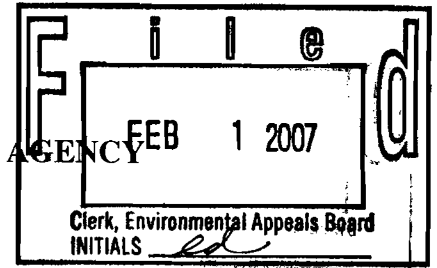

ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Tri-County Public Airport Site, Raytheon Aircraft Company, Petitioner	)	CERCLA § 106(b) Petition No. 06-01

ORDER STAYING PROCEEDINGS

United States Environmental Protection Agency Region 7 (the "Region") seeks a stay of any further proceedings in this matter pending the resolution of liability issues in *Raytheon Aircraft Company v. United States of America*, Case No. 05-2328-JWL, a Comprehensive Environmental, Response, Compensation, and Liability Act ("CERCLA") contribution action filed by the petitioner, Raytheon Aircraft Company ("RAC"), in the United States District Court for the District of Kansas, which deals with factual and legal issues that allegedly overlap with the issues present in the matter pending before the Board.[1] Taking into account the Region's Motion to Stay Proceedings, the parties' other written submissions, and statements at a January 17, 2007 hearing on the Motion to Stay, the Board, for the following

[1] Previously, by motion dated February 9, 2006, the Region sought to dismiss this matter on the grounds that RAC's Petition for Reimbursement was premature because the Region had not yet issued a notice of completion to RAC. "Completion of the required action" is a jurisdictional prerequisite for a CERCLA petition for reimbursement, and petitions for reimbursement must be filed within 60 days of such completion. CERCLA § 106(b)(2)(A). In a September 21, 2006 status report, RAC notified the Board that the Region had issued the notice of completion on September 6, 2006, and stated "RAC respectfully moves the Board forthwith to deny [the Region's] Motion to Dismiss. RAC further requests that the Board order reimbursement of RAC's response costs incurred in complying with the UAO * * *." In an October 20, 2006 status report, the Region conceded that it "agrees that it would now be appropriate for the Board to consider a Petition for Reimbursement, if RAC decides to resubmit its Petition or if the Board allows the existing Petition to go forward." In view of these statements by the parties, the Board considers RAC's September 21, 2006 status report to be a sufficient restatement of its request for reimbursement to satisfy CERCLA § 106(b)(2)(A)'s jurisdictional requirement and allow the Board to entertain the petition.

reasons, grants the Region's Motion to Stay, subject to the terms and conditions set forth below.

Factual Background

This matter involves the former Herington Army Airfield, near Herington, Kansas, currently known as the Tri-County Public Airport Site ("TCPA" or the "Site"). The factual background relevant to this matter can be briefly summarized as follows.[2] From 1942 to 1946, the United States Army Air Corps processed bombing crews and aircraft at the Site as part of the World War II effort. The Army Air Corps also performed maintenance on aircraft at the Site.

In 1948, the United States quitclaimed the Airfield to the City of Herington, Kansas, which thereafter leased portions of it to commercial tenants. Beech Aircraft Company ("Beech"), which is a predecessor to RAC, leased portions of the Site from 1950 to 1960 for purposes of operating a military aircraft refurbishing facility and for various manufacturing purposes. Beech's activities included operations in an area of the Site known as "Hangar 1."

From 1993 to 1997, the Region conducted investigations at the Site and detected trichloroethylene (TCE)– a chemical commonly used in degreasing heavy equipment– and other contaminants. In October 1997, the Region sent a CERCLA § 104(e) information request

[2] The facts relevant to this matter have not yet been resolved, either before the Board or in the District Court litigation. The facts referenced here are largely drawn from RAC's various factual assertions in its Petition for Reimbursement before the Board and in its Complaint before the District Court and are assumed here for background purposes only. Where, in this Order, we refer to a fact alleged by the Region, we note it as such.

letter to RAC, inquiring about its activities at the Site. RAC responded in November 1997.[3] *See* EPA's Reply to RAC's Response to Motion to Stay Proceedings, Exh. A. In this response, RAC indicated that it had used a TCE degreaser in Hangar 1. *Id.* In 1998, the Region began an expanded site investigation/remedial investigation at TCPA to verify that a release of TCE had occurred and to determine the extent of the contamination. The Region also issued an information request letter to the United States Army Corps of Engineers ("USACE").[4] In response, USACE summarily denied that the Army was responsible for the contamination at the TCPA site and apparently also denied that the Army used TCE at the Site.

