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January 3, 2006

Clerk, Environmental Appeals Board
Mail Code 1103B
US Environmental Protection Agency
401 M Street SW
Washington, D.C. 20460

Re: Petition for Reimbursement
Removal Action at the Tri-County Public Airport
CERCLA-07-2004-0311

Dear Sir or Madam:

Raytheon Aircraft Company ("RAC") submits this Petition for Reimbursement for reimbursement of costs RAC incurred complying with a Unilateral Administrative Order ("UAO") issued by the U.S. Environmental Protection Agency ("EPA") on September 30, 2004.

Sincerely,

Beverlee J. Roper
Daryl G. Ward

BJR/maa
cc: Cecelia Tapia

IN THE ENVIRONMENTAL APPEALS BOARD

IN RE RAYTHEON AIRCRAFT COMPANY	)	Case No. _____

RAYTHEON AIRCRAFT COMPANY'S PETITION FOR REIMBURSEMENT

Raytheon Aircraft Company ("RAC")[1] respectfully requests reimbursement of its costs incurred complying with Unilateral Administrative Order (Docket # CERCLA-07-2004-0311) ("UAO")[2] issued to RAC by the U.S. Environmental Protection Agency ("EPA") on September 30, 2004. The UAO ordered RAC to conduct an extensive soil excavation and offsite disposal operation north and northwest of Hangar 1 ("Removal Area")[3] at the Tri-County Public Airport (the "TCPA") located in Morris County, Kansas. Originally known as the Herington Army Airfield ("HAAF"), the U.S. War Department constructed the TCPA in 1942.

The removal action compelled by the UAO stemmed from an Engineering Evaluation/Cost Analysis prepared by EPA Region VII, dated August 21, 2003 ("EE/CA") (Exhibit B). The EE/CA, Section 1.1, identified trichloroethylene (TCE), 1,2-dichloroethylene (DCE), and vinyl chloride as the contaminants of concern (COC) at the TCPA Removal Area.[4] The UAO defined the scope of the removal action and the volume of soil removed solely by the geographical extent of these COCs. See Exhibit A, Attachment 5 (Statement of Work at p. 4).

[1] RAC's main office is located at 9709 E. Central, Wichita, Kansas 67206.

[2] A full copy of the UAO is attached at Exhibit A.

[3] See definition of "Hangar 1 Area" in the UAO (p. 2) and Attachment 2 to the UAO (Tri-County Public Airport Soil Excavation Area) (Exhibit A).

[4] DCE and vinyl chloride are degradation products of TCE.

I. Compliance with the Order

RAC has complied fully with the UAO. *See*, the Removal Action Report (Exhibit C) and the published letter to the editor of the *Herington Times* written by Kenneth Rapplean, EPA's Remedial Project Manager for the TCPA ("Rapplean Letter") (Exhibit D).

II. Completion of the Required Action

RAC has completed the required action. See Removal Action Report (Exhibit C) and Rapplean Letter (Exhibit D).

III. Timeliness of the Petition

RAC completed the required action on November 4, 2005 when it submitted the Removal Action Report (Exhibit C), and this petition is filed within the 60-day deadline.[5]

IV. Incurrence of Costs

RAC incurred, at a minimum, $2,491,149.80 complying with the UAO. RAC seeks reimbursement of these costs, plus interest. Documentation of RAC's costs is attached at Exhibit E.

V. Grounds for Reimbursement

A. RAC Is Not Liable For the Response Costs Incurred To Remove The Hazardous Substances Pursuant to the UAO.

Pursuant to Section 106(b)(2)(C) of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"),[6] RAC is entitled to reimbursement because it is not liable for the response costs it incurred removing COCs from the Removal Area pursuant to the UAO. RAC did not arrange for disposal of these hazardous substances, transport these

[5] 60 days from November 4, 2005 falls on January 2, 2006, a federal holiday. Therefore, the deadline is extended to January 3, 2006. See 61 Fed. Reg. 55298, October 25, 1996.

[6] 42 U.S.C. § 9606(b)(2)(C).

hazardous substances to the TCPA, nor did it own or operate the TCPA at the time these hazardous substances were disposed.

