RECEIVED
U.S. E.P.A.
2015 AUG 18 AM 10:49
ENVIR. APPEALS BOARD

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

In the Matter of: HUDSON OIL REFINERY SUPERFUND SITE Land O'Lakes, Inc., Petitioner	CERCLA § 106(b) Petition No. _____ Unilateral Administrative Order U.S. EPA Region 6 CERCLA Docket No. 06-16-08 Petitioner Requests Oral Argument, Evidentiary Hearing, and Supplementation of Record

LAND O'LAKES, INC.'S PETITION FOR REIMBURSEMENT UNDER CERCLA SECTION 106(b) AND FOR RELIEF FOR CONSTITUTIONAL VIOLATIONS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Statutes andRules

Other Authorities

ACRONYMS AND ABBREVIATIONS

ACM	Asbestos Containing Material
ARAR	Applicable or Relevant and Appropriate Requirements
ATSDR	Agency of Toxic Substances and Disease Registry
bbls.	Barrels
Bear Stearns	Bear, Stearns N.Y., Inc.
BGL	Below ground level
BGS	Below ground surface
bpd	Barrels per day
CERCLA	The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, *et seq.*
COB	Cushing Oklahoma Brownfields, LLC
COC(s)	Chemical(s) of Concern
EAB	Environmental Appeals Board
EPA	United States Environmental Protection Agency
ESD	Explanation of Significant Differences
HF	Hydrofluoric
HRS	Hazard Ranking System
Hudson	Hudson Refining Co., Inc. and Hudson Oil Co., Inc.
IQAT	Independent Quality Assurance Team
Land O'Lakes or LOL	Land O'Lakes, Inc.
LNAPL	Light Non-Aqueous Phase Liquid
LTU	Land Treatment Unit
NCP	National Contingency Plan
NESTF	North East South Tank Farm
NFRAP	No Further Response Action Planned
NPL	National Priorities List
ODEQ	Oklahoma Department of Environmental Quality
OPA	Oil Pollution Act
Petition	Land O'Lakes' Petition for Reimbursement under CERCLA Section 106(b) and for Relief for Constitutional Violations

PHA	Public Health Assessment
PRP	Potentially Responsible Party
QA/QC	Quality Assurance/Quality Control
Quantum	Quantum Realty Company, L.C.
RA	The Remedial Action required by the ROD and UAO
RCRA	Resource Conservation and Recovery Act
RD	The Remedial Design required by the ROD and UAO
Refinery	Hudson Oil Refinery located in Cushing, Oklahoma, f/k/a Cushing Refinery
RI/FS	Remedial Investigation/Feasibility Study
ROD	EPA's Record of Decision dated November 23, 2007
SAOC	Soil Area of Concern
Site	Hudson Oil Refinery Superfund Site located in Cushing, Oklahoma, f/k/a Cushing Refinery
SOW	EPA's Statement of Work issued as Attachment 3 to the UAO
TEL	Tetraethyl Lead
UAO	Unilateral Administrative Order issued by EPA on January 6, 2009
USR	Collectively, U.S. Refining and Marketing Company, Inc. and U.S. Refining, L.P.
Western	Western Environmental of Oklahoma, L.L.C.
Weston	Roy F. Weston Company (EPA Contractor)

I. INTRODUCTION

Land O'Lakes, Inc. ("Land O'Lakes" or "LOL") is a Minnesota, member-owned, agricultural cooperative corporation originally formed in 1921.[1] Among other business lines, it is a producer and marketer of dairy food products and agricultural supplies. Refining of petroleum products is not part of Land O'Lakes' business lines. Land O'Lakes has never directly owned or operated a petroleum refinery.

Land O'Lakes never owned or operated the former Hudson Refinery f/k/a Cushing Refinery ("Refinery") at the Hudson Oil Refinery Superfund Site ("Site") in Cushing, Oklahoma. Despite this, the United States Environmental Protection Agency, Region 6 ("EPA") issued a Unilateral Administrative Order ("UAO")[2] to Land O'Lakes on January 6, 2009, pursuant to section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 ("CERCLA").[3] The UAO required Land O'Lakes to perform a remedial design ("RD") for the remedy selected by EPA in the November 23, 2007 Record of Decision ("ROD") and to then perform a remedial action ("RA") to implement the RD. A full copy of the text of the UAO is Exhibit 1 hereto.

