



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
MANPOWER AND RESERVE AFFAIRS  
111 ARMY PENTAGON  
WASHINGTON, DC 20310-0111

March 20, 2003

Re: CHALLENGE Number 2003-0001

Mr. Denny W. Dickey  
1030 53<sup>rd</sup> Avenue East  
Tuscaloosa, Alabama 35404-3616

Dear Mr. Dickey:

This responds to your challenge to the Army's 2001 Federal Activities Inventory Reform (FAIR) Act inventory. Your "Challenge" concerns two activities, Function Codes Q520 and Q540.

Function Code Q520, Operation and Maintenance of Locks and Bridges  
Function Code Q540, Operation and Maintenance of Dams

**Date of Receipt.** February 10, 2003.

**Standing.** As an employee within the meaning of 5 United States Code 2105, performing the function of "lock operator" and "lock and dam operator" included in Function Code Q520, Operation and Maintenance of Locks and Bridges and Function Code Q540, Operation and Maintenance of Dams, you are an "interested party" who is qualified to submit challenges of inclusion or exclusion of the "lock operator" and "lock and dam operator" functions to the United States Army list. You are not, however, an "interested party" with respect to any other functions included within Function Codes Q520 and Q540.

**Activity Challenged.** You have challenged the inclusion of "lock operators" and "lock and dam operators" included within "Operation and Maintenance of Locks and Bridges," Function Code Q520, and "Operation and Maintenance of Dams," Function Code Q540, on the list.

**Decision.** I have determined that the "lock operator" and "lock and dam operator" activities included under Function Codes Q520 and Q540 are not inherently Governmental. Therefore, they are properly included in the Army's FAIR Act list.

**Rationale.** The FAIR Act list includes only functions and activities that, in the judgment of the head of the agency, are not inherently Governmental. An inherently

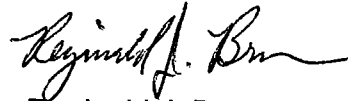
Governmental function includes those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government. Activities within the spectrum of duties of operators of locks, dams and bridges, involve decisions regarding the volume, velocity and timing of water releases, directing lock traffic and controlling river levels during floods and drought. You make the point that these activities significantly affect the life, liberty and property of private persons. However, these decisions by operators of locks, dams, and bridges, involve technical functions rather than the making of value judgments in interpreting and executing the laws of the United States. There are private actors or non-Federal Governmental entities, which exercise similar technical judgments and decisions having broad and significant public impacts. The mere fact that an activity has an impact on the public or on the life, liberty and property of private persons is not a sufficient basis for an inherently Governmental characterization.

You contend that because the lock or dam operator often works without direct supervision, the lock or dam operator is left to make the decisions that may affect the life, liberty or property of private persons that would normally be made by the supervisor in his or her absence. However, lock and dam operators are not empowered to make value judgments or exercise Government discretion. Rather, operators are confined to sets of procedures that have already been developed and approved.

**Significance.** The significance of a non-inherently Governmental designation for an activity is discussed at the Army web site hyperlinked to the Department Of Defense (DOD) FAIRNET at <http://www.asamra.army.pentagon.mil/fair>. In some cases there may be legal impediments to contracting activities designated as non-inherently Governmental, as reflected in statutes, international agreements, and restrictions on contracting for personal services. In other cases, the Army may consider it imprudent to contract activities designated as non-inherently Governmental based on risk assessment and national security considerations, or enlightened human resources management. Such a determination has been made at the present time in the case of some activities included within this challenge.

**Scope.** The United States Army's functions are defined by its unique roles and missions. Therefore, the Army's FAIR Act decisions may not be extended to other agencies with different missions based solely on function code titles. The Army FAIR Act Inventory included civilian positions performing functions within the Army infrastructure and within Civil Works. The FAIR Act Inventory excluded all contractor positions and all military positions, as well as all personnel performing functions in the following mission areas within the Army: Major Theater of War or Smaller Scale Contingency, Base Engagement Force, Strategic Reserve, Domestic Support, or Homeland Defense.

**Appeal Rights.** You have the right to appeal my decision since it is adverse to your "Challenge." The specific procedures for submitting an appeal are set forth at the enclosure to this decision.

A handwritten signature in black ink, appearing to read "Reginald J. Brown". The signature is fluid and cursive, with a long horizontal stroke at the end.

Reginald J. Brown  
Assistant Secretary of the Army  
(Manpower and Reserve Affairs)

Enclosure

## Appeal Rights

Appeals must be in writing and transmitted by United States mail, express mail delivery or other similar service, or facsimile transmission, or may be delivered in person only if the person making the delivery is authorized access to the Pentagon. (To assist in processing, appellants may mark "FAIR Appeal" on the envelope.) Appeals must be submitted to the office listed below within 10 working days of the date on which the challenger received the decision denying or rejecting the challenge:

Department of the Army  
Office of the Assistant Secretary  
Manpower and Reserve Affairs  
ATTN: SAMR-FMMR-FAIR  
111 Army Pentagon  
Washington, D.C. 20310-0111  
Fax: 703-614-5975

Enclosure