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

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In the Matter of: :

Tri-County Public Airport Site, : CERCLA Section

: 106 (b)

Raytheon Aircraft Company, : Petition No. 06-01

Petitioner :

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Washington, D.C.

January 17, 2007

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1 The above-entitled matter came on for hearing at the
2 Administrative Courtroom, U.S. Environmental
3 Protection Agency, EPA East Building, 1201
4 Constitution Avenue, NW, Room 1152, Washington, D.C.
5 on Wednesday, January 17, 2007, at 10:30 a.m.

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7 Before: HON. SCOTT T. FULTON,
8 Environmental Appeals Judge

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10 Also present: Eurika Durr, Clerk

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1 Appearances:

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P R O C E E D I N G S

(Announcement by the Clerk.)

JUDGE FULTON: Good morning. This morning we will be hearing argument on Region 7's motion to stay in this matter. The argument will proceed in accordance with the Board's order of November 30, 2006. Each side will have 20 minutes for argument. The Region is the moving party, will proceed first, and may reserve time for rebuttal if you wish.

Now before we proceed, could each party state for the record their name and the party that they represent?

MR. PEMBERTON: My name is Scott Pemberton. I'm in the Office of Regional Counsel with EPA, Region 7, representing EPA's interest.

JUDGE FULTON: Will anyone else be presenting for the Region this morning? Or just you.

MR. PEMBERTON: Just me.

JUDGE FULTON: Okay, thank you.

MS. ROPER: Good morning. Beverlee Roper for Raytheon Aircraft Company, along with Molly Brown from Raytheon Company.

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1 JUDGE FULTON: Very well. Welcome.

2 Did you bring the cold weather with you?

3 MS. ROPER: We did. (Laughing)

4 JUDGE FULTON: I was out in Southeast
5 Missouri, which is where my parents live, around the
6 holiday time; and it seemed to be pretty balmy there
7 then.

8 MS. ROPER: It was like Florida during the
9 holiday. Not last night and not the night before.

10 JUDGE FULTON: Well, welcome to Washington
11 to both of you.

12 So I guess without further ado, we'll
13 start with the Region. I of course have a number of
14 questions for each of you; I think my inclination is
15 to hold my questions except for clarifying questions
16 during the course of your arguments; but you should
17 expect that I'll probably have a little litany of
18 things to work through with you when you're finished
19 with your affirmative presentation.

20 And Mr. Pemberton, will you be asking for
21 time for rebuttal?

22 MR. PEMBERTON: Yes. Of our allotted

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1 time, we'd like to reserve five minutes, if rebuttal
2 is necessary, and I don't know if it would be.

3 JUDGE FULTON: Okay, very good. Please
4 proceed.

5 MR. PEMBERTON: May it please the Board.
6 In July 2005, Raytheon filed a lawsuit in Federal
7 District Court seeking cost recovery or contribution
8 from the United States Army as a liable party.
9 Raytheon also sought a declaratory judgment that the
10 provisions of CERCLA governing the Unilateral
11 Administrative Order regime are unconstitutional
12 under the due process clause of the Fifth Amendment.

13 On November 17, 2005, the United States
14 filed a motion to dismiss, or in the alternative, for
15 summary judgement in that case. In response to the
16 United States' motion, the District Court issued a
17 memorandum and order on May 26, 2006.

18 As a result of the Court's memorandum and
19 order, Raytheon only has contribution claims
20 remaining against the United States; an implied
21 Section 107(a) claim for its UAO cost, and a Section
22 113(h) contribution claim for the cost Raytheon has

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1 incurred under two AOCs.

2 JUDGE FULTON: Were there originally
3 contribution claims running against other parties?

4 MR. PEMBERTON: I do not believe so. It
5 is only --

6 JUDGE FULTON: The litigation has always
7 been limited to --

8 MR. PEMBERTON: The United States.
9 Particularly the Department of Defense, the Army,
10 Army Corps of Engineers.

11 JUDGE FULTON: Why the Corps of Engineers?

12 MR. PEMBERTON: They have been designated
13 to represent the Army in litigation matters.

14 JUDGE FULTON: Okay.

15 MR. PEMBERTON: In January 2006, Raytheon
16 filed a reimbursement petition with the Board to
17 recover the cost it incurred in complying with the
18 UAO. In the reimbursement petition proceeding,
19 Raytheon must show that it is not liable. Because
20 Beech Aircraft, which was purchased by Raytheon in
21 1980, operated a TCE degreaser near the UAO removal
22 area, Raytheon seeks to prove its nonliability by

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1 circumstantially establishing the Army used and
2 disposed of the TCE in the UAO removal area.

3 The EPA does not have direct evidence that
4 the Army used TCE in degreasers at the site during
5 World War II, and the Army is not part of this
6 proceeding.

7 Because of the unique fact pattern of this
8 case, and Raytheon's attempt to prove its
9 nonliability by proving the Army is the liable party
10 for the UAO cost, it is our view that the District
11 Court is a better venue for deciding liability
12 issues.

13 Raytheon is seeking to recover its cost of
14 complying with the UAO before both the Board and the
15 District Court. The issue of Raytheon's liability is
16 a common issue before each forum.

17 In the District Court, the United States
18 expects to prove Raytheon liable, that Raytheon's
19 share of liability is very large, if not 100 percent;
20 and that Raytheon should get little or no
21 contribution from the United States.

22 The District Court will need to resolve

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1 the issue of Raytheon's liability in addressing the
2 contribution plans. The EPA has approximately
3 \$2.4 million in unreimbursed response costs, and
4 intends to ask DOJ to file a counterclaim in the
5 District Court action to recover those costs.

6 The concept of judicial economy applies in
7 this matter.

8 JUDGE FULTON: Excuse me, can you repeat
9 that about the counterclaim? What's the value of the
10 counterclaim.

11 MR. PEMBERTON: We have estimated we have
12 approximately \$2.4 million in unreimbursed response
13 costs that are outstanding, and these costs cover all
14 the work that EPA has done at the site from somewhere
15 around 1997 to the present. But that excludes the
16 cost we've incurred in the reimbursement petition,
17 and it also excludes the cost we've incurred in the
18 current litigation in District Court. So there may
19 be other costs.

