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March 6, 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 Response to the Environmental Appeals Board's Order to Show Cause Why Petition for Reimbursement Should Not Be Dismissed As Premature. Please file the original and copies of the motion.

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,

Beverly Roper

Beverlee J. Roper

BJR/maa
Enclosures

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

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

RAYTHEON AIRCRAFT COMPANY'S RESPONSE TO THE ENVIRONMENTAL APPEALS BOARD'S ORDER TO SHOW CAUSE WHY PETITION FOR REIMBURSEMENT SHOULD NOT BE DISMISSED AS PREMATURE

Petitioner, Raytheon Aircraft Company (RAC), submits this response to the U.S. Environmental Protection Agency, Environmental Appeals Board (the "Board") Order directing RAC to show cause why RAC's Petition For Reimbursement should not be dismissed as premature.

CERCLA §106(b)(2)(A) provides that "[a]ny person who receives and complies with the terms of any [Unilateral Administrative Order ("UAO")] may, *within 60 days after completion of the required action*, petition the President for reimbursement." (Emphasis added). The UAO issued by the U.S. Environmental Protection Agency ("EPA") to RAC on September 30, 2004, required RAC to excavate contaminated soil from a defined area north of Hangar 1 at the Tri-County Public Airport, dispose of the contaminated soil, backfill the excavation, and, within 30-days of completing these field activities, submit "a Removal Action Report summarizing the actions taken to comply the UAO." (*See Statement of Work*, Attachment 5 to the UAO.)

RAC completed "the required action" by submitting a Removal Action Report to EPA on November 4, 2005. In accordance with the Board's *Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions* ("Procedures"),

RAC sent its Petition for Reimbursement to the Board via certified U.S. Mail on January 3, 2006, within 60 days after completing "the required action".

In response, EPA filed a Motion to Dismiss RAC's Petition, arguing "that until EPA reviews and approves the Hangar 1 Removal Action Report . . . and notifies RAC that the response actions have been fully performed, the matter is not ripe for review by the [Board]." EPA cites no authority for this position. Conversely, CERCLA §106(b)(2)(A) and the Board's Procedures do not require, and more importantly, *do not permit*, RAC to delay filing its Petition until EPA completes a review. The statute required the Petition to be filed "within 60 days after completion of the required action," *not* within 60 days of EPA's determination that the work is complete.

EPA's position is entitled no deference because EPA takes whatever position is the most advantageous to obtain a dismissal. For example, in *In re Findley Adhesives, Inc.*[1] EPA argued that the petitioner's claim was barred 60 days after the last load of contamination was removed from the site despite the fact that the UAO in that case required the petitioner to analyze samples taken after the contamination was removed and the results reviewed.[2] The Board rejected EPA's position, holding that the "required actions" were not complete until the petitioner completed the requisite analytical work and associated reports because the Petitioner was required to do so by the UAO.[3] Whether or not EPA issued a notice of completion was not discussed or even relevant in *Findley,* and it is not relevant here. *See In re: Atlantic Richfield Co.*, 8 E.A.D. 394, 413 n. 24 (June 21, 1999) (noting the Board's denial of EPA's motion to dismiss even though EPA had not yet approved certain reports submitted by the petitioner).

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[1] 5 E.A.D. 710, 717 (Feb. 10, 1995).
[2] *Id.*
[3] *Id.*

EPA took an equally inconsistent position in *In re: Micronutrients International, Inc.*[4] arguing that the reimbursement petition was untimely because the petitioner did not filed its petition within 60 days of completing the "underlying cleanup work". In that case, the petitioner's last required action was to submit a notice to EPA that it had completed the work. Although the UAO did not require the petitioner to file its notice within a set time frame, the petitioner filed it concurrently with a petition for reimbursement approximately three months after completing the underlying cleanup work. The Board rejected EPA's motion to dismiss, holding that the UAO required that the petitioner submit the notice of completion and thus that requirement was part of the "required action".

