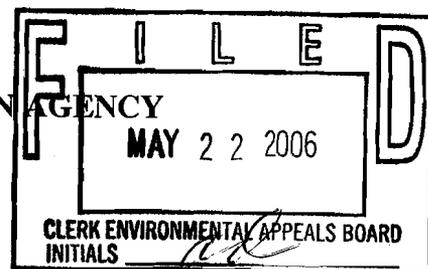


ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



In the Matter of:

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

CERCLA § 106(b) Petition No. 06-01

**ORDER GRANTING REGION'S MOTION FOR LEAVE TO REPLY TO RAC'S  
RESPONSE AND DIRECTING REGION TO FILE STATUS REPORT**

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 (the "Site"). On February 9, 2006, the Region filed a Motion to Dismiss the Petition of RAC ("Motion to Dismiss") on the grounds that RAC had filed the Petition prematurely.<sup>1</sup> 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"). On March 6, 2006, RAC filed a Response to the Board's Order to Show Cause Why Petition for Reimbursement Should Not Be Dismissed As Premature ("Response").

<sup>1</sup> Pursuant to the Board's Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions (November 10, 2004) (the "EAB CERCLA Guidance"), the Region was required as part of its initial filing to submit a certified index to the administrative record that was developed in conjunction with the Region's CERCLA section 106(a) order in this matter. Pursuant to a subsequent order by the Board, the Region filed its certified index on March 13, 2006. Believing that the administrative record was inadequate based on the Region's index, RAC filed a Motion to Supplement the Administrative Record on March 30, 2006. Because the question of the adequacy of the record will become germane only upon a determination by the Board that RAC's Petition is, in fact, ripe for consideration at this juncture, the Board defers consideration of the question of the adequacy of the administrative record. If RAC's Petition survives the Region's Motion to Dismiss, the Board will address RAC's Motion to Supplement the Administrative Record.

On April 14, 2006, the Region filed a Motion For Leave To Reply To the Response (“Motion For Leave”). At the same time the Region filed a Reply To the Response (“Reply Brief”) and a Declaration of J. Scott Pemberton. The Motion for Leave explains the delay in seeking leave to reply by stating that although the certificate of service indicates that RAC served its Response on March 6, 2006, it was not received by the Region and was first discovered on the Board’s website on April 10, 2006. The attached Declaration supports this statement. The Motion for Leave states that the Region “believes that the [Board’s] precedents were not fully discussed by Petitioner and seeks leave to augment the legal argument for dismissing the petition for reimbursement as premature.” Motion for Leave at 1.

The EAB CERCLA Guidance does not specifically address the filing of reply briefs when, as in the present case, a motion to dismiss a petition for reimbursement is before the Board. The Guidance states only that the petitioner must have an opportunity to respond before the Board may rule on the motion to dismiss. *See* EAB CERCLA Guidance at 7. Nonetheless, the Guidance generally recognizes the Board’s discretion to allow “[b]riefs other than those expressly required or invited by the [Board to be] submitted \* \* \* with leave of the [Board].” *Id.* at 8. Because the Board believes that the Region’s Reply Brief will assist the Board in its deliberations regarding the Motion to Dismiss, the Board hereby grants the Region’s Motion for Leave and, accordingly, accepts its Reply Brief for filing.

The Board observes that, at this juncture, the Region’s sole argument in its Motion to Dismiss is that RAC’s Petition is premature because the Region has not yet provided a written notice of completion to RAC.<sup>2</sup> The Region argues that a notice of completion is a condition

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<sup>2</sup> CERCLA section 106(b)(2)(A) states that petitions for reimbursement must be filed within 60 days of “completion of the required action.” 42 U.S.C. § 9606(a)(2)(A).

precedent to RAC's reimbursement claim under CERCLA §106(b). RAC, in its Response, protests that the Region "has an unlimited time period within which to file its notice of completion. 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 [the Region] unfettered discretion to control the timing of RAC's position." Response at 3. RAC filed its Petition on January 9, 2006, and alleges that it completed the required action on November 4, 2005, when it submitted its Removal Action Report. Petition at 2. In light of RAC's argument and the amount of time that has passed since RAC submitted its Removal Action Report, the Board hereby directs the Region to file a status report with the Board explaining the status of its review of RAC's Removal Action Report and providing an estimate of when it anticipates notifying RAC that it has approved or disapproved its Report. The Region's status report shall be filed by June 5, 2006.

So ordered.

Dated: May 22, 2006

ENVIRONMENTAL APPEALS BOARD

By:   
Scott C. Fulton  
Environmental Appeals Judge

## CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Granting Region's Motion for Leave To Reply To RAC's Response and To Directing Region To File Status Report, 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:

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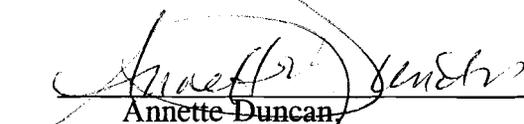
By Pouch Mail and:  
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Dated: MAY 22 2006

  
Annette Duncan  
Secretary