20 JUDGE FULTON: Okay. Actually, Mr.
21 Pemberton, it would be useful for me if you could
22 talk a little bit about the history of response at

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1 the site. It would be helpful for me to understand
2 better how the Unilateral Administrative Order that's
3 at issue here relates to the broader remedial action
4 at the site.

5 Could you just review briefly kind of the
6 sequencing of response at the site?

7 MR. PEMBERTON: I can. Probably early on
8 -- I was assigned to this site about two or three
9 years ago -- but early on, EPA -- and I'm not sure
10 exactly through which avenue, found that there was
11 contamination in the ground water at the site. This
12 might have been a result of the Army doing some work
13 at the site; I'm not real clear on that.

14 We became aware that there was TCE
15 contamination in the groundwater at the site, and
16 that it covered approximately seven square miles;
17 it's my understanding that it's that large.

18 EPA then went through several evaluations,
19 and did some more investigations of the site, and
20 discovered that a number of the rural residents that
21 lived in the area -- this is in a rural area -- had
22 contaminated groundwater. At that time I think EPA

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1 decided to supply bottled water to these individuals.

2 After that, EPA entered into negotiations
3 with Raytheon, in one of the AOCs that I mentioned,
4 to provide a water treatment system for their houses
5 to treat the water; and Raytheon did those, did enter
6 into that AOC, and did provide that filtration system
7 to those parties.

8 Subsequent to that, the City of
9 Harrington, which actually owns the site, the airport
10 site, applied for and received -- well, they applied
11 and received a grant to build a water system, piping;
12 water system to these residents that live in that
13 rural area. And that recently, within the last six
14 months I believe, has been completed, and I think
15 Raytheon is getting ready to remove the treatment
16 systems from those houses, and they will have
17 completed work under that particular order.

18 Also around that time, Raytheon entered
19 into an order, administrative order with the Kansas
20 Department of Natural Resources to conduct an RIFS,
21 with the aim of it eventually that we were going to
22 have to select a remedial action to address the

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1 contaminated groundwater.

2 By the way, the site was proposed for the
3 NPL, and it has not been finalized on the NPL; it is
4 currently still proposed in the proposed status for
5 the NPL.

6 Currently Raytheon is conducting the RIFS,
7 although I am not quite certain where in the process
8 the company is with the RIFS; because this again is
9 under state oversight.

10 JUDGE FULTON: Again, the focus of the
11 RIFS is groundwater remediation?

12 MR. PEMBERTON: It would focus on
13 groundwater remediation, it would focus on
14 determining source areas of contamination, so if
15 there are source areas, that they can be removed.
16 They would probably focus also on any institutional
17 controls that may be necessary for the site in the
18 future, if that is part of the decision.

19 JUDGE FULTON: The Kansas administrative
20 order on consent, that was premised on state law?

21 MR. PEMBERTON: Yes.

22 JUDGE FULTON: So those are the two pieces

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1 that precede the one that is before us?

2 MR. PEMBERTON: That is correct.

3 JUDGE FULTON: Okay.

4 MR. PEMBERTON: The Unilateral Order;
5 early on the State of Kansas requested that EPA
6 conduct a removal at a known source area at the site;
7 and that is the area near Hangar One. That was
8 contributing to the contamination of the groundwater.
9 This happens a lot of time where EPA, before remedial
10 actions are selected, that if there are known source
11 areas, that we seek to remove those areas to keep
12 from contributing to the contamination in the
13 groundwater.

14 Originally, Kansas discussed with Raytheon
15 about implementing a removal in that area. They were
16 not able to reach an agreement with Raytheon; and
17 then the State requested that EPA do the EECA, which
18 is the Environmental Engineering Cost Analysis, which
19 is similar to an RIFS in the remedial realm; but
20 that's for the removal part; that we do that and
21 either request Raytheon to implement the action
22 selected in the EECA or conduct the action ourselves.

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1 And I'm not sure of the timing; the United
2 States did the EECA, and then we requested Raytheon
3 to implement the decision under an order. Raytheon
4 originally responded favorably to consider
5 negotiating with this on the order, but subsequently
6 said that they could not enter into an order as long
7 as the Department of Defense was not part of that
8 order and doing the work along with Raytheon.

9 So Raytheon declined to enter into the
10 consent agreement. Thereafter the United States,
11 EPA, issued the UAO to Raytheon in September of 2004.
12 And Raytheon complied with the order, and all the
13 work currently is completed under that particular
14 order.

15 In the decision regarding whether the stay
16 should be issued in this particular matter, we feel
17 that the concept of judicial economy applies here.
18 Extensive discovery is currently ongoing in the
19 District Court litigation. In fact, the trial for
20 the District Court is currently scheduled for October
21 2nd of this year.

22 JUDGE FULTON: What's the discovery

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1 schedule?

2 MR. PEMBERTON: I would like to answer
3 that, my best guess, I think the original discovery
4 schedule was that discovery was supposed to be
5 completed by the end of November of 2006; but there
6 are still depositions going on, I think. I'm not
7 real familiar with what the current status is, but I
8 believe the parties were exchanging, very soon if not
9 already, their privileged logs for privileged
10 information. I don't know if there are outstanding
11 issues yet to be resolved concerning the discovery,
12 though.

13 JUDGE FULTON: The Justice Department is
14 handling that litigation?

15 MR. PEMBERTON: Yes, Your Honor.

16 JUDGE FULTON: I'll check in with Ms.
17 Roper about that. She may have some thoughts about
18 where that stands.

19 MR. PEMBERTON: Thank you.

20 Currently in the discovery, the United
21 States is conducting discovery of Raytheon concerning
22 Raytheon's liability, and Raytheon is currently

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1 conducting discovery in an attempt to prove that the
2 Army is liable for the site contamination.

3 It would be duplicative and wasteful to
4 litigate Raytheon's liability simultaneously in both
5 forums. We therefore before that the Board should
6 stay the reimbursement proceeding until the Court's
7 address Raytheon's liability.

8 If the Courts do not resolve Raytheon's
9 liability, the stay can be lifted and the petition
10 for reimbursement can proceed. Granting the stay
11 does not prejudice Raytheon's ability recover its UAO
12 cost on the ground that either Raytheon is not
13 liable, or the U.S. is liable, or both. In the Board
14 proceeding, Raytheon is earning interest on its
15 legitimate UAO cost, if it's ultimately determined
16 Raytheon is not liable.

