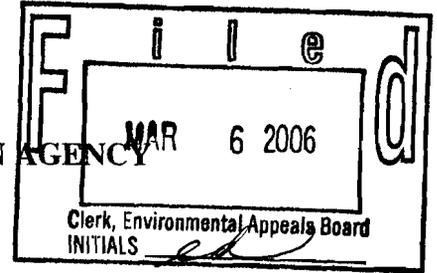


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**ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**



In the Matter of:

Tri-County Public Airport Site,  
Raytheon Aircraft Company, Petitioner

CERCLA § 106(b) Petition No. 06-01

**ORDER TO PRODUCE ADMINISTRATIVE RECORD INDEX AND SETTING FORTH  
BRIEFING SCHEDULE**

On January 9, 2006, the Raytheon Aircraft Company ("RAC") filed a petition ("Petition") seeking reimbursement of costs (plus interest) incurred in complying with the terms of the Unilateral Administrative Order for Removal Response Activities, Docket # CERCLA-07-2004-0311, (the "UAO") issued by U.S. Environmental Protection Agency Region 7 (the "Region") on September 30, 2004, regarding the Tri-County Public Airport Site, located in Morris County, Kansas. Consistent with the Environmental Appeals Board's (the "Board's") practice and in accordance with the Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions (November 10, 2004) ("EAB CERCLA Guidance"), the Clerk of the Board sent a letter to the Region on January 12, 2006, notifying the Region that if its response to the Petition were to challenge RAC's eligibility to seek reimbursement without regard to the merits of the reimbursement claim, such response would be due on or before February 13, 2006. *See* EAB CERCLA Guidance Part IV.A.1. It further notified the Region that if its response were to address the merits of the reimbursement claim, such response would be due on March 13, 2006. *See id.* Part IV.A.2. It additionally requested that the Region include with its response a certified index ("Certified Index") to the administrative record that was compiled in connection with the issuance of the underlying CERCLA section 106(a) order. According to the EAB CERCLA Guidance, the Certified Index should accompany the Region's first response to the

EAB. *See id.* Part IV.A.3. On February 9, 2006, the Region filed a Motion to Dismiss the Petition of RAC (“Motion to Dismiss”) on the grounds that the Petition had been filed prematurely. This Motion to Dismiss did not include a Certified Index. On February 16, 2006, the Board issued an Order to Show Cause Why Petition for Reimbursement Should Not Be Dismissed As Premature (“Order to Show Cause”), directing RAC to file an appropriate brief or pleading on or before March 6, 2006, showing cause why its Petition should not be dismissed, without prejudice, as premature. On March 1, 2006, the Region filed a motion for clarification requesting the Board to clarify the deadline for filing a response brief on the merits of the Petition (“Motion for Clarification”). On March 2, 2006, RAC filed a Motion to Produce a Certified Administrative Record Index (“Motion to Produce Index”), requesting the Board to order the Region to produce the Certified Index, and stating that RAC needs the index to respond to the Board’s Order to Show Cause.

This Order addresses both RAC’s Motion to Produce Index and the Region’s Motion for Clarification.

First, as noted above, the EAB CERCLA Guidance provides that “[t]he Region’s first response to the EAB (either addressing one or more statutory prerequisites for reimbursement or the merits of the petitioner’s claims) must be accompanied by a certified index to the administrative record that the Region compiled in connection with the issuance of the underlying CERCLA § 106 order.” EAB CERCLA Guidance Part IV.A.3. This requirement also was mentioned in the January 12, 2006 letter from the Clerk of the Board to the Region. Therefore, the Region was required to submit the Certified Index along with its Motion to Dismiss.<sup>1</sup> Accordingly, RAC’s Motion to Produce Index is hereby granted and the Region is

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<sup>1</sup> RAC’s Motion to Produce Index alleges on page 2 that “[t]he Assistant Regional Counsel represented that \* \* \* the Board’s staff told the Assistant Regional Counsel that the  
(continued...)

ordered to produce the Certified Index on or before March 16, 2006. In the interest of fairness, and to allow RAC the opportunity to review this index, the deadline by which RAC is required to file a brief or pleading showing cause why the Petition should not be dismissed is hereby extended to March 30, 2006. In the event that RAC files such a brief or pleading with the Board before its receipt of this Order, RAC hereby is permitted until March 30, 2006, to amend its brief or pleading.

Second, the EAB CERCLA Guidance provides instruction as to when the Region should file a response brief on the merits of a petition in a circumstance in which it has previously filed a motion to dismiss the petition for failure to meet one of the statutory prerequisites. It states that “the EAB may rule on any or all of the prerequisite issues [raised in the motion to dismiss] or may defer ruling on them until the merits have also been briefed (*pursuant to a further order of the EAB*).” EAB CERCLA Guidance Part IV.A.1. (emphasis added). It further clarifies that “[i]f the Region does not contend that one or more of the statutory prerequisites \* \* \* have not been met, the Region must submit a response addressing the merits \* \* \* within sixty days after the date of the EAB’s letter.” *Id.* Part IV.A.2. Thus, the 60-day deadline for a response on the merits applies only when a motion to dismiss addressing the statutory prerequisites has not been filed. When such a motion to dismiss has been filed, the Region is instructed that briefing on the merits should take place pursuant to a further Board order issued in conjunction with the Board’s resolution of the Region’s Motion

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<sup>1</sup>(...continued)

Board had waived this requirement [to produce the Certified Index].” The Board is not aware of any such conversation.

to Dismiss. Accordingly, the schedule for such briefing will be set forth in a future Board order, and therefore a response on the merits from the Region is not due on March 13, 2006, as the Region apparently inferred from the letter from the Clerk of the Board.

So ordered.

Dated: March 6, 2006

ENVIRONMENTAL APPEALS BOARD

By: Scott C. Fulton  
Scott C. Fulton  
Environmental Appeals Judge

## CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order to Produce Administrative Record Index and Setting Forth Briefing Schedule, in the matter of Tri-County Public Airport Site, Raytheon Aircraft Company, Petitioner, CERCLA § 106(b) Petition No. 06-01, were sent to the following persons in the manner indicated:

By First Class Mail  
Postage Prepaid and  
Facsimile:

Beverlee J. Roper  
Daryl G. Ward  
Blackwell Sanders Peper Martin, LLP  
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Kansas City, Missouri 64112  
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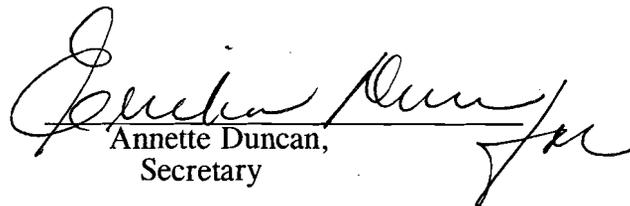
By Pouch Mail and:  
Facsimile:

J. Scott Pemberton  
Senior Assistant Regional Counsel  
Office of Regional Counsel  
U.S. EPA, Region 7  
901 North 5th Street  
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By Inter-Office Mail and  
Facsimile:

Tracy L. Sheppard  
Attorney-Advisor  
Office of Site Remediation Enforcement  
U.S. EPA  
1200 Pennsylvania Ave., NW  
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fax: (202) 564-0086

Dated: 3/6/06

  
Annette Duncan,  
Secretary