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ENVIR. APPEALS BOARD
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November 3, 2006

VIA COURIER

Ms. 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 the original and five copies of Raytheon Aircraft Company's Response to the EPA's Motion to Stay Proceedings in the above-referenced matter.

A sixth copy of the Response is also enclosed. Please stamp the sixth copy and return it in the self-addressed stamped envelope enclosed.

Sincerely,



Daryl G. Ward 

DGW/jm
Enclosures

KC-1444055-1

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AFFILIATES: LEEDS • MANCHESTER
MEMBER OF THE WORLD SERVICES GROUP

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

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ENVIR. APPEALS BOARD

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 ENVIRONMENTAL PROTECTION AGENCY'S MOTION TO STAY PROCEEDINGS

Petitioner, Raytheon Aircraft Company ("RAC"), hereby submits its response to the Environmental Protection Agency, Region VII's ("EPA's") motion to stay RAC's Petition for Reimbursement ("Petition") filed with the Environmental Appeal Board ("Board") pursuant to § 106 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

I. BACKGROUND

From 1997, RAC cooperated with EPA and the Kansas Department of Health and Environment ("KDHE") in their efforts to address trichloroethylene (TCE) contamination at the Tri-County Public Airport (the "TCPA" or "Site"). In March 2000, RAC agreed to provide whole house water treatment systems for impacted residences until a permanent waterline was installed. Later that year, RAC also agreed to conduct a Remedial Investigation/Feasibility Study ("RI/FS"). As a result of conducting the RI/FS and performing additional historical research, RAC learned that the operations of its predecessor, Beach Aircraft Company, could not have caused the contamination at the Site, including but not limited to the contamination north and northwest of Hangar 1. Instead, the evidence compels the conclusion that the contamination

was caused by the United States Army Air Force's ("Army's") operations at the Site during World War II.

RAC shared this evidence with EPA. However, because EPA cannot coerce the Army to truthfully respond to a CERCLA § 104(e) information request, let alone to undertake a response action, on September 30, 2004, EPA issued a Unilateral Administrative Order ("UAO") to RAC requiring a multi-million dollar excavation at "Hangar 1". With threats of civil penalties and treble damages, EPA forced RAC to comply.

RAC filed suit against the United States in July 2005 to challenge the constitutionality of the UAO and to recover all costs it incurred addressing the Army's contamination at the Site. In May 2006, the Court, *inter alia*, dismissed RAC's as-applied constitutional challenge without prejudice, holding that none of the jurisdictional triggers enumerated by CERCLA § 113(h), including an action for reimbursement pursuant to CERCLA § 106, had yet occurred.¹

In January 2006, RAC filed its Petition for Reimbursement with the Board to recover costs it incurred excavating the Army's contamination from the Hangar 1 area. After significant delay and foot-dragging by EPA regarding the approval of RAC's Removal Action Report, the Board is finally in a position to make a substantive ruling on RAC's Petition.

II. GRANTING EPA'S MOTION WOULD BE INAPPROPRIATE

There are two acceptable outcomes to this proceeding. First, if the Board concludes that RAC did not cause the contamination in the Hangar 1 area, EPA will reimburse RAC for its UAO costs plus interest. That outcome would correct EPA's violation of RAC's constitutional rights and RAC would no longer be able to complain about the administrative reimbursement process under CERCLA § 106 because the process to rectify EPA misjudgments would have

¹ As noted by EPA, the Court also gave RAC an opportunity to bring a CERCLA §107 cost recovery action if RAC would amend its Complaint to assert that it was not a potential responsible party ("PRP"). Such an amendment was not necessary given the Court's recognition of RAC's right to bring a contribution against the United States.

worked. Second, should the Board determine that RAC is liable for at least a portion of the contamination in the Hangar 1 area, RAC would no longer be barred by CERCLA §113(h) from filing an action in federal court to challenge the constitutionality of the UAO and the Board's determination.

Practically speaking, proceeding with a substantive decision by the Board will not conflict with the Court's future holdings in RAC's civil action against the United States. If the Board grants RAC's Petition, RAC's UAO costs will be excluded from RAC's contribution claim against the United States. If the Board denies RAC's petition, that denial will only reflect the Board's determination that RAC is liable for contamination in the Hangar 1 area. RAC's contribution claim against the United States does not involve a determination of whether RAC is liable under CERCLA. Rather, the Court's task is to allocate the cost of remediating the entire site, including but not limited to the Hangar 1 area, between the United States and RAC.

EPA's previous delays and its Motion to Stay Proceedings are an attempt to preclude the Board from hearing the merits of the Petition and to preclude the Court from hearing RAC's constitutional challenge to the UAO scheme. In this instance, granting a Stay would effectively deny RAC any opportunity for a fair hearing on its constitutional complaints regarding the UAO scheme. Because of the conflict within the United States at sites where the United States itself is a PRP, a private person like RAC necessarily becomes trapped in a Catch-22. Basic fairness and equity dictate the Board's next move: promptly act on RAC's petition. Only if the Board stays these proceedings will justice be denied.

Date: November 3, 2006

Respectfully submitted,

A handwritten signature in black ink that reads "Daryl G. Ward". The signature is written in a cursive style and is positioned above a horizontal line.

Beverlee J. Roper

nr

Daryl G. Ward

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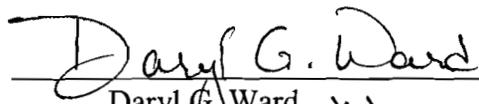
Facsimile: (816) 983-8080

Attorneys for Petitioner Raytheon Aircraft Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via first class US mail, return receipt requested, this 3rd day of November, 2006 to:

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



Daryl G. Ward *mw*