Since 2000, RAC has been subject to three administrative orders to conduct clean-up activities at the Site. First, in March 2000, RAC entered into an Administrative Order on Consent ("AOC") with the Region pursuant to CERCLA § 122(d), by which RAC agreed to conduct a removal action to address TCE and TCE degradation products present at TCPA. Raytheon thereafter incurred response costs for this work. Next, in November 2000, RAC signed an AOC with the Kansas Department of Health and Environment to perform a remedial investigation/feasibility study at the Site. RAC incurred response costs for work performed under this AOC as well. Finally, on September 30, 2004, the Region, pursuant to CERCLA § 106, issued a unilateral administrative order ("UAO") to RAC, ordering the company to conduct soil excavation and an off-site disposal operation at a location north and northwest of Hangar 1 (the "Hangar 1 UAO Area"). The removal action required by the UAO stemmed

[3] This information was provided by the Region as part of its Reply to RAC's Response to EPA's Motion to Stay Proceedings.

[4] According to the United States in the District Court action, the USACE is "responsible for the conduct of Defense Environmental Restoration Program actions, as appropriate, at Formerly Used Defense Sites, including the Site." Memorandum in Support of Defendant United States' Motion for Partial Dismissal, or, in the Alternative, Motion for Partial Summary Judgment at 2 n.3.

from an engineering evaluation/cost analysis prepared by the Region, which identified TCE and TCE degradation products (1,2-dichloroethylene (DCE), and vinyl chloride) as the contaminants of concern in the Hangar 1 UAO Area. RAC allegedly incurred, at a minimum, $2,491,149.80 as a result of complying with the UAO. The Region has not identified USACE as a liable party at the Site and, as such, USACE has not, to date, contributed to any of the costs described above.

Procedural History

RAC is seeking reimbursement for its costs relating to the TCPA site in two fora. First, on July 28, 2005, RAC filed a Complaint in United States District Court for the District of Kansas seeking cost recovery or contribution from USACE for all or some of the costs incurred performing the work required by the three administrative orders described above. The Complaint also challenged the constitutionality of the September 30, 2004 UAO directing RAC to conduct a removal action in the Hangar 1 UAO Area. In a Memorandum and Order dated May 26, 2006, the District Court dismissed RAC's cost recovery claim, but ruled that RAC has an implied right to a claim for contribution under CERCLA § 107(a). At the same time, the District Court dismissed RAC's as-applied constitutional claim because none of the jurisdictional triggers enumerated by CERCLA §113(h), including a federal court action for reimbursement pursuant to CERCLA § 106, had yet occurred. Discovery is nearly complete in the District Court case, and trial is scheduled for October 2007.

On a second front, RAC, on January 9, 2006, filed a Petition with the Board pursuant to CERCLA § 106(b)(2), seeking reimbursement of costs incurred in complying with the

September 30, 2004 UAO.[5] In this Petition for Reimbursement, RAC denies that it is responsible for the contamination in the Hangar 1 UAO Area and instead points to operations conducted at the Site by the Army Air Corps as the likely source of the contamination.

The Petition for Reimbursement is narrower in scope than the District Court litigation, in that it seeks reimbursement for response costs arising only out of the UAO, and not the costs associated with the two AOCs, which cover more extensive clean-up activity and a larger area of the Site. However, the issues relating to liability with respect to the Hangar 1 UAO Area are nearly identical in both cases. Essentially, in both cases, RAC argues that it has evidence that the Army Air Corps contaminated that area and that Beech could not possibly be responsible for the contamination because of the manner in which Beech handled and disposed of TCE and the distance between the Hangar 1 UAO Area and the location of RAC's degreasing operations.

In view of the overlap between the cases, the Region filed a Motion to Stay Proceedings with the Board on October 20, 2006. RAC filed a Response to the Region's Motion to Stay on November 3, 2006, stating its opposition to staying the case. The Region filed a Reply to RAC's Response on November 17, 2006. By order dated November 30, 2006, the Board accepted the Region's Reply for filing and directed the parties to appear for a January 17, 2007 hearing on the Motion to Stay.

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[5] CERCLA § 106(b)(2) allows any person who has complied with an administrative order issued by EPA or another federal agency under CERCLA § 106(a) to seek reimbursement of the reasonable costs incurred in complying with the order, plus interest. To establish a claim for reimbursement, the petitioner must demonstrate that it was not liable for response costs under CERCLA § 107(a), or that EPA's selection of the ordered response action was arbitrary and capricious or was otherwise not in accordance with law. Such a claim must be presented in the first instance as a petition to this Board. Only after a Board decision adverse to the petitioner may the petitioner file a claim for reimbursement in federal court.