Before EPA issued the UAO to Land O'Lakes, **three** different environmental cleanup actions occurred at the Site—one by Hudson during 1986-1994 and two by EPA during 1998-1999 and 2002-2003. In 2006, the United States Agency of Toxic Substances and Disease Registry ("ATSDR") found (utilizing the same data upon which EPA issued and based the UAO)

---

[1] Cooperatives such as Land O'Lakes operate under different financial requirements and capital structures than normal business corporations. A description of these differences and the effect of such differences, including how the costs incurred by Land O'Lakes to comply with the UAO affects its members, was provided in Land O'Lakes' *Notice of Intent* (defined herein) and is restated and incorporated here. *See* Ex. 24, ¶¶ 39-41.

[2] The title of the UAO is *Unilateral Administrative Order for Remedial Design and Remedial Action.*

[3] Land O'Lakes' only connection to the Site is through a January 1, 1982 merger with Midland Cooperatives, Inc. ("Midland"). Midland sold the Refinery to Hudson on February 1, 1977, nearly six years prior to the merger with Land O'Lakes.

that the Site posed no apparent public health hazard. Notwithstanding, EPA ordered the **fourth** cleanup of the Site by its issuance of the UAO to Land O'Lakes. As ordered under EPA's threat of civil penalties and punitive damages, Land O'Lakes completed the required actions under the UAO on June 19, 2015. Such completion by Land O'Lakes required over six and a half years and the expenditure of over $17,000,000.[4]

Land O'Lakes is entitled to full reimbursement of all costs pursuant to Section 106(b)(2)(A), (C), and (D) of CERCLA for several reasons summarized here. In a nutshell, EPA erred in issuing the UAO because it violated Federal Court Orders, ignored CERCLA's petroleum exclusion, ignored the operational history of the Site, violated Land O'Lakes constitutional and statutory rights of notice, comment and participation in EPA's remedy selection process, and ordered Land O'Lakes to cleanup areas for which Land O'Lakes is not responsible or which are divisible.

Land O'Lakes, as successor to Midland by merger, is covered by and the beneficiary of the protections from environmental liability it received in Federal Court Orders relating to the Site. The United States District Court for the Western District of Oklahoma entered a 1987 *Final Consent Decree* and 1994 Order for Closure of the Final Consent Decree ("*Closure Order*") regarding the Site in *United States of America, Plaintiff v. Hudson Refining Co., Inc., and Hudson Oil Co., Inc., Defendants*, United States District Court for the Western District of Oklahoma, Civil Action No. 84-2027-A. The *Final Consent Decree* and *Closure Order* were entered over four years, and over a decade, respectively, after all refining operations ended at the Site in December 1982. The *Final Consent Decree* and *Closure Order* provided protections from liability to Land O'Lakes for the Site. These protections included a covenant not to sue in

[4] Provided as Exhibit 22 hereto is a USB flash drive with a complete copy of the UAO administrative record as maintained by Land O'Lakes.

the *Final Consent Decree* and a release from liability and termination of obligations in the *Closure Order*. Land O'Lakes, therefore, is not liable pursuant to Section 106(b)(2)(C) of CERCLA. On June 23, 2015, Land O'Lakes filed its Declaratory Judgment Complaint in the United States District Court for the Western District of Oklahoma, Case No. 15-863-L, to enforce the *Final Consent Decree* and *Closure Order* against EPA.