In its motion to dismiss the petition in *Micronutrients International*, EPA expressed concern that the petitioner's unlimited time within which to file its notice of completion would open the reimbursement process to manipulation.[5] RAC shares EPA's concerns. EPA has an unlimited time period within which to file its notice of completion. (UAO ¶ 71.) To use that event as the trigger for the sixty-day period, rather than the last action required of RAC articulated in the UAO, grants EPA unfettered discretion to control the timing of RAC's petition. The temptation to abuse such discretion is tremendous in cases like this one, where RAC is prepared to present compelling evidence that the United States bears full responsibility for the contamination that the United States required RAC to cleanup. The appearance of an equitable process would be better preserved if the Board rejected EPA's motion to dismiss and followed the plain language of CERCLA §106(b)(2)(A).

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[4] 6 E.A.D. 352, 357 (March 25, 1996).
[5] *Id.* at 358.

Even the Board's previous statement that "[g]enerally, this 60-day period will commence on the date EPA confirms that the required actions have been completed"[6] will not sustain EPA's motion. First, the Board's statement is not supported by its own cited decisions.[7] Even assuming that the Board's statement correctly summarizes the law, Ken Rapplean's published Letter to the Editor of the *Herington Times,* confirms that the removal action was a success[8] and identifies EPA's last required action, *i.e.*, "[t]he final report is being prepared by [RAC]." RAC submitted the report to EPA the following day.

EPA's assertion that RAC's Petition must be dismissed because there is a danger that "the work has not been completed in accordance with the UAO" and that EPA may require RAC to "modify the work plan . . . and implement additional work,"[9] is ludicrous. EPA's personnel openly and publicaly declared the work a complete success. The substantive portion of Removal Action Report is little more than a compilation of the progress reports that RAC periodically submitted to EPA and to which EPA raised no objection during the course of the project. EPA's project manager expressed no reservations whatsoever regarding compliance with the UAO in his summary for the public.

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[6] *In re: Glidden Co. and Sherwin-Williams Co.*, 10 E.A.D. 738, 747 n. 7 (December 17, 2002).

[7] *See Id.* (citing *In re Solutia, Inc.*, 10 E.A.D. 193, 201 (November 6, 2001) (The Petition for Reimbursement was not dismissed as premature even though it was filed on March 9, 1999, well before EPA's Notice of Completion, which was issued on April 5, 2000.); *In re A & W Smelters &Rrefiners, Inc.*, 6 E.A.D. 302, 306 (March 11, 1996) (The Board allowed the trigger date to be petitioner's submittal of its Removal Action Report, not EPA's issuance of its Notice of Completion); *In re ASARCO Inc.*, 6 E.A.D. 410, 419 n. 21 (April 17, 1996) (In this case, EPA argued that its Notice of Completion had no effect on the 60-day period.)).

[8] EPA's view of the success of the removal action is evidence by Mr. Rapplean's statements:

> We would also like to recognize the efforts of Shaw Environmental Inc. of Wichita, Kansas, and Remediation Services, Inc. of Independence, Kansas. Both are contractors of Raytheon Aircraft Company. ***Their performance through out the project allowed for the timely completion of the work.***
>
> A total of 45,539 tons of contaminated soils was removed from the excavation and hauled to a landfill under a special water permit. A total of 184 tons of contaminated soil was hauled to a hazardous waste facility for proper disposal. The excavated area was backfilled with onsite soils. ***The combined effort of all parties made for the successful completion of the project.***"

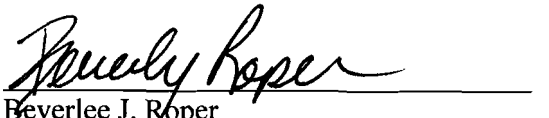
[9] EPA's Motion to Dismiss, 2.

CONCLUSION

EPA's Motion to Dismiss is inconsistent with: (1) the language of CERCLA §106(b)(2)(A); (2) previous decisions of the Board, (3) positions EPA has previously taken in other cases; and (4) EPA's public announcement in this case. Therefore, RAC respectfully requests that the Board deny EPA's Motion to Dismiss.

Date: March 6, 2006

Respectfully submitted,



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Attorneys for Petitioner Raytheon Aircraft Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 6th day of March 2006 to:

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

Beverlee J. Roper