In 1999, EPA concluded that "the primary source of TCE contamination at Hangar 1 is located only at or near the northwest corner of the hangar." Expanded Site Inspection/Remedial Investigation Report at p. 4-5 (Exhibit F). RAC's predecessor, Beech Aircraft Corporation ("Beech"),[7] did not use TCE in the northwest corner of Hangar 1.

[Each factual assertion on this Petition is supported by evidence attached hereto. Each fact asserted is set forth in Exhibit G followed by citations to documentary evidence. The evidentiary document supporting each factual assertion is included as an attachment to Exhibit G.]

1. Beech Operations at Hangar 1.

As detailed in Exhibit G and summarized here, the record shows that:

In August 1950, Beech leased parts of the TCPA from the City of Herington, Kansas ("City"). Beech used Hangar 1 from 1951 to 1955 to dismantle military training aircraft and to refurbish select aircraft parts. From approximately 1955 to 1959, Beech used Hangar 1 to manufacture jettisonable wing fuel tanks.

During the dismantling project, Beech conducted a paint stripping operation in the northwest corner of Hangar 1. The paint stripping chemical, Turco Paint Stripper No. 3535, was sprayed onto metal parts to remove the paint. After adequate contact time, the Turco Paint Stripper No. 3535 and the removed paint were washed from the metal by steam spray. Waste materials from this operation flowed into drains that discharged into a holding pond north, and

[7] Beech Aircraft Corporation was purchased by Raytheon Company in 1980. At the time of the purchase, Beech became the aircraft division of the Raytheon Company, retaining the name "Beech Aircraft Corporation" for name recognition. In 1995, Raytheon Company changed the name of the aircraft division to Raytheon Aircraft Company (RAC).

beyond, the Removal Area. The Turco Paint Stripper used by Beech was phenol-based and did not contain TCE.

During the wing tank project, Beech operated an "Iridite System" in the northern portion of Hangar 1. The Iridite system consisted of a series of six to eight vertical tanks approximately 3 1/2 feet across and 12 feet deep. The Iridite System included an alkaline cleaner, deoxidizer, and Iridite tank along with a wash tank. Beech did not use TCE in the Iridite system.

Also during that wing tank project, Beech operated a sophisticated Chromium Conversion Coat Process Line in the southwest corner of Hangar 1 that included a TCE degreaser, more than 200 feet from the removal area.[8] This tank line was situated on top of the concrete floor and was surrounded by a secondary containment curb. Beech personnel recall that spent solvents from Beech's vapor degreaser were placed in 55-gallon drums.[9]

The wing tank project continued until Beech's operations at the site began winding down in the late 1950's and terminated shortly after March 23, 1960.

2. United States Army Air Force Operations at Hangar 1.

Conversely, the United States Army Air Force ("Army") used and disposed of TCE in the Removal Area and is therefore liable for the response costs of the removal action. As detailed in Exhibit G and summarized here, the record shows that:[10]

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[8] RAC personnel did not pour spent TCE degreaser sludge into the floor drains because the floor drains in the southwest portion of Hangar 1, where Beech's vapor degreaser was located, flow to the south rather than to the EPA-identified source area of contamination to the north.

[9] Where these drums were ultimately disposed of remains unclear. In the 1950's, a severe shortage of TCE caused TCE manufactures to develop TCE reclamation programs whereby TCE users received credit for spent TCE shipped back to the manufacturing facility to be reclaimed. Beech may have participated in this type of project or the drums may have been shipped to Beech's main manufacturing facility in Wichita, Kansas, on the daily trucks that ran between the facilities. Even if Beech disposed of the drums at the TCPA, such disposal could not have occurred in the area of contamination addressed by the UAO.

[10] The WWII facts contained in this Petition were developed by RAC. They are authenticated in EPA's Administrative Record only because RAC submitted the underlying evidence supporting them to EPA on a number of occasions. Without RAC's efforts, the Administrative Record would be entirely devoid of the facts contained in this Petition because the Army's CERCLA Section 104(e) responses to EPA failed to include them. EPA abstained

The United States government constructed the TCPA in 1942 to process heavy bombers, primarily B-29's but also B-17 and B-24 aircraft, for overseas deployment in World War II theaters of operations ("WWII"). By April 1944 it was "understood that the Second Air Force plan[ned] to stage ***all*** B-29's at Herington." (Emphasis added.) Staging aircraft required extensive aircraft maintenance activities.