17 If the court proceeding determines
18 Raytheon is not liable, the stay can be lifted and a
19 hearing can be held solely on the legitimacy of
20 Raytheon's cost and the amount of interest due. If
21 the court proceeding determines Raytheon is liable to
22 any degree for the contamination address by the UAO,

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1 the reimbursement petition will become moot.

2 JUDGE FULTON: Let me stop you there. If
3 the Court determines that Raytheon is not liable with
4 respect to this area in Hangar One, will the Court
5 then not award to Raytheon contribution from the Army
6 at that point? Or is it the United States' view that
7 a nonliable party is not eligible for contribution
8 recovery under this implied theory of contribution
9 under Section 107(a)?

10 MR. PEMBERTON: I believe -- it is EPA's
11 position -- I'm not sure about the United States --
12 but it is EPA's position that this implied liability
13 decision that was reached by the Court is not
14 correct. However, that is the law in this particular
15 case.

16 We believe -- we don't know if the Court
17 would award Raytheon its cost if it's determined that
18 Raytheon is not liable. Assuming that they do, we're
19 not sure if the Court would also award the interest
20 that Raytheon would be due under the reimbursement
21 petition.

22 But in either case, if the Court fails to

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1 do either one or both of those, they could bring back
2 and we could lift the stay on the reimbursement
3 petition to settle those issues.

4 JUDGE FULTON: It's theoretically possible
5 if the Court sort of follows through its implied
6 contribution view that if Raytheon establishes that
7 the contamination in this area was entirely the
8 Army's doing, they may get their award from the
9 District Court, which would obviate this proceeding.

10 MR. PEMBERTON: That would make the most
11 sense.

12 JUDGE FULTON: As a matter of policy, if
13 you have a party that is not a liable party, is it
14 not more appropriate in some ways that they work
15 their way through the reimbursement process rather
16 than having to maintain an action in District Court
17 as though they were a liable party?

18 MR. PEMBERTON: Generally speaking, yes.
19 However, Raytheon initiated the District Court action
20 to recover its cost; initiated in July 2005, six
21 months; well before they filed their reimbursement
22 petition.

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1 Since they just started that process, and
2 they do have the claims -- we feel, and because the
3 issues of liability are central to each proceeding,
4 and because the discovery has gone on so far in that
5 proceeding, we feel that the District Court is a
6 better venue to decide the liability issues.

7 JUDGE FULTON: Will the Region be
8 prejudiced in any way, apart from litigation
9 expenses, if the Board were to deny the stay request
10 here, and proceed to have this litigation go forward?

11 MR. PEMBERTON: I do not -- I really don't
12 have an answer as to whether we'd be prejudiced or
13 not. If the Board were to reach a decision that
14 Raytheon was not liable, we're not sure of the effect
15 that would have on the District Court action.
16 Because liability is still an issue in that
17 particular action, we're not sure what would happen
18 in that particular case; whether the Department of
19 Justice would give full faith and credit to the Board
20 decision, where they have to -- we're not sure.
21 These are issues that have not come up before. So my
22 answer is we're not sure if we would be prejudiced or

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1 not.

2 JUDGE FULTON: Okay.

3 Did you have anything you wanted to share
4 as part of your affirmative statement?

5 MR. PEMBERTON: I would like to address
6 the as-applied constitutional challenge, if I may.

7 In its response to EPA's motion to stay,
8 Raytheon seems to argue that the District Court will
9 have jurisdiction to hear its as-applied
10 constitutional challenge when and only when the Board
11 denies its reimbursement petition.

12 Raytheon apparently bases this argument on
13 the District Court's finding in its memorandum and
14 order, dismissing Count 5 of the Complaint, where the
15 Court stated: Because cleanup at the Tri-County
16 Public Airport is not complete, there is no basis for
17 jurisdiction for Count 5 under Section 113(h)(1).

18 However, the Court also noted that
19 Raytheon admits that there may be other UAOs
20 forthcoming. There's no indication the Court would
21 consider the as-applied constitutional challenge
22 regardless of what the Board decides with respect to

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1 Raytheon's liability for the subject UAO.

2 Raytheon's argument is based on the
3 assumption that the District Court will have
4 jurisdiction to decide whether EPA's issuance of the
5 UAO violated due process -- the as-applied challenge
6 -- when and only when the Board denies its petition
7 and Raytheon seeks reimbursement from the District
8 Court.

9 Raytheon has not supported this
10 jurisdictional argument, and the United States may
11 not concede that it is correct.

12 JUDGE FULTON: But if, in the wake of --
13 assuming for purposes of argument -- if the Board
14 ruled adversely to Raytheon on their petition, that
15 would then open the door for Raytheon to file an
16 action in District Court under 106(b), right? And
17 would that then not serve as a possible vehicle for
18 raising their constitutional concern?

19 MR. PEMBERTON: They may well attempt to
20 try to raise that concern; I can't say that the
21 United States would not oppose that --

22 JUDGE FULTON: Well, I'm sure the United

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1 States would oppose it. But what I hear Raytheon
2 saying is that the only sure path to getting a
3 constitutional issue ventilated in the courts is
4 through 106(b), in the wake of the Court's decision
5 here; and viewed from that vantage point, they would
6 need to get through this process in order to be able
7 to pursue that.

8 MR. PEMBERTON: The Court's decision did
9 not say that they have to complete the reimbursement
10 petition procedure, I don't believe.

11 JUDGE FULTON: I don't think the Court
12 addressed it.

13 MR. PEMBERTON: They did not address it,
14 that is correct. They only referenced the fact that
15 the work was not done, which soon after that we
16 issued the notice of completion, we accepted the
17 report, they made some changes, and the work was then
18 complete.

19 JUDGE FULTON: It's just that they, in the
20 Court's view, the action that's currently pending
21 does not serve as an adequate predicate for the
22 raising of the constitutional and as-applied

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1 challenge.

2 Okay. Anything further.

3 MR. PEMBERTON: No, Your Honor, that is
4 all.

5 JUDGE FULTON: Okay, I've got a few things
6 for you.

7 The contamination of concern here is -- at
8 least in Hangar One, and this northwest corner of the
9 Hanger, TCE is the only contaminant of concern?

