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ENVIR. APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII  
901 NORTH 5TH STREET  
KANSAS CITY, KANSAS 66101

**EXPRESS MAIL OVERNIGHT DELIVERY**

October 19, 2006

Eurika Durr  
Clerk of the Board, Environmental Appeals Board  
U.S. Environmental Protection Agency  
1341 G Street, N.W., Suite 600  
Washington, D.C. 20005

RE: In the Matter of Tri-County Public Airport Site  
The Raytheon Aircraft Company, Petitioner  
Petition Number: 106(b) 06-01

Dear Ms. Durr:

Enclosed please find one original for filing and five copies of EPA's Motion to Stay Proceedings in the above-referenced matter. A copy of this letter and its attachments has been sent to counsel for the Petitioner.

Thank you for your assistance in this matter.

Sincerely

J. Scott Pemberton  
Senior Assistant Regional Counsel

Enclosures

cc: Beverlee J. Roper, Esquire  
Daryl G. Ward, Esquire  
Blackwell Sanders Peper Martin, LLP  
4801 Main Street, Suite 1000  
Kansas City, Missouri 64112

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

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ENVIR. APPEALS BOARD

IN RE: )  
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Tri-County Public Airport Site )  
Morris County, Kansas )

Petition No. )  
CERCLA 106(b) 06-01 )

Raytheon Aircraft Company, )  
)

Petitioner )  
)  
)

Petition for Reimbursement Under )  
Section 106(b)(2) of the Comprehensive )  
Environmental Response, Compensation, )  
and Liability Act of 1980, as amended, )  
42 U.S.C. § 9606(b)(2). )  
)

**MOTION TO STAY PROCEEDINGS**

**I. Introduction**

The Respondent, Region VII of the U.S. Environmental Protection Agency ("EPA"), by and through its Office of Regional Counsel, hereby moves the Environmental Appeals Board ("Board"), pursuant to Section II.I.1 of the Board's Practice Manual dated June 2004 to stay further proceedings on Raytheon Aircraft Company's Petition for Reimbursement ("Petition") until liability issues are resolved in the matter of *Raytheon Aircraft Company v. United States of America*, Case No. 05-2328-JWL. On July 28, 2005, Raytheon Aircraft Company ("RAC") filed a complaint in the United States District Court, District of Kansas (see Exhibit A). The complaint seeks cost recovery or contribution from the Army Corps of Engineers, acting on behalf of the Department of Defense, in connection with response actions and contamination at

the Tri-County Public Airport Site and concerns the same set of facts that is the subject matter of the Petition that was filed with the Board on January 9, 2006. In the District Court action, RAC also sought a declaratory judgment that the provisions of Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9601 et seq., governing the unilateral administrative order regime are unconstitutional under the Due Process Clause of the Fifth Amendment.

On November 17, 2005, the United States filed a Memorandum in Support of Defendant United States’ Motion for Partial Dismissal, or, in the Alternative, Motion for Partial Summary Judgment (Exhibit B). On May 26, 2006, the District Court issued a Memorandum and Order (“Order”) which granted the United States’ motion in part and denied it in part (Exhibit C).

1. RAC’s CERCLA Section 107(a) Cost Recovery Claim. In its Order, the District Court dismissed RAC’s CERCLA Section 107(a) cost recovery claim against the United States on the basis that RAC failed to allege in its complaint that it was not a potentially responsible party (“PRP”). However, the District Court provided RAC an opportunity to file an amended complaint by June 16, 2006, to assert that it is not a PRP, if RAC intended to take the stance in the District Court litigation that it was not a PRP (see Order, Exhibit B, page 15). RAC did not take this opportunity to amend its complaint by the June 16, 2006 deadline in the District Court litigation to allege it is not a PRP, even though under CERCLA Section 106(b)(C), to obtain reimbursement a petitioner must establish by a preponderance of the evidence that it is not liable for response costs under CERCLA Section 107(a).

