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ENVIR. APPEALS BOARD
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April 28, 2006

VIA COURIER

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

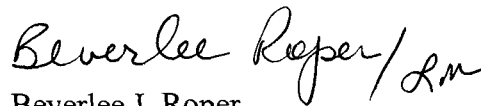
**Re: In the Matter of Tri-County Public Airport Site
The Raytheon Aircraft Company, Petitioner
Petition Number: 106(b) 06-01**

Dear Ms. Durr:

Enclosed please find one original and five copies of Raytheon Aircraft Company's Reply Memorandum in Further Support of Its Motion to Supplement the Administrative Record.

A sixth copy of the motion is also enclosed. Please stamp the sixth copy and return it in the self-addressed stamped envelope enclosed.

Sincerely,


Beverlee J. Roper

BJR/maa
Enclosures

KC-1394529-1

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AFFILIATES: LEEDS • MANCHESTER
MEMBER OF THE WORLD SERVICES GROUP

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

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ENVIR. APPEALS BOARD

IN THE MATTER OF:)
)
)
TRI-COUNTY PUBLIC AIRPORT SITE,)
RAYTHEON AIRCRAFT COMPANY) CERCLA § 106(b) Petition No. 06-01
)
)

RAYTHEON AIRCRAFT COMPANY’S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

Raytheon Aircraft Company’s (“RAC’s”) Motion to Supplement the Administrative Record asked that the U.S. Environmental Protection Agency’s (“EPA’s”) Administrative Record conform with EPA’s Guidance.¹ EPA opposes the request on the grounds that mere Guidance is not binding but “is in fact guidance, not a regulation,” (EPA Response 8), and as such EPA is free to ignore it. While EPA may maintain the prerogative to disregard its own guidance, EPA may not ignore its regulations.² Regulations found at 40 CFR § 300.810 affirm that many of the excluded documents should “typically” be included in the Administrative Record. EPA offers no explanation why this matter is an exception to the general rule.³

EPA acknowledges reliance upon information contained in the excluded documents but infers that the information can be found elsewhere in the Administrative Record. EPA fails, however, to provide any details where the information can be found. Pursuant to 40 CFR § 300.810(b), the only documents that may be excluded are those records that “do not form a basis

¹ Final Guidance on Administrative Records for Selecting CERCAL Response Actions, OSWER Directive # 9833.3A-1.

² *Sierra Club v. Johnson*, 436 F.3d 1269, 1280 (11th Cir. 2006).

³ EPA also argues that review of the Administrative Record is premature and infers that any reference to the Administrative Record is unnecessary. (EPA Response 4.) EPA has not stipulated, however, that the Administrative Record is irrelevant to this proceeding and to review by an Article III court of EPA’s actions that culminated in EPA’s issuance of the Unilateral Administrative Order to RAC on September 30, 2004.

for the selection of the response action.” The regulation provides no exception; if a document contains information that was considered by EPA, it must be included in the Administrative Record. The risk of relevant information being excluded outweighs any downside to duplication.

EPA argues that enforcement documents are properly excluded (EPA Response 5) but fails to explain why EPA included some enforcement documents but excluded others. For example, EPA apparently considered the United States Army Corps of Engineers’ (“USACE”) response to EPA’s *first* CERCLA § 104(e) information request (included in the Administrative Record), wherein USACE denied that the Army ever used any hazardous substances at the Site. However, EPA apparently ignored USACE’s response to EPA’s *third* CERCLA § 104(e) information request (excluded from the Administrative Record), wherein USACE:

- admitted the Army’s use of solvents at the Site;
- acknowledged the testimony of former airmen in which they testified that the Army used a vapor degreaser at the Site to clean tens of thousands of aircraft spark plugs [above the contamination that EPA’s UAO required RAC excavate], that solvents were freely disposed of on the ground surface and in drains, that technical orders were rigorously adhered to, that no recycling or other environmental requirements were a priority or were even in existence during World War II; and
- included a copy of Technical Order No. 03-5E-02 which, contemporaneously with the Army’s operations at HAAF, required the use of trichloroethylene in vapor degreasers used for cleaning aircraft spark plugs.


EPA failed to provide a reasoned explanation for its inclusion of some enforcement documents while excluding others.

The term “index” is defined as “something that serves to guide, point out, or otherwise facilitate reference.”⁴ EPA explained why it submitted multiple volumes but failed to explain how the documents are organized within those volumes to facilitate reference. RAC simply seeks a usable reference. The model index suggested by the Guidance seems like a reasonable choice.

For the reasons set forth above, RAC’s Motion to Supplement the Administrative Record should be sustained.

Date: April 28, 2006

Respectfully submitted,



Beverlee J. Roper

Daryl G. Ward

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Attorneys for Petitioner Raytheon Aircraft Company

⁴ *Webster’s Dictionary, Office Edition*, p. 352 (1996).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via first class US mail, return receipt requested, this 28th day of April 2006 to:

J. Scott Pemberton
Senior Assistant Regional Counsel
Environmental Protection Agency
901 N. Fifth Street
Kansas City, Kansas 66101



Beverlee J. Roper