10 MR. PEMBERTON: That was the contaminant
11 that was driving everything else. There were other
12 contaminants that were there, but they were at a lot
13 lower levels, and it really did not drive the
14 response action.

15 JUDGE FULTON: I notice there is a
16 reference in the materials to these degradation
17 byproducts, DCE and vinyl chloride. Is it the case
18 that neither of those themselves were at the action
19 level?

20 MR. PEMBERTON: I cannot be sure of
21 exactly what levels we had detected there of those
22 particular constituents. I believe they were

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1 detected, and they may well have been above the
2 levels we selected for the cleanup, which were the
3 Kansas soil to the groundwater levels.

4 JUDGE FULTON: But whether they by
5 themselves would have driven the response is less
6 clear, I gather.

7 MR. PEMBERTON: Well, I would not be able
8 to answer that.

9 JUDGE FULTON: Do you know whether the DCE
10 and vinyl chloride were present only because they
11 were degradation byproducts of TCE? Or is there any
12 suggestion in the record that these substances had
13 potential origins independent of the TCE?

14 MR. PEMBERTON: To my recollection, there
15 was nothing in the record that would indicate that
16 these other two substances were there independently
17 of the TCE.

18 JUDGE FULTON: So there's no suggestion
19 that, separate and apart from Raytheon's -- or Beech
20 Aircraft's -- possible contribution of TCE that they
21 also contributed DCE or vinyl chloride?

22 MR. PEMBERTON: I do not believe there is

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1 any such indication.

2 JUDGE FULTON: Okay. Do you know, is
3 there a divisibility issue present here with respect
4 to this UAO? Let me state it slightly differently.

5 In the Region's view, is this UAO
6 sufficiently discrete in nature that it can be
7 extracted from the overall cleanup and disposed of?

8 MR. PEMBERTON: Excuse me, could you
9 rephrase that? I want to be sure I have the question
10 correctly.

11 JUDGE FULTON: I guess a question is
12 whether the UAO can be viewed, or whether the Region
13 would concede that it can be appropriately be viewed
14 as a divisible part of this overall cleanup, such
15 that the liability relating to the UAO really can be
16 viewed in isolation, and addressed in isolation.

17 MR. PEMBERTON: Not from a site-wide
18 perspective, because we believe that the soils and
19 subsurface soils that were removed contained the TCE
20 contamination that was significantly impacting the
21 groundwater at the site.

22 We do not know if this was the sole source

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1 yet of the contamination; but it was a significant
2 contributor to the groundwater contamination. So
3 there is still the issue of liability as it applies
4 site-wide for the groundwater contamination.

5 JUDGE FULTON: I understand; let me try it
6 a different way.

7 If the Board were to proceed with the
8 petition, would the Region advance the argument that
9 we should not reach the merits here because the
10 cleanup at the site should be viewed as an
11 indivisible whole?

12 MR. PEMBERTON: We may make that argument.
13 I would have to consult with some other people to see
14 whether we would make that argument.

15 JUDGE FULTON: Does the Region maintain
16 that there is a genuine issue of fact relating to the
17 source of the TCE in the removal area in Hangar One?
18 Recognizing that Raytheon maintains it's not theirs.

19 MR. PEMBERTON: They maintain that it's
20 not theirs. We have no information indicating the
21 Army used TCE in the degreasers at the site during
22 World War II.

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1 JUDGE FULTON: Do you have information
2 that indicates that Raytheon's version of the facts
3 in terms of their contribution is incorrect?

4 MR. PEMBERTON: Raytheon originally
5 admitted they use a TCE degreaser in the area close
6 to the contamination; they say 200 feet inside the
7 hangar. Since they filed their original 104(e)
8 response, they supplemented that response; and then
9 in their petition they've indicated that there's no
10 way they could have caused that contamination
11 immediately outside Hangar One, that their people put
12 the material in barrels and either were shipped off
13 or maybe dumped somewhere else on the site, but they
14 don't really know.

15 So there are some factual issues out there
16 that need to be resolved or at least factual
17 assertions that should be resolved in the forum;
18 that's why we feel that the District Court is a
19 better forum to address those issues with the
20 availability of discovery and depositions to conduct
21 the interviews as to the factual assertions that
22 Raytheon has made, as to why they could not have

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1 caused the contamination.

2 JUDGE FULTON: Your understanding is that
3 there are depositions scheduled or planned that will
4 be, that are viewed as an opportunity for testing
5 Raytheon's factual assertions relating to the
6 specific area?

7 MR. PEMBERTON: It's my understanding that
8 those have already occurred, and I don't know if
9 there's any more scheduled now or not. Department of
10 Justice is defending the Army, and so I'm not
11 completely aware of their entire deposition schedule.

12 JUDGE FULTON: Do you think in this
13 proceeding Raytheon would need to prove that the Army
14 was the liable party, or would Raytheon simply need
15 to prove that they were not?

16 MR. PEMBERTON: I think it's important for
17 their case to prove the Army is liable. Because with
18 that, if we can't prove that the Army used TCE at the
19 site during the period of operation, during World War
20 II, the only other party that could have caused the
21 contamination is Raytheon.

22 JUDGE FULTON: But if Raytheon is able to

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1 demonstrate, by a preponderance of the evidence, that
2 their TCE activities were contained and confined in a
3 way that would have not allowed for transport to the
4 area addressed by the UAO, would that not be
5 sufficient?

6 MR. PEMBERTON: Sufficient for --?

7 JUDGE FULTON: For recovery.

8 MR. PEMBERTON: For recovery. Well,
9 that's the standard, if they can prove that they
10 could have not.

11 JUDGE FULTON: Okay, so they don't really
12 have to prove that someone else was responsible for
13 it; they just need to show that it wasn't theirs.

14 MR. PEMBERTON: That is correct, but they
15 are attempting to prove that in this proceeding as
16 well as the District Court proceeding, as applies to
17 site-wide contamination.

18 JUDGE FULTON: A second.

19 Can we assume that the District Court
20 proceeding will necessarily include a review of this
21 evidentiary issue? It's inconceivable that it could
22 not.

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1 MR. PEMBERTON: Yes. The District Court
2 will be dealing with the same issues.

3 JUDGE FULTON: The idea of the stay is
4 really based on judicial economy and not some legal
5 limitation on the Board's ability to act here,
6 correct?

