

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

ENVIR. APPEALS BOARD

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IN RE:)
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)

Tri-County Public Airport Site)
Morris County, Kansas)

) Petition No.
) CERCLA 106(b) 06-01
)

Raytheon Aircraft Company,)
)

Petitioner.)
)
)
)

**REPLY TO RAYTHEON AIRCRAFT COMPANY'S RESPONSE TO THE
ENVIRONMENTAL APPEALS BOARD'S ORDER TO SHOW CAUSE WHY
PETITION FOR REIMBURSEMENT SHOULD NOT BE DISMISSED AS
PREMATURE**

Raytheon Aircraft Company ("Raytheon") argues that it filed its petition for reimbursement "within 60 days after completion of the required action" (CERCLA 106(b)(2)(A)), citing several decisions of the Board in support of its position. However, Raytheon makes no mention of the Board's May 11, 2005, Order Dismissing Petition in Part Without Prejudice in In the Matter of: Grand Street Mercury Site, General Electric Company, Petitioner, CERCLA § 106(b) Petition No. 05-01 ("GE Order").

In that case the Board noted that "the Remedial action UAO provides that the Region shall give GE notice when the Region has determined that GE has completed the action required by the Remedial Action UAO," citing the UAO issued to GE. In this case, the UAO says specifically:

"When EPA determines, after its review of the Removal Action Report, that all Work has been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, including Section XI (Record Preservation) and

Section XVI (Reservation of Rights by EPA), EPA will provide written notice to Respondents. . . .”

Section XXII, ¶71, UNILATERAL ADMINISTRATIVE ORDER FOR REMOVAL RESPONSE ACTIVITIES (attached to EPA’s Motion to Dismiss the Petition of Raytheon Aircraft Company). The GE Order is squarely on point with the situation in this case. The UAO sets out clearly when the action will be complete: when EPA provides written notice. As explained in the Motion to Dismiss, that has not yet happened. Raytheon has submitted the report, and EPA has not yet completed its review and sent written notice of completion to Raytheon. Until that happens, the petition for reimbursement is premature, exactly as the Board explained in the GE Order:

“We have previously noted that the determination whether the required action has been completed usually will focus on the order’s terms, *In re CoZinCo*, 7 E.A.D. 708, 735 (EAB 1998), and courts have recognized that the agency that issued an order is normally given deference in interpreting the order’s requirements, *Employers Ins. Of Wausau v. Browner*, 52 F.3d 656, 666 (7th Cir. 1995). Thus, the clarity of the order’s language in the present case, GE’s acknowledgment regarding the absence of the key factual predicate (*i.e.*, notice from the Region), and the Region’s clearly stated interpretation that the matter is not ripe for review would appear to dictate that GE’s petition be dismissed in part as premature insofar as it relates to the Remedial Action UAO.”

GE Order at 5.

For the same reasons as the Board articulated in the GE case, this petition is premature and should be dismissed without prejudice.

Respectfully submitted,

By:



J. Scott Pemberton
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A handwritten signature in black ink, appearing to read "Tracy L. Sheppard", written over a horizontal line.

Tracy L. Sheppard
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DECLARATION OF J. SCOTT PEMBERTON

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1. I am the EPA attorney assigned to Petition No. CERCLA 106(b) 06 - 01.

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2. The Certificate of Service for Raytheon Aircraft Company's Response to the Environmental Protection Appeals Board's Order To Show Cause Why Petition Should Not Be Dismissed As Premature is attached hereto as Exhibit 1.

3. Although it states that the document was mailed to me at my correct address on March 6, 2006, the document was not received. I have made a search and have been unable to find the document or any record that it was received in my office.

4. On April 10, 2006, I discovered Raytheon's response on the EAB website and read it for the first time.

I state under penalty of perjury that the foregoing is true and correct. Executed on April 13th, 2006.



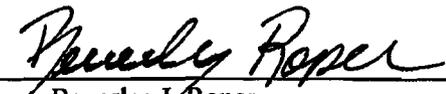
J. Scott Pemberton

EXHIBIT 1

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 6th day of March 2006 to:

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



Beverlee J. Roper