Additionally, almost all of the RD/RA activities required by EPA's UAO, which implemented the ROD, ignored CERCLA's petroleum exclusion. Numerous reports and studies fully characterized the Site, and EPA knew that CERCLA-excluded petroleum materials were located throughout the surface and sub-surface of the Site. Numerous companies operated the Site as a petroleum refinery from 1915 until Hudson shut down refinery operations on December 30, 1982. In the UAO, EPA ordered Land O'Lakes to remediate large areas of petroleum-excluded materials. Land O'Lakes is therefore not liable pursuant to Section 106(b)(2)(C) of CERCLA because of the petroleum exclusion.

Moreover, the UAO and ROD required Land O'Lakes to engage in RD/RA activities for areas of the Site for which Land O'Lakes cannot be liable under CERCLA because of conditions occurring after the sale of the Refinery by Midland to Hudson.[5] These areas were either: (i) never owned or operated by Midland; (ii) not attributable to Midland due to subsequent activities after Midland's sale of the Refinery; or (iii) not attributable to Midland because they are divisible under CERCLA. Land O'Lakes is therefore not liable for these areas pursuant to Sections 106(b)(2)(C) and 107(a) (1) and (2) of CERCLA.

In addition, Land O'Lakes is entitled to reimbursement because the UAO, and the RD/RA activities it mandated, were arbitrary, capricious, or otherwise not in accordance with

[5] Land O'Lakes, as the successor to Midland by merger, is not an owner, operator or other responsible party under 107(a) of CERCLA for disposal after Midland's 1977 sale of the Refinery to Hudson. 42 U.S.C. § 9607(a)(2).

law pursuant to Section 106(b)(2)(D) of CERCLA. For example, the UAO and ROD required Land O'Lakes to engage in RD/RA activities for areas of the Site that had no CERCLA "hazardous substances." To the extent the UAO and ROD required RD/RA activities in these areas, the UAO and ROD are arbitrary, capricious, and not in accordance with law.

Another example is that the ROD's soil remedy required Land O'Lakes to conduct excavation and removal of "visual contamination," which ultimately became the principal remedial driver for required RA soil activities at the Site. However, the ROD did not define "visual contamination." The ROD instead necessarily left its definition to EPA's field personnel to make arbitrary, subjective, and unsupported visual (eyesight) decisions in the field, which changed from day-to-day, as to what constituted "visual contamination." Neither the ROD, EPA, nor its field personnel had any objective criteria, data, or chemical analysis to determine what constituted "visual contamination." Moreover, soils with "visual contamination" are all subject to CERCLA's petroleum exclusion. More perplexing still was that the ROD allowed the excavation of chemical exceedances in soil (determined by lab testing) to terminate at two feet below ground surface ("BGS"), but required the excavation of "visual contamination" to unlimited depths without objective lab analytical data. To the extent the UAO and ROD required Land O'Lakes to excavate and dispose of "visual contamination," the UAO and ROD are arbitrary, capricious, and not in accordance with law.

Furthermore, EPA's actions and omissions throughout the process leading to the ROD and the UAO violated Land O'Lakes' constitutional and statutory notice, comment, and participation rights. Time and again, EPA failed to provide reasonable and required notice to Land O'Lakes, as an alleged potentially responsible party for the Site, regarding key milestones, decision points, and participation rights relating to the Site. For seven years, EPA gave Land

O'Lakes no required notice or opportunity to comment while EPA selected the Site remedy. As a result, EPA did not take into account all relevant factors in its selection of the remedy. Moreover, when petitioned to remand the ROD's administrative record for further development with input from Land O'Lakes, EPA denied such request for Land O'Lakes' input. EPA violated CERCLA's public participation requirements, the NCP, and Land O'Lakes' constitutional right to due process. EPA's conduct was arbitrary, capricious, and not in accordance with law.

For these reasons and the other reasons stated in this Petition, Land O'Lakes respectfully submits this *Petition for Reimbursement* ("*Petition*") of **$17,646,502**, which is the amount Land O'Lakes has incurred through December 31, 2014, with interest through August 14, 2015, for compliance with the UAO.