7 MR. PEMBERTON: That is correct.

8 JUDGE FULTON: Does the Region maintain
9 that maintaining a reimbursement petition proceeding
10 while at the same time seeking contribution in
11 District Court are incompatible positions?

12 MR. PEMBERTON: Yes. We believe that it
13 is, that Raytheon is taking a different legal
14 liability stance in the two proceedings; and the
15 reimbursement petition proceeding, it has to show
16 that it is not liable. And in the District Court
17 proceeding, it only has contribution actions, which
18 by the very nature of contribution means that you are
19 assuming some sort of liability or causation for a
20 set of circumstances.

21 The Court, when they dismissed Raytheon's
22 107 action against the United States, said that

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1 Raytheon -- it was not clear from the complaint
2 whether Raytheon was taking the stance that it was
3 not liable in that proceeding. And the Court issued
4 the memorandum May 26, I believe, of '06, and they
5 gave Raytheon until June 16, I think, to amend the
6 complaint; that it was not a PRP if it wanted to take
7 that stance in the District Court proceeding.
8 Raytheon declined to do that, believing that their
9 contribution action was enough.

10 JUDGE FULTON: Does the Region have the
11 authority to resolve a reimbursement petition without
12 a ruling by this Board?

13 MR. PEMBERTON: I am not sure.

14 JUDGE FULTON: In other words, if the
15 Region were of a mind to settle this dispute, is
16 there any limitation on the Region's authority in
17 that regard?

18 MR. PEMBERTON: Your Honor, I can't say
19 one way or the other if there is a limitation; that's
20 a thought that has not occurred to us, to resolve
21 this through negotiations.

22 JUDGE FULTON: Maybe if you could confer

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1 with your colleagues there.

2 MR. PEMBERTON: Yes. And I will.

3 JUDGE FULTON: Let's see.

4 Okay, I think that's it for now.

5 MR. PEMBERTON: Thank you.

6 JUDGE FULTON: Thank you.

7 Ms. Roper.

8 MS. ROPER: We thank you very much for
9 bringing us before the Board today to discuss this in
10 assisting the Board in making its decision. We know
11 that you have great discretion over what happens
12 here; and hopefully we can clarify a few things.

13 First of all, this as you point out -- I
14 like to call it the Back 40. I don't like calling it
15 Hangar One, because Raytheon was not ordered to clean
16 up anything in Hangar One. In fact, it began six
17 feet to the north of Hangar One, and it included the
18 apron, it included part of the tarmac, and it
19 included the foundation of a building that had been
20 used during World War II but had been removed by the
21 time Beech leased the site in November of 1950.

22 So that was the area, and I like to think

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1 of the site as a bean pod, and this was a very
2 discrete bean that was created by EPA when it issued
3 its UAO. I don't know if the Board has seen the
4 statement of work, but it was very well outlined and
5 determined and finite, and there were cells and you
6 do this and you do that; there was nothing quantum
7 mechanics about it. I mean, it was very, very
8 mechanical, and the work was done.

9 Listening to Scott, I believe that EPA
10 completely misunderstands what Raytheon Aircraft
11 Company will show the Board in this reimbursement
12 action. We haven't had an opportunity to present our
13 case yet, but our case is not that someone else is
14 guilty; it has nothing to do with that someone else.

15 Our case is that Beech Aircraft is not
16 liable. That's the case. And perhaps it would help
17 you if I explained, just in a nutshell, what the
18 evidence will be.

19 The evidence here -- and it involves the
20 soil excavation, and it involves an excavation in an
21 area where an intense amount of TCE was in the soil,
22 and there were very high levels of vinyl chloride in

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1 the same soil, very high levels of DCE.

2 So we will prove, by a preponderance of
3 the evidence, that the current contamination --
4 actually it's been excavated now -- but the way the
5 contamination sat in the ground as of 2005 proves
6 actually, that Beech Raytheon is not liable. And you
7 may sit there and think "Now, how can they do that?"

8 Well, the way we do that is this: We know
9 what our operation was at the site from 1950 to 1960.
10 We know that in the first portion of the site, the
11 company was taking old Model 18 trainers that they
12 had made for the Army during World War II, they were
13 breaking them down, and in the northwest corner of
14 the Hangar One building and in the finger building,
15 which was a building that shot off onto the apron to
16 the north, and in the actual area around there, they
17 were performing a paint stripping operation which, by
18 most people's description -- and we have a picture of
19 it -- was a fairly messy operation, and they were
20 using something, a paint stripper on it. This is
21 something that wasn't clear when they filed their
22 initial 104(e) which they did, in 30 days, as ordered

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1 by EPA. But this is information that we developed
2 subsequent to that, and we gave it to prior to the
3 UAO being issued.

4 In 1953, a farmer who was leasing property
5 at the airport complained that his farm well had been
6 somehow compromised by this substance. And so at
7 that time, in 1953, Beech Aircraft, to be a good
8 neighbor, contacted the State of Kansas, the Kansas
9 Department of Health and Sanitation, in both Topeka
10 and Lawrence, Kansas. They had experts come in from
11 the State, they had the experts look at the
12 operation, they took samples of the discharge, they
13 took samples of the well itself.

14 We have the sample results: high in
15 phenols. This was a Turco 3535 product -- that was
16 the name of it -- and it was very high, it's a
17 phenolic-based compound, and it was very high in
18 phenols. No mention of anything chlorinated in this.

19 So Raytheon Beech -- it was Beech Aircraft
20 -- they said "Well, what should we do?" And there's
21 correspondence having to do with, "Can we inject it?"
22 You know, we want to inject it. Somebody's doing

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1 that down in Texas; can we do that? What can we do?"

2 So the fellows from the State looked it
3 over, the experts, and they said "No, we don't like
4 this idea in Kansas of injection. What we want you
5 to do is we want you to redirect your discharge down
6 to Imhof tanks that had actually -- they had been
7 used by the Army during World War II." That's
8 exactly what Beech did.

9 JUDGE FULTON: What is an Imhof tank?

10 MS. ROPER: An Imhof tank, it's the type
11 of a tank -- there are three tanks, they're concrete,
12 and it's where the discharge goes into the first of
13 the three tanks, and it's tested for pH and various
14 things; then it goes to the next tank and then the
15 next tank, and then it's discharged. And I'm sorry,
16 I don't know what all the chemistry is there; but
17 that's what they told us to do, and that's what the
18 company did. So the company knows that.