2. RAC’s Contribution Claims. The District Court also dismissed RAC’s claim for contribution for costs it incurred in complying with the Unilateral Administrative Order for Removal Response Activities, Docket No. CERCLA-07-2004-0311 (“UAO”), issued by EPA on

September 30, 2004, because the UAO is not a civil action under CERCLA Section 106 or 107(a).<sup>1</sup> However, the Order allowed RAC to sue for contribution under CERCLA Section 113(f)(3)(B) for costs it incurred in connection with an Administrative Order on Consent (“AOC”) RAC had entered into with EPA and for costs it incurred in connection with an AOC RAC had entered into with the Kansas Department of Health and Environment.<sup>2</sup> As to the costs RAC incurred in complying with the UAO, the District Court concluded that RAC had an implied cause of action for contribution under CERCLA Section 107(a)(4) for costs not recoverable under CERCLA Section 113, since RAC could not bring a contribution action under CERCLA Section 113(f)(1) for costs RAC incurred in complying with the UAO.

## **II. The Circumstances Of This Petition And The District Court Case Make The District Court A Better Venue For Determining Liability At This Time.**

In its Petition, RAC states that it is entitled to reimbursement because it is not liable for the response costs it incurred in complying with the UAO (see Section V.A of the Petition) in conducting a removal in the Hangar 1 area of the Site. RAC also alleges that the United States Army Air Force (“Army”) used and disposed of the principal contaminant of concern, trichloroethylene (“TCE”), in the Hangar 1 removal area during World War II and is therefore liable for the response costs of the UAO removal action (see Section V.A.2) The Army’s use and/or disposal or non-use or non-disposal of TCE at the Site is precisely the issue that will be decided in the District Court litigation. To succeed in the contribution action in District Court, RAC must prove the Army is a liable party under CERCLA Section 107. Based upon available information, it is the Agency’s position that the contamination in the Hangar 1 area of the Site could only have been caused by RAC’s predecessor, Beech Aircraft Corporation, during its

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<sup>1</sup> See Section III.B of Exhibit B, pages 9 through 11.

<sup>2</sup> See Section III.C of Exhibit B, pages 11 through 14.

period of operations at the Site from approximately 1950 through 1960. There are no other known PRPs. Proceeding in this matter may result in a premature decision that is binding on Region VII, and thus the United States. An EAB decision requiring EPA to reimburse RAC for any portion of RAC's costs would be final agency action (see 40 C.F. R. § 22.31). Region VII would have no right to appeal such a decision, as only non-EPA parties have a right to obtain judicial review of an EAB decision. The District Court is the more appropriate venue for determining the liability or non-liability of the Army in this matter, especially since the District Court action was initiated well before the Petition was filed in this matter and the District Court proceeding allows for expansive discovery.

**III. Absent A Stay Of Proceedings, Responding to RAC's Petition on the Merits Will Require An Unnecessary Expenditure Of Resources.**

The matter in District Court will proceed regardless of whether this Motion to Stay is granted by the Board. If a stay of these proceedings is not granted, an unnecessary expenditure of resources will occur. In the District Court case, the parties are currently engaged in extensive discovery, the ultimate aim of which is to determine the liability of the parties.

**IV. Conclusion.**

For the reasons stated above, EPA respectfully requests that the Petition for Reimbursement be stayed pending resolution in the federal courts of the liability issues in this case. EPA has consulted counsel for RAC who has indicated they will oppose the granting of the requested stay.

Dated this 19<sup>th</sup> day of October, 2006.

Respectively submitted,

By:




J. Scott Pemberton  
Senior Assistant Regional Counsel  
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Lee R. Tyner  
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**CERTIFICATE OF SERVICE**

I, Sarah Zaragoza, hereby certify that on the 19<sup>th</sup> day of October, 2006, the original and five copies of the foregoing Motion to Stay Proceedings was sent via Express Mail Overnight Service to Eurika Durr, Clerk of the Board, Environmental Appeals Board, U.S. Environmental Protection Agency, 1341 G Street, N.W., Suite 600, Washington, D.C. 20005, and that a true and correct copy was sent regular mail to the following counsel for Petitioner:

Beverlee J. Roper, Esquire  
Daryl G. Ward, Esquire  
Blackwell Sanders Peper Martin, LLP  
4801 Main Street, Suite 1000  
Kansas City, Missouri 64112

  
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