II. AFFIDAVITS AND DECLARATIONS OF EXPERT AND FACT WITNESSES

Land O'Lakes has obtained Affidavits and Declarations from fact and expert witnesses regarding the Site, its history, and the actions required of Land O'Lakes in the UAO and ROD. Land O'Lakes adopts and incorporates by reference herein the Affidavits and Declarations of the following witnesses (presented in alphabetical order by last name):

Expert Witnesses

1. D. Keith Baugher[6] (Petroleum Refining Operations Expert) *See* Ex. 4.
2. Paul Boehm, Ph.D. (Environmental Forensics Chemistry) *See* Ex. 5.
3. Raymond F. Dovell (Forensic Accounting, Superfund Accounting) *See* Ex. 6.
4. Bill Hathaway (Superfund Remediation and Process) *See* Ex. 7.
5. Tarek Saba, Ph.D. (Environmental Forensics Chemistry) *See* Ex. 8.
6. Jay Vandeven (Superfund Remediation and Regulatory Process) *See* Ex. 9.

[6] The Declaration of Mr. Baugher is subject to Land O'Lakes' *Motion for Additional Time to Retain Substitute Expert Witness and File Supplemental Expert Witness Affidavit, and Suggestions in Support* filed simultaneously with this *Petition*.

Fact Witnesses

1. David Brady (Site Superintendent) *See* Ex. 11.
2. Forrest Fuqua (Former Refinery Employee) *See* Ex. 12.
3. Mick Gaskins (Former Refinery Employee) *See* Ex. 13.
4. Melissa Keplinger (Authentication Witness) *See* Ex. 23.
5. Jack Lawmaster (Project Manager) *See* Ex. 14.
6. Eldon Penn (Project Manager) *See* Ex. 15.
7. Al Williams (Former Refinery Employee) *See* Ex. 16.
8. Mary Mills Wilson (Former Land O'Lakes Counsel) *See* Exs. 17, 18.
9. Carolyn Wolski (Land O'Lakes Former Outside Counsel) *See* Ex. 19.
10. Glen Wright (Former Refinery Employee) *See* Ex. 20.

III. BACKGROUND INFORMATION

As required by EPA's Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions (February 23, 2012), Land O'Lakes provides the following background information:

Petitioner's Information	Land O'Lakes, Inc. 4001 Lexington Avenue North Arden Hills, MN 55126-2998
Petitioner's Counsel Information	Byron E. Starns, Esq. Stinson Leonard Street LLP 150 South Fifth Street, Suite 2300 Minneapolis, MN 55402 Telephone: (612) 335-1516 Telefax: (612) 335-1657 E-mail: byron.starns@stinsonleonard.com Mark E. Johnson, Esq. Stinson Leonard Street LLP 1201 Walnut Street, Suite 2900 Kansas City, MO 64106-2150 Telephone: (816) 691-2724 Telefax: (816) 412-1208 E-mail: mark.johnson@stinsonleonard.com

	Mark D. Coldiron, Esq. Stephen L. Jantzen, Esq. Ryan Whaley Coldiron Jantzen Peters & Webber PLLC 900 Robinson Renaissance 119 North Robinson Oklahoma City, OK 73102 Telephone: (405) 239-6040 Telefax: (405) 239-6766 E-mail: mcoldiron@ryanwhaley.com E-mail: sjantzen@ryanwhaley.com
Site (Facility) Information	Hudson Oil Refinery Superfund Site 800 West Main Street Cushing, OK 74023
EPA Docket Number	CERCLA Docket No. 06-16-08

IV. FACTUAL BASIS

The supporting evidence presented in this *Petition* establishes a well-maintained refinery, operating in sound condition and at full capacity, implementing process and environmental compliance improvements, and with no unaddressed maintenance or environmental issues until it was sold by Midland. Midland, the predecessor by merger of Land O'Lakes as to the Refinery, sold the Refinery in early 1977 to Hudson. Ex. 12 (Fuqua) ¶¶ 116-21; Ex. 13 (Gaskins) ¶ 110; Ex. 16 (Williams) ¶ 79; Ex. 20 (Wright) ¶¶ 57-62. Until the 1977 sale, the story is a simple one—a small, stable, well-run refinery.