The Parties' Arguments Regarding a Stay

The Region argues that the Board should stay the present reimbursement case because the issues here are subsumed within the liability and factual questions that are being addressed in the District Court proceeding. According to the Region, proceeding to litigate the same questions in two fora would waste the resources of the involved tribunals, as well as the parties. Therefore, based on principles of judicial economy, the Board's review should, in the Region's view, await the outcome of the District Court litigation. RAC, on the other hand, argues against granting the Motion to Stay. RAC argues, in essence, that CERCLA's reimbursement mechanism was intended to offer an expeditious expense recovery procedure for innocent parties who, despite their innocence, choose to comply with a CERCLA Section 106(b) unilateral order, and that the issuance of a stay would frustrate this objective. RAC also sees a Board decision on its Petition for Reimbursement as a necessary predicate for its as-applied constitutional claim, and expresses concern that a stay would preclude the assertion of such a claim.

Discussion

Having considered both parties' arguments, the Board has decided to stay the present proceedings. While the Board is not unsympathetic to RAC's concern that, if it is truly not liable for the contamination in the Hangar 1 UAO Area, it should be able expeditiously to recover its expenses in complying with the UAO, this simply begs the question of RAC's non-liability for the Hangar 1 UAO Area – one of the very matters currently being litigated in the District Court case. As noted, that case, having been initiated prior to RAC's filing of its Petition with the Board, is well along, with the discovery process near completion and a trial scheduled for October 2007. Although the Board recognizes that the District Court case is

broader in scope and will address facts that go beyond those at issue in the Petition, the District Court case appears certain to contend with the factual issues that are at the core of the dispute before the Board.

It is also plain that, because the facts pertaining to RAC's liability in relation to the UAO are still in dispute, the Board, in order to resolve RAC's Petition for Reimbursement, would necessarily have to conduct a factual inquiry akin to the one currently underway in District Court. It is hard to see such an undertaking by the Board as anything other than a duplication of the District Court process.

Under these circumstances – where the parallel litigation was initiated first in time, has subsumed within it the very issues presented by the Petition before the Board, and appears destined to address those issues in the relative near term – principles of judicial economy strongly dictate in favor of a stay. *Cf. In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692, 702-03 (EAB 1996) (explaining the *Colorado River* doctrine, which allows a federal court to decline to exercise jurisdiction for reasons of judicial economy when there is a parallel state proceeding in which substantially the same parties are litigating substantially the same issues). We do not see the issuance of a stay as materially prejudicial to RAC. As the Region observes, assuming that RAC ultimately prevails in its Petition for Reimbursement, it will be entitled to recover interest accruing up to the time of recovery, thus serving to mitigate any financial disadvantage to RAC associated with delayed recovery. *See* CERCLA § 106(b)(2)(A). While the stay may serve to defer RAC's pursuit of an as-applied constitutional challenge to the UAO, we see RAC's objective in this regard as speculative in view of the fact that it presupposes that the Board will deny RAC's Petition. In any case, we find a temporary deferral of this nature insufficient to overcome the substantial judicial economy concerns presented here.

The stay shall run until the conclusion of the federal court litigation. However, in the event that through that litigation the material facts pertaining to RAC's liability for the Hangar 1 UAO Area are resolved or become undisputed, either party may request a lifting of the stay so that the Board might, as appropriate, resolve RAC's Petition before the conclusion of the federal court litigation in its entirety.[6]

So ordered.

Dated: 2/1/2007

ENVIRONMENTAL APPEALS BOARD

By: Scott C. Fulton
Scott C. Fulton
Environmental Appeals Judge

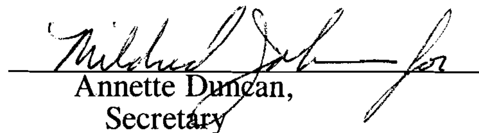
[6]The Board recognizes that, because the federal court case is broader than the Petition before the Board, that litigation could conceivably continue after the issues relating to the UAO and RAC's liability for the contamination in Hangar 1 Area are resolved. We see no reason to forebear in resolving the Petition in such circumstances.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Staying Proceedings, in the matter of Tri-County Public Airport Site, Raytheon Aircraft Company, Petitioner, CERCLA § 106(b) Petition No. 06-01, were sent to the following persons in the manner indicated:

By First Class Mail Postage Prepaid and Facsimile:	Beverlee J. Roper Daryl G. Ward Blackwell Sanders Peper Martin, LLP 4801 Main Street, Suite 1000 Kansas City, Missouri 64112 fax: (816) 983-9143
By Pouch Mail and: Facsimile:	J. Scott Pemberton Senior Assistant Regional Counsel Office of Regional Counsel U.S. EPA, Region 7 901 North 5th Street Kansas City, Kansas 66101 fax: (913) 551-7925
By Inter-Office Mail and Facsimile:	Tracy L. Sheppard Attorney-Advisor Office of Site Remediation Enforcement U.S. EPA (2366A) 1200 Pennsylvania Ave., NW Washington, DC 20460 fax: (202) 564-5531

Dated: FEB 1 2007



Annette Duncan,
Secretary