19 Now in 1955 they completely reworked the
20 Hangar One and Hangar Four areas at the base, and
21 they became a manufacturing facility, very modern,
22 something that they were very, very proud of. In

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1 fact, they were so proud that they made a multipage
2 glossy brochure, with pictures, many of them at
3 Harrington with this operation, where they were
4 making jettisonable fuel tanks, all under government
5 contract. In fact, all of the work that Beech
6 performed at Harrington was under government
7 contract. That's neither here nor there.

8 But they were very proud of it, and we
9 actually have pictures of both of the degreasers that
10 were used, and the EPA had those pictures, of course,
11 before it filed its UAO, and the picture shows the
12 degreaser in Hangar One being an above-ground
13 degreaser, part of a conversion line, that sat in the
14 southwest corner of Hangar One.

15 The southwest corner of Hangar One, if
16 there were to be a release from that tank, it would
17 actually go to the southwest corner; there's like a
18 divide in Hangar One; and it would have gone to the
19 other area in the south. That area has been tested
20 by EPA, it's been tested by a number of different
21 entities out there, and there is no TCE contamination
22 in that area.

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1 Therefore, we have hired an expert for
2 this case that we have filed against the United
3 States; we have hired an expert, and the expert was
4 able to review the phenolic based compound, and what
5 it did to this area underneath the apron at the
6 northwest corner of Hangar One, which is the only
7 area at issue in this reimbursement case.

8 Where Raytheon spent money, it's my
9 understanding under a UAO, that's what the Board has
10 jurisdiction over. So he looked at that, and he has
11 issued a report, he will be deposed next week in the
12 action -- but he has issued a report, it's been peer-
13 reviewed, that says the way the contamination
14 actually had evolved over time with the degradation
15 and how the plume has operated and so forth, proves
16 that when that operation, that paint stripping
17 operation occurred, in 1951 to 1953 to 1954, at that
18 time when the first paint stripping operation began,
19 the TCE had to be in the ground.

20 We don't care who did it; before the Board
21 we don't care who did it. We care.

22 JUDGE FULTON: District Court, you care.

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1 MS. ROPER: Oh, we care big time in the
2 District Court, there's no question about that. But
3 we don't need to reach that here. We don't need to
4 reach any of the Army's behavior here; that will be
5 reserved for the Article 3 court.

6 What we want to show you, by a
7 preponderance of the evidence -- we would love to
8 show you the file from 1953. We think there's a
9 certain poetic justice that a company that did the
10 right thing in 1953 would have the evidence in 2007
11 to be able to come before the court and receive
12 reimbursement on this activity.

13 This in no way prejudices the other case,
14 it in no way has anything -- if this Board were to
15 decide to give Raytheon reimbursement, that relief of
16 course would be taken out of the case. It wouldn't
17 be available; we're not going to double recover. It
18 would not be available.

19 Here, if you deny Raytheon, and I mean the
20 Board is free to say "Well, on a hot day in 1957 when
21 they were operating that line down in the southwest
22 corner, if they had all the doors open in the hangar,

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1 you know, a molecule of TCE could have wafted out and
2 come over and landed on that apron, and a willy
3 raindrop could have taken it down through the
4 concrete, and therefore, we're not going to give you
5 reimbursement."

6 That's fine, too. I mean, it's a
7 decision. That's what Raytheon Aircraft Company
8 needs in this case, is a decision by the Board. The
9 Board is equipped to handle the review, the Board is
10 capable of reviewing the expert report and the 1953
11 file; in fact, all of the information -- this Board
12 is an Environmental Appeals Board. You're familiar
13 with it, we don't have to educate you on it, it
14 should be a relatively cut-and-dried proceeding.

15 JUDGE FULTON: We would need to do an
16 evidentiary hearing, though, don't you think?

17 MS. ROPER: I do. I do. I think you
18 would need to do that. We would present to you the
19 evidence that we have, we would present to you -- we
20 would bring Peter Massard in, who wrote the expert
21 report, and allow you to cross-examine him, if you
22 like.

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1 We're more than happy to do that before
2 the Board. This is no way has anything -- when I say
3 it doesn't have anything to do with the District
4 Court case, I don't want to say that we don't have
5 Mr. Massard hired for that case, because we do.

6 JUDGE FULTON: I would assume the same
7 quantum of proof that you would be advancing before
8 the Board you would also be advancing in District
9 Court.

10 MS. ROPER: That's correct.

11 JUDGE FULTON: Just going to be adding
12 some proof to it as well.

13 MS. ROPER: It's a different standard.
14 Here we are proving that we're not liable. When the
15 District Court invited us to file the 107 action, we
16 weren't about to do that at that point because we
17 already had the party we wanted in the court on a
18 contribution action. I mean, that's basically what
19 we wanted to do.

20 We also operated a large degreaser down at
21 Hangar Four. So an expert can say yes, but that 800
22 parts per billion that was found in soil three feet

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1 below that actually came from the plume that migrated
2 up through the soil, with off-gassing and so forth.
3 Or it could be said, maybe some escaped from there
4 and went down -- you know, we don't know.

5 But we weren't about to get into that
6 argument; and that is a totally irrelevant argument
7 with respect to this Board's action. We're only
8 talking, I believe, with you -- we're only talking
9 about that work that was performed under a UAO,
10 that's all.

11 You know, it's ironic. It's interesting
12 to look at the behavior of Raytheon Aircraft Company.
13 In 1953 they did what they did, in 1997 they told the
14 truth on their 104(e) response. 2000, they signed
15 up to protect the people, then they put the whole
16 house water treatment systems in, and they've been
17 operating them ever since. The State came to them
18 and said, "We want you to sign up and do an RIFS."
19 Raytheon Aircraft said "Okay."

20 Raytheon Aircraft Company has completely
21 cooperated in every sense of the word at this site,
22 knowing that it probably wasn't liable, but it did it

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1 anyway until the Agency, the EPA, after having been
2 given the evidence that I just described, absent the
3 expert report, Raytheon Aircraft Company said "No.
4 We can't do that work in the North 40."

5 JUDGE FULTON: Does Raytheon maintain that
6 it has no liability for this site at all? Is that
7 the position that you're taking in the District Court
8 litigation?

