

and sent by U.S. Mail to:

Jonathan W. Meyer, Esq.
Office of Regional Counsel
United States Environmental Protection Agency
Region VII
901 N. Fifth Street
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Attorney for Learjet Inc.