The Army, the Executive Branch agency of the United States government tasked with operating TCPA, used and disposed of trichloroethylene ("TCE') in the area of contamination north of its Hangar 1 in conjunction with processing the heavy bombers, as set forth below. Hangar 1, the largest of the four hangars at the TCPA, was part of the "Sub-depot" where Army and civilian personnel performed heavy maintenance activities during WWII. During the war period, the Sub-depot also included, *inter alia*, a Spark Plug Cleaning building that was located northwest of Hangar 1.

- Between approximately 1943 and the end of WWII in August 1945, the Army used TCE to degrease aircraft spark plugs. Spark plugs were cleaned and replaced on all the airplanes processed by the Army at the TCPA. The Spark Plug Department used degreasing and sandblasting equipment to recondition spark plugs. The Army located the operation first in Hangar 1 and then in Building 514, immediately adjacent and northwest of Hangar 1.[11] The spark plug department was of the highest priority and very busy operating two twelve hour shifts a day, seven days a week. The HAAF Army colonel in charge of the Hangar 1 Subdepot recalled under oath that the spark plugs were degreased in a vapor degreaser. The Army required TCE to be used in

from pursuing its fellow Executive Branch agency. EPA refused to act on any of the evidence presented to it by RAC. RAC's submittals included official U.S. Government Technical Orders and sworn testimony.

[11] Hangar 1, the Spark Plug Cleaning Building (# 514), the Engineering Building (# 515), and others all in the same general area made up the HAAF "Subdepot." HAAF personnel conducted third echelon maintenance on aircraft at the Subdepot. Building 514 was razed prior to Beech's lease with the City.

spark plug vapor degreasers. *Handbook of Instructions - Reconditioning of Ceramic Aircraft Spark Plugs by AAF Depots*, Technical Order Nos. 03-5E-2.

- The Army conducted extensive overhaul and maintenance work on aircraft in and around the Subdepot. Hangar 1, the largest of the four hangars at the TCPA, housed civilian personnel tasked with performing all heavy maintenance activities at the base. For example, the Army's Engine Repair Department operated in the northwest corner of Hangar 1. Army personnel recalled under oath that solvents were used to clean aircraft engines and that used solvents were disposed on the ground. Personnel assigned to the Engine Repair Department had ready access to the area of contamination in the northwest corner of the hangar through the main hangar door. Because of the B-29's high priority during WWII (only the Manhattan Project carried a higher priority) and HAAF's critical role in processing the aircraft for service, HAAF received everything it needed to expeditiously move aircraft through final inspections and into the various war theaters. TCE was then, and remains today, one of the most effective solvents for heavy maintenance degreasing activities. Given the requirement to use "cleaning solvent" in the Engine Repair Department, and its location adjacent to the highest levels of contamination disposed of on the ground immediately north of Hangar, the Army's use of TCE remains the only explanation for the contamination found and required to be excavated at the TCPA.
- Army personnel washed aircraft in and around Hangar 1. HAAF unit histories indicate high-pressure spray machines were located outside of the hangars and that the airplanes, especially the engines, were washed prior to inspection. Army personnel recalled the use of the spray gun apparatuses that used compressed air to

draw solvent from buckets or drums and sprayed the solvent, without dilution, onto the aircraft. Army personnel also recalled 55-gallon drums of solvent being stored and used immediately outside the hangars. Drums were not marked with manufacturers' names or trademarks, but merely painted olive drab with silver numbers and letters.

- The Army's carbon tetrachloride fire extinguishers contained TCE. The Army had approximately 1,200 extinguishers at the site, which were manually checked and refilled on a periodic basis. Army personnel stationed at HAAF during WWII recalled under oath that WWII HAAF personnel used the fluid from these fire extinguishers for cleaning purposes, even for cleaning their individual overalls and uniforms.