9 MS. ROPER: Yes. We will say that our
10 contribution should be next to zero, and we'll
11 maintain that. Whether or not the Court agrees with
12 that, we'll have to wait and see. But that's what we
13 are maintaining at this point, yes. That's not for
14 the Board to decide.

15 We are definitely maintaining that the
16 area north of Hangar One that was ordered excavated -
17 - not a molecule. That's been our position, we want
18 to bring it to you. That's all we're asking for.

19 We can say that for one thing, the Board
20 should not stay this proceeding. There is no chance
21 of conflicting results. If the Board denies
22 Raytheon's petition, then we will take it before the

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1 Court and yes, we will try to bring back our as-
2 applied constitutional challenge.

3 You see what happened here. I mean, the
4 timing of everything is very interesting when you
5 think about the Cooper versus Avioli, where it was in
6 time when this order was issued and when the actual
7 opinion came out by the Supreme Court two and a half
8 months after this UAO issued.

9 What can happen here and what was
10 basically, it was a superhighway provided by the
11 Solicitor General's amicus brief in the Avioli case to
12 the Supreme Court, is that at any of these sites
13 where the United States is a potentially responsible
14 party, all EPA has to do is issue a UAO to a private
15 party; that's it.

16 Now, that's not before the Board, but it's
17 an interesting sidelight. And this Board, making a
18 determination one way or the other, if you make the
19 determination that Raytheon deserves reimbursement,
20 that will be fine, that will be removed from any
21 relief sought in the District Court; those funds will
22 be just taken off the table. And that's final agency

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1 action, as I understand from the brief of the EPA,
2 and I guess that's what the EPA would say at that
3 point. One time when unitary executive might
4 help.

5 But at any rate, that would be fine. If
6 this Board denies Raytheon's petition, Raytheon will
7 live with that, and it will live with it in the
8 District Court.

9 The one thing that this Board should not
10 do is issue the stay. The other thing the Board
11 should not do is deny the stay and then sit on the
12 evidentiary hearing and a decision.

13 JUDGE FULTON: How would you be prejudiced
14 by the issuance of the stay?

15 MS. ROPER: We would be prejudiced because
16 we would never be able to argue the reimbursement
17 case before the Board.

18 JUDGE FULTON: But if you're correct,
19 you'll get your recovery in District Court, right?

20 MS. ROPER: If we're correct, we will get
21 a recovery from the Corps of Engineers in District
22 Court. In the District Court matter, that will be

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1 for the entire bean pod.

2 JUDGE FULTON: Is that not arguably a more
3 appropriate place for the recovery to come from than
4 the Superfund?

5 MS. ROPER: Not in this case. In this
6 case, if you look at the evidence that -- it's not
7 the way the system is set up, and it's certainly, if
8 we're talking equity and fairness. No, it would be
9 totally appropriate for it to come from the Superfund
10 in this case.

11 JUDGE FULTON: Even though you maintain
12 that the responsible party here, the responsible
13 actor was the Army?

14 MS. ROPER: That's a federal family issue.
15 We're a private party, a private employer. We don't
16 care which pot it comes out of; if the Solicitor
17 General wants to work that out among the various
18 agencies and the Office of Management and Budget,
19 that's the government's prerogative.

20 In this case, the law has been set up and
21 it says: If you're issued an order, and you perform
22 the work, and the work is certified complete, you

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1 have an opportunity at that point to go in before the
2 Environmental Appeals Board and prove, by a
3 preponderance of the evidence, that you weren't
4 liable.

5 We only ask for that to be done.

6 Any other questions?

7 JUDGE FULTON: I would imagine. Let me
8 look through my list here.

9 When we talk about Hangar One, really
10 we're talking about an interior structure. Hangar
11 One proper is a building, I assume?

12 MS. ROPER: That's correct, and it's one
13 of those very large buildings that could house two or
14 three B-29s.

15 JUDGE FULTON: Huge, right.

16 MS. ROPER: But that's not the area we're
17 talking about.

18 JUDGE FULTON: The area is just outside
19 the hanger, is what you're saying.

20 MS. ROPER: That's correct. That's right.

21 JUDGE FULTON: Do you know whether the
22 action levels for DCE and vinyl chloride were met

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1 here? I mean, if TCE wasn't part of the equation,
2 would there still have been a cleanup?

3 MS. ROPER: Yes, definitely.

4 JUDGE FULTON: There still would have
5 been, okay.

6 MS. ROPER: Vinyl chloride, I've heard the
7 term screaming. What you had there was a bioreactor.
8 You had a tremendous, just a tremendous release and
9 discharge of trichloroethylene. A massive release
10 under there -- I mean, it really -- I've heard it
11 described as the most contaminated site in Kansas, et
12 cetera.

13 You had a massive release of
14 trichloroethylene in this location. And then since
15 then you've had this injection of phenol, and it's
16 just been sitting there for 50 years, bioreacting.
17 So the levels of vinyl chloride are quite high, or
18 were high.

19 There's also quite a bit of contamination.
20 I hate bringing this up -- that remains under Hangar
21 One. That bloomed out.

22 JUDGE FULTON: Any other parties involved

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1 in the litigation?

2 MS. ROPER: No.

3 JUDGE FULTON: Okay.

4 MS. ROPER: We could have added parties,
5 but it makes no sense to do that because the
6 contamination had to be in the ground. There was a
7 farmer there until 1942, and after Pearl Harbor, the
8 War Department bought the property and put in its
9 huge operation.

10 Between the time that World War II was
11 over, and they quitclaimed the deed to the City of
12 Harrington, and Beech Aircraft signing -- there was a
13 chicken farm and a few other non-TCE related type
14 operations there.

15 JUDGE FULTON: You would agree, I guess,
16 that Raytheon's view of the facts here is still being
17 tested through the discovery process in District
18 Court?

19 MS. ROPER: Yes, and let me fill you in on
20 that. Yes, it is being tested. The discovery has
21 closed, but for expert witness depositions. We are
22 also taking a deposition this week of Burns &

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1 McDonnell. We have a 30(b)(6) of that company,
2 because they were the U.S. Army Corps of Engineers'
3 consultant that initially went out and performed the
4 initial site investigation.

