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ENVIR. APPEALS BOARD

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April 14, 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 in the above-referenced matter and five copies of EPA's Response To Raytheon Aircraft Company's Motion To Supplement The Administrative Record. 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 APR 18 AM 9:35
WASHINGTON, D.C.

ENVIR. APPEALS BOARD

IN RE:)
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)

Tri-County Public Airport Site)
Morris County, Kansas)

Raytheon Aircraft Company,)

Petitioner.)
)
)

Petition No.
CERCLA 106(b) 06-01

**EPA'S RESPONSE TO RAYTHEON AIRCRAFT COMPANY'S MOTION TO
SUPPLEMENT THE ADMINISTRATIVE RECORD**

The Respondent, U.S. Environmental Protection Agency, Region 7 ("EPA"), by and through its Office of Regional Counsel, hereby submits this response, pursuant to Section II.I.1 and V of the Environmental Appeals Board's ("Board") Practice Manual, dated June 2004 ("EAB Manual"), to Raytheon Aircraft Company's Motion to Supplement the Administrative Record, dated March 30, 2006.

I. BACKGROUND

On January 3, 2006, The Raytheon Aircraft Company ("Raytheon") filed a Petition for Reimbursement ("Petition") with the Board, seeking reimbursement of the costs it had incurred at the Tri-County Public Airport ("TCPA") Site in complying with a September 30, 2004, Unilateral Administrative Order ("UAO") issued by EPA pursuant to the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended

("CERCLA"), 42 U.S.C. § 9601 et seq. The response action that EPA selected, which is the subject of Raytheon's Petition, was the removal of contaminated surface and subsurface soils that EPA had determined to be a source of continuing contamination to the TCPA Site groundwater. On January 12, 2006, the Board directed EPA to submit a response to the Petition and, to include with the response, a certified index to the Administrative Record that was compiled in connection with the issuance of the underlying UAO. On February 8, 2006, EPA filed a motion to dismiss the Petition on the basis that the required action has not been completed. On March 1, 2006, Raytheon filed a motion requesting the Board order EPA to provide the certified index to the Administrative Record. On March 6, 2006, Raytheon filed its response to EPA's Motion to Dismiss¹ and the Board ordered EPA to file a certified index to the Administrative Record by March 16, 2006. On March 10, 2006, EPA produced certified indices to the Administrative Record for the response action that was selected by EPA and which Raytheon was required to conduct under the UAO. On March 30, 2006, Raytheon filed its Motion to Supplement the Administrative Record ("Motion")² requesting the Board order EPA to: 1) supplement the Administrative Record with documents listed in Exhibit C of its Motion; 2) review its files to determine if additional documents have been improperly omitted from the Administrative Record; and 3) prepare a certified index that comports with the Model Index contained in Appendix B of the Administrative Record Guidance ("Guidance").³ Although Raytheon's Motion was silent on the subject, EPA objects to the granting of the relief sought by Raytheon's Motion.

¹ Counsel representing EPA in this matter did not receive a copy of this response from Petitioner. EPA submitted to the Board a Motion for Leave to File a Reply with the proposed Reply and a Declaration attached on April 13, 2006.

² Counsel for EPA received this Motion on April 3, 2006.

³ Final Guidance on Administrative Records for Selecting CERCLA Response Actions, OSWER Directive # 9833.3A-1.

II. THE SUFFICIENCY OF THE ADMINISTRATIVE RECORD

It is well settled administrative law that administrative records should only be supplemented in very limited circumstances. In United States v. Amtreco, Inc., et al., 806 F. Supp. 1004 (M.D. Georgia 1992), the court ruled on the defendants' motion for supplementation of the administrative record in a CERCLA removal action case. The court had denied the defendants' original motion, but permitted defendants to submit specific documents to the court to consider for supplementation. After consideration of the submitted documents, the court ruled that the administrative record was complete and supplementation was unnecessary. In deciding the case, the court in Amtreco at 1006 stated,

“Supplementation of an administrative record is only allowed in the following circumstances: 1) the record is so inadequate to explain the agency action that it ‘effectively frustrates judicial review’; 2) the record is incomplete in that it does not contain documents considered by the decision maker; 3) the agency has failed to consider relevant factors; or 4) there is a strong showing that the agency engaged in improper behavior or acted in bad faith.” (citing *Animal Defense Council v. Hodel*, 840 F.2d 1432 (9th Cir.1989) and *Texas Steel Co. v. Donovan*, 93 F.R.D. 619 (N.D.Tex.1982).

The court also recognized that the exceptions to supplementing the administrative record, “... are to be narrowly construed, and defendants have a heavy burden to show that supplementation is necessary.”

In its Motion, Raytheon has not alleged the record is so inadequate that it would effectively frustrate review, identified relevant factors that relate to selection of the response action that EPA failed to consider, or alleged that EPA engaged in improper behavior or acted in bad faith. Raytheon only complains that the Administrative Record is incomplete. However, except for the documents identified in Exhibit C to Raytheon's Motion that EPA does not have, all the records Raytheon requests be placed into the Administrative Record were reviewed and determined either: 1) not to contain information that was necessary in the consideration of

selecting the response action; or 2) contained information that was considered in the selection of the response action, but was found elsewhere in the Administrative Record.