The widespread pattern of TCE contamination in the removal area is consistent with the Army's operations in that area. Army personnel recalled the pervasive practice of disposing of used solvents from buckets onto the ground. The Army's focus remained entirely on winning WWII by processing aircraft for service, not on environmental awareness. No reasonable, rational fact finder could conclude that Army personnel would **not** have disposed of used spark plug cleaning and maintenance TCE on the ground between Hangar 1 and the Spark Plug Cleaning Building. The flow of waste solvents from the Army's washing activities was, in the Army's vernacular, "apron dumped", *i.e.*, a portion of the waste solvents moved through the concrete into the soils below and the remainder flowed to the edge of the concrete tarmac where it soaked into the adjacent soils. Yet EPA ordered RAC to shore up Hangar 1 on the north side, then begin excavating soils to the north and northwest, including the foundation of the spark plug

cleaning building, a structure that had been razed before Beech leased Hangar 1 in December 1950, and the soils beyond.

3. RAC Is Entitled To Reimbursement.

RAC presented all facts discussed herein to EPA prior to and again following the issuance of the UAO. In spite of the evidence laid out before it, EPA, like the Army, an Executive Branch, chose to issue the UAO rather than bring in the Army or file a civil action in this matter. By so doing EPA creatively transferred the cost of waging WWII from its own Executive Branch onto a private company without any independent review of the facts.

Beech did not use TCE in the Removal Area. EPA has never shown that Beech used TCE in the Removal Area beyond unsupported allegations. To date no evidence has been revealed that suggests Beech or any other subsequent tenant at Hangar 1, Welch Manufacturing (1961 - 1984), Military Aircraft Restoration Corporation (1987 - 1993), Insulfoam (1993 – approximately 2000) conducted operations in the area of contamination that would have generated the type of frenetic, all-encompassing, and urgent activity as the Army's B-29 processing in the exact location.

Based on a preponderance of the evidence, it is clear that RAC:

- Is not the current owner or operator of the Removal Area;
- Did not own or operate the TCPA at the time TCE was disposed in the Removal Area;
- Did not arrange for disposal of TCE in the Removal Area; and
- Did not transport TCE to the Removal Area for disposal.

Therefore, EPA must reimburse for all of RAC's costs because RAC is not liable for any of response costs of the removal action under section 107(a) of CERCLA. *See* 42 U.S.C. §

9606(b)(2)(C). On the contrary, EPA's own Executive Branch is liable for the costs of cleaning up the Removal Area.

Even if one assumed, *arguendo,* that RAC could be held liable for the release of any hazardous substance at the TCPA, RAC still cannot be liable for the removal of the COCs within the Removal Area. Although courts have interpreted CERCLA to impose joint and several liability, such liability has been limited to a party's share at multiple party sites where the harm caused by each party is divisible. *United States v. Alcan Alum. Corp.*, 990 F.2d 711, 721 (2nd Cir. 1993); *U.S. v. Hercules, Inc.*, 247 F.3d 706, 717 (8th 2001) (Court held that divisibility doctrine is "compatible with the text and the overall statutory scheme of CERCLA and a sensible way to avoid imposing on parties excessive liability for harm that is not fairly attributable to them."). Thus, if multiple parties "cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused." *Alcan*, 990 F.2d at 268 (quoting Restatement (Second) of Torts § 881).

RAC is entitled to have discrete harms apportioned respectively between the parties. The scope of the UAO only addressed harms caused by the Army. No harm from Beech's vapor degreaser, remotely located in Hangar 1, has ever been identified. RAC is not liable, therefore, for the response costs associated with the UAO and the United States is obligated to reimburse RAC for the costs plus interest that RAC incurred complying with the UAO.

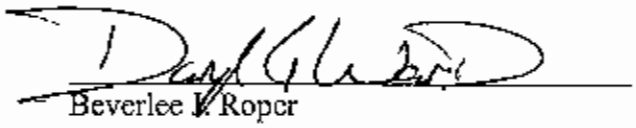
VI. Conclusion

RAC is entitled to full reimbursement from the United States for all costs incurred complying with the UAO because RAC is not liable for the contamination removed pursuant to

the UAO. RAC respectfully requests that EPA, through this Appeals Board, redress this wrong and order reimbursement.

Date: January 3, 2006

Respectfully submitted,



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