5 So we have found evidence of various
6 things that aren't really at issue here, but would be
7 very at issue in the District Court case. So we'll
8 be taking that deposition this week.

9 Next week the government will be deposing
10 our expert, and then we will be receiving an expert
11 witness report from the government; we'll have 60
12 days to review, I believe it is; and I believe all
13 discovery will be completed by the end of October.
14 But right now that's where we are; fact discovery is
15 closed.

16 JUDGE FULTON: Okay.

17 You don't have any sort of smoking gun
18 admission through which you could argue that the
19 Region has conceded your view of the facts at this
20 point?

21 MS. ROPER: Well, no. We feel that we
22 have tremendous evidence of the Army Corps of

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1 Engineers' use of TCE in that very area, and we
2 believe that it's a complete misstatement that there
3 is no evidence that the Army Corps of Engineers or
4 the Army Air Force used TCE at that very location.

5 We literally have videotape of a
6 deposition where the colonel who was in charge of the
7 maintenance department there for many years admits
8 that they had a vapor degreaser and cleaned spark
9 plugs in this building that Raytheon Aircraft Company
10 was ordered to remove its foundation.

11 The other thing, too, I would like to
12 remind the Court, and that is that this isn't a small
13 matter, this UAO. It cost the company over
14 \$2.5 million to do this, plus its internal resources
15 that you can't really quantify.

16 Anyway, we have that. And then there was
17 a question: "Well, you don't have the technical
18 order for the degreaser, if spark plugs were in fact
19 being degreased." We tracked the technical order
20 down to a location in Suitland, Maryland, and
21 obtaining that was tricky. We couldn't get it from
22 the government under FOIA; the government had never

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1 turned this over. They finally did in a 104(e), but
2 we had that -- which says that: If you were operating
3 a degreaser, cleaning spark plugs in World War II,
4 you had to use TCE. You had no alternative, none."

5 And that was the spark plug cleaning
6 building. We can show you, that's what it says right
7 on the -- you know. That's one operation. We also
8 have testimony from a man who was there who said that
9 there was a degreaser that operated in the northwest
10 corner inside the hangar. Of course that's not that
11 germane to this action, but it does show TCE in the
12 location. Really, none of it's germane to this
13 action. We're just going to show you that when we
14 showed up, it was in the ground.

15 JUDGE FULTON: What matters most to
16 Raytheon here is the constitutional challenge or the
17 money?

18 MS. ROPER: Both. Both.

19 I mean, the money, if the Court were to
20 reimburse the money, I'm not sure what that would do
21 with the constitutional challenge, to be quite frank.
22 Because the way we get before the Court on the

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1 constitutional challenge is because of the UAO. At
2 least that's the Court's decision now. We also filed
3 a pattern and practice, but that was dismissed.

4 This as-applied challenge, however, would
5 go forward. I'm fairly confident under the law it
6 would go forward, understanding that the EPA would
7 argue against it.

8 JUDGE FULTON: Okay. Very good.

9 Thank you.

10 MS. ROPER: Thank you.

11 JUDGE FULTON: Mr. Pemberton, would you
12 like to offer a final word here?

13 MR. PEMBERTON: Yes, Your Honor. I just
14 had some information that was given to me about your
15 question about whether EPA had the authority to
16 settle.

17 Apparently we can settle a 106(b)
18 petition, and what I'm told is that it would have to
19 be with your approval. And it's unclear what would
20 happen if the Region wanted to go forward with the
21 settlement without your approval.

22 JUDGE FULTON: Thank you.

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1 MR. PEMBERTON: I think that's the only
2 thing that I would have.

3 JUDGE FULTON: All right. Thank you.

4 Just a question for both of the parties.
5 Have there been any settlement discussions relating
6 to this discrete element of the overall case?

7 MR. PEMBERTON: No, Your Honor.

8 JUDGE FULTON: Does that, in the view of
9 either party, offer any potential here enough that
10 it's worth considering? What you have here is a,
11 it's a case for money; I understand that there's a
12 constitutional issue lurking here, too, and
13 particularly if ultimately disappointed by the
14 outcome, Raytheon will certainly be interested in
15 pursuing its constitutional claim. Of course if
16 you're successful, there will be no constitutional
17 claim.

18 So it's really, at bottom, about money.
19 And just a question for the parties, whether there
20 would be any utility irrespective of how the Board
21 deals with the stay motion, in designating a
22 settlement judge to examine the question of

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1 settlement with the parties.

2 If this is of no interest to either of
3 you, then obviously it's not something that we can
4 impose on you. But we'd be willing to offer that
5 assistance if it had any potential utility here.

6 MR. PEMBERTON: Your Honor, Beverlee
7 mentioned a couple things in regards to her expert's
8 report that were quite interesting, and I'd like to
9 have the opportunity to review this report and
10 discuss this report with my technical people before
11 we would say that there's no chance for settlement.

12 MS. ROPER: That sounds promising.

13 JUDGE FULTON: Well, let's let that offer

14 --

15 MR. PEMBERTON: We'd like to review that,
16 just to see what it says.

17 MS. ROPER: The United States has the
18 report.

19 MR. PEMBERTON: They did send it to us
20 late last week, but I've not had a chance to even
21 start to review it. I think it's supposed to be
22 distributed to our technical people last week, but

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1 their response is not due until the end of this week.

2 MS. ROPER: The report was submitted in
3 August.

4 JUDGE FULTON: Well, we'll let that, the
5 offer by the Board to designate a settlement judge
6 for this stand; you can consider it further and let
7 us know if this is something you would care to
8 pursue.

9 MS. ROPER: We would never say we are not
10 interested in settlement discussions. But of course
11 I can't reiterate enough today to you that the main
12 thing we want to do is move forward.

13 I think that moving forward with the
14 actual petition itself in an evidentiary hearing will
15 cause people to come up to speed on it, and it will
16 enhance the opportunities for settlement.

17 JUDGE FULTON: Understood.

18 Okay, well, thank you all very much for
19 your presence here today and for your thoughtful
20 presentations, and we'll be taking this under
21 advisement, and you'll be hearing from us shortly on
22 the stay motion, I'm certain.

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(Announcement by the Clerk.)

(Whereupon, at 11:45 a.m., the hearing
concluded.)

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I, Daniel W. Hawkins, shorthand reporter,
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