1. The Administrative Record Is Not Relevant To The Threshold Issue Before The Board.

Before the Board is EPA's Motion to Dismiss the Petition of Raytheon Aircraft Company on the basis that the Petition was filed prematurely and therefore did not meet one of the prerequisites for obtaining review of a reimbursement petition. It is EPA's position that the subject response action will not be complete until the Final Removal Action Report, that Raytheon submitted on November 4, 2005, is approved by EPA and notice of approval has been provided to Raytheon. Issues concerning the sufficiency of the Administrative Record have nothing to do with whether the threshold timeliness requirement for filing the Petition has been met. Since no documents generated after the decision document was signed (see Enforcement Action Memorandum, Appendix C) are in Administrative Record, the Administrative Record will not aid the Board in reaching a decision of the threshold issue as to whether the removal action has been completed.

2. The Issue In This Case Is Liability, Not Whether The Response Action Selected Was Arbitrary And Capricious Or Otherwise Not in Accordance With Law.

As previously stated, an administrative record contains the documents that form the basis for the selection of a particular response action at a site. Raytheon has not alleged in its Petition that EPA's selected response action was inappropriately chosen; only that it is not liable for costs it incurred in complying with the UAO. Since the Administrative Record does not have to include documents that solely concern the liability of a particular party, the sufficiency of the Administrative Record should not be an issue in this matter. See Section III.B, Enforcement Documents, of the Guidance.

If the EAB determines that it is appropriate to review the sufficiency of the Administrative Record at this time, EPA offers the following specific responses to the issues raised in Raytheon's Motion.

III. THE NEED TO SUPPLEMENT THE ADMINISTRATIVE RECORD

As the Guidance and 40 C.F.R. § 300.800(a) state, the lead agency shall establish an administrative record that contains the documents that form the basis for the selection of a particular response at a site. In establishing an administrative record, the following principles should apply: 1) the record should be compiled as documents relating to the selection of the response action are generated or received by the lead agency; 2) the record should include documents that form the basis for the decision, whether or not they support the response selection; and 3) the record should be a contemporaneous explanation of the basis for the selection of a response action. (see Section I.A of the Guidance, page 2) As stated above, an administrative record should contain the documents that not only support a response decision, but should also include relevant documents that were considered but ultimately rejected. Inclusion of the documents identified in Exhibit C of Raytheon's Motion is clearly inappropriate for the reasons set forth below.

1. **Enforcement Documents**. Section III.B of the Guidance discusses the types of documents that could be included in an administrative record for removal actions. Enforcement documents to be included are administrative orders, consent decrees, affidavits containing relevant factual information not contained elsewhere in the record file, notice letters to PRPs, responses to notice letters, Section 104(e) information request letters and Section 122(e) subpoenas; and responses to Section 104(e) information request letters and Section 122(e) subpoenas. The Guidance suggests including an enforcement document if it contains

information that was considered or relied on in selecting the response action or shows that the public had an opportunity to participate in and comment on the selection of the response action. However, the Guidance does state that an administrative record should not include enforcement documents solely pertaining to liability. A number of documents (see numbers 3, 4, 5, 6, 7, 24, 26, 27, 28, 31, 34 and 37 in Appendix B)⁴ identified in Exhibit C to Raytheon's Motion, that were not included in the original Administrative Record, are enforcement documents that either pertain solely to liability or had no bearing on the selection of the response action. These documents should not be made a part of this Administrative Record.

2. **Post-Decision Documents**. Section 300.825 of the NCP and Section III.N of the Guidance addresses documents generated or received after the signing of the decision document that selects the response action. As stated above, in this matter, the decision document is the Enforcement Action Memorandum (see Appendix C). The Guidance specifies that all documents generated or received after signing the decision document should be kept in a post-decision document file, which should not be part of the administrative record file. The Guidance provides the reason why post-decision documents should, in general, not be added to the administrative file: the documents generated or received after the response action has been selected are not relevant to that response decision. Documents kept in a post-decision file may be added to an administrative record file in limited situations when: A) a decision document does not address or reserves a portion of the decision to be made at a later date; B) there is a significant change in the selected response action; C) the changes in the response action are so significant that they fundamentally alter the very nature or basis of the overall response action; D) comments containing significant information are submitted by interested persons after the

⁴ For ease of reference, attached is Appendix B, a numbered list of the documents included in Exhibit C to Raytheon's Motion.

close of the public comment period;⁵ or E) the lead agency holds public comment periods after the selection of the response action. None of the above exceptions apply here. Four documents (see numbers 34, 35, 36 and 37 in Appendix B) identified in Exhibit C to Raytheon's Motion were generated well after the signing of the decision document on September 30 2004, and none of the four contain significant information that would have been considered in selecting the response action.

3. **Other documents.**

Documents numbered 1, 9, 10, 11, 14, 23 and 33 (see Appendix B) were not and cannot be included in the Administrative Record because EPA does not have copies of the documents. The above-referenced documents appear to be communications between Raytheon and either ATSDR or the Kansas Department of Health and Environment ("KDHE"). The documents should not now be added to the Administrative Record because they were not considered in the selection of the subject response action.

Documents numbered 8, 9, 14, 15, 16, and 17 (see Appendix B) are documents related to ATSDR's draft and final Public Health Assessment that that Agency performs at NPL and proposed NPL sites. The information in these documents, except documents numbered 9 and 14 which EPA does not have, may have been considered in the selection of the subject response action, but the relevant information in these documents that pertains to EPA's selection of the response action is found in documents contained in the current Administrative Record.

Information contained in documents numbered 2, 12, 13, 18, 19, 20, 21, 22, 24, 25, 29, 30 and 32 (see Appendix B) may have been considered in the selection of the subject response action, but is found in documents contained in the current Administrative Record. Documents 2,

⁵ To be considered significant, these comments must address the selection of the response action.

8, 9, 14, 15, 16, 17, 29, 30 and 32 (see Appendix B) contain information appropriate for inclusion in the administrative record that will be developed for the proposed remedial action for the TCPA Site.

IV. REVIEW OF EPA FILES

The Administrative Record Guidance is in fact guidance, not a regulation, the purpose of which is to provide state and federal agencies with guidelines for establishing administrative records for the selection of CERCLA response actions. EPA has already reviewed its site files and determined which documents to include in the Administrative Record for the subject response action and should not be required to do so again. Raytheon has already had an opportunity to comment on the Administrative Record. EPA developed the engineering evaluation/cost analysis (“EE/CA”), which proposed a response action for the Hangar 1 area of the TCPA Site. In September 2003, EPA published a fact sheet announcing the availability of the EE/CA and the supporting documents (August 2003 Administrative Record) with a public comment period that ran for thirty (30) days, beginning on September 4, 2003 (see Appendix D), pursuant to Section 300.415(n)(4) of the NCP. During the public comment period, Raytheon submitted comments by letter dated October 3, 2003. Raytheon’s comments and EPA’s responses to the comments were included in the January 2004 Addendum to the Administrative Record (see See EPA’s Certified Indices To The Administrative Record, submitted to the Board on March 10, 2006, page 2 of 4).⁶

⁶ Documents numbered 19, 20, 21 and 22 (see Appendix B), which Raytheon claims are not part of the Administrative Record, are attached to Raytheon’s October 3, 2003 comments, and are therefore part of the Administrative Record.

V. PREPARATION OF A NEW INDEX FOR THE ADMINISTRATIVE RECORD

Raytheon's Motion has requested the EAB to order EPA to prepare a new certified index that comports with the model index contained in Appendix B of the Administrative Record Guidance. Appendix B to the Guidance is a model file guidance that may be used to compile an administrative record for a response action. EPA currently has two administrative records for the TCPA Site. The first record was issued in May 1998 as EPA began conducting response actions at the TCPA Site. This May 1998 record was updated by the June 2001 Addendum in accordance with Regional policy that calls for updates to an administrative record to be in the form of an addendum. This June 2001 Addendum was issued near the time the EPA selected a response action to provide alternate water supplies to residences at the TCPA Site whose drinking water was contaminated. The second Administrative Record was issued in August 2003 for the response action that Raytheon ultimately implemented under the UAO. The August 2003 record was updated by the January 2004 Addendum and again by the March 2006 Addendum.

The volume number that appears on each index cover page refers to the binder in which the index appears, which is always in the first binder of a particular record. The Region has developed this and all administrative records in accordance with Appendix B of the Guidance, but as modified by Regional Policy which adds certain categories to the administrative records that is consistent with the Region's site filing system. The listing of each category in a record is contained in the body of the each administrative record, but not necessarily in the indices.

There are no requirements that EPA organize documents it considers in selecting a response action into one administrative record for a site. In fact, it is not possible to do so where there are several response actions taken at a particular site, such as the TCPA Site where so far, EPA has selected two different response actions. Another administrative record will be issued

by KDHE, as the lead agency for remedial action at the Site, prior to the selection of the remedy. EPA's practice in Region 7 is to prepare a separate administrative record for each response action selected, but when more than one response action occurs at a site, a second response action may build on the first one, and thus it is reasonable to incorporate the administrative record for the first response action into that of the second response action.


VI. CONCLUSION

Issues relating to the sufficiency of the Administrative Record need not be decided at this time. If the Board determines that such issues should be resolved at this time, EPA respectfully requests that the Board, for the reasons stated herein, not order EPA to: 1) supplement the Administrative Record with the documents listed in Exhibit C to Raytheon's Motion; 2) review its files to determine if additional documents have been omitted from the Administrative Record; or 3) prepare a new certified index for the Administrative Record.

Dated this 14th day of April 2006.

Respectively submitted,

By:


J. Scott Pemberton
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CERTIFICATE OF SERVICE

I, Sarah Zaragoza, hereby certify that on the 14th day of April 2006, the original and five copies of the foregoing EPA's Response To Raytheon Aircraft Company's Motion To Supplement The Administrative Record were sent via Express Mail Overnight Service to Eureka 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
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