After the 1977 sale, the story becomes complicated: nearly six years of refining operations by Hudson, a 1982 shutdown of the Refinery by Hudson due to economic and other considerations; environmental enforcement actions; an EPA-directed and site-wide environmental investigation and remediation; subsequent Federal Court release of liability; multiple sales of the Refinery (a virtual revolving door of bankrupt owners, operators, and suitors); multiple formulated and then abandoned plans to rehabilitate and restart refining

operations; a large, but short-lived, crude oil storage operation; destructive, illicit, and polluting salvage operations; litigation; vandalism; decay/degradation of equipment; tax forfeitures and tax sales; and multiple government agency-led environmental investigations and removals.

EPA's UAO is based on the faulty premise that nothing occurred at the Refinery after Midland's 1977 sale of the Refinery. By issuing the UAO, EPA ignored all of the environmentally significant, intervening events and actors during the 32 years since Land O'Lakes' predecessor last set foot on the Refinery. EPA issued the UAO to Land O'Lakes: (1) despite EPA's agreement to a prior covenant not to sue in favor of Land O'Lakes in 1987; (2) despite a site-wide RCRA cleanup approved and terminated by the U.S. District Court in 1994; (3) despite EPA's determination in October 1995 (18 years after Midland's sale of the Refinery) that no further response action was required at the Site; (4) despite all of the deleterious environmental effects of operations taking place at the Refinery after 1995, of which EPA was well aware; and (5) despite ATSDR's 2006 determination, after EPA's two removal actions were completed and the completion of EPA's Remedial Investigation, that the Site posed no apparent public health hazard. EPA's UAO required Land O'Lakes alone to conduct further environmental investigation and remediation at the Site.

A. Basic Site Information/Initial History

Comprising approximately 200 acres, the Site is located on the west side of the City of Cushing, Payne County, Oklahoma. *See* Ex. 26. The Site is divided into the "North Refinery" (approximately 165 acres in size) and the "South Refinery" (approximately 35 acres in size) by State Highway 33. *See* Ex. 3, Figure 2. Exhibits 27 and 28 present Site features of the North Refinery and South Refinery that are relevant to this *Petition*. The North Refinery was principally characterized by a series of ponds that the UAO and ROD required to be investigated and remediated: Aeration Pond 7 and associated sumps, Wastewater Ponds 1 through 6,

Treatment Pond 8, Pond 8A, Runoff Pond 9, and Unnamed Pond 1. *See* Ex. 27. Soil Area of Concern ("SAOC")-7 was the sole soil excavation area on the North Refinery. *See id.* The South Refinery was principally a soil excavation focus. SAOC-1 through SAOC-6, AA-1, and the EPA-designated "Coke/Tar Area," are depicted on Exhibit 28. The Coke Pond was the sole pond on the South Refinery requiring investigation and remediation. *See* Ex. 28. Unrelated to the Site, but related to Refinery operations are: (1) the East Tank Farm, which stored crude oil and product in large tanks approximately one mile to the east of the Site; and (2) the South Tank Farm, which stored crude oil in large tanks approximately three miles south of the Site. *See* Ex. 21 (Joint Ex. 1).

Refining of petroleum has taken place on the Site since approximately 1915. *See* Ex. 29, ¶ 1; Ex. 9 (Vandeven) ¶¶ 39, 40; Ex. 12 (Fuqua) ¶¶ 10-16; Sanborn Maps 1917 (Stillman Refining on East side), 1924 (Inland Refining (west side) and Cushing Oil & Gasoline (east side), 1931 (Cushing Oil & Gasoline on both sides), 1938 (Vandeven Aff., Exs. Sanborn 2-5); Historical Deeds to Jane Oil and Gas Company (1912); Colonial Refining Company (1913); Newham Oil Co., Inc. (1921); Cushing Oil & Gas Company (1922). Before Midland, petroleum operations of Cosden Oil & Refining, Inland Refinery Company, Stillman Refinery Company, Cushing Refining & Gasoline Company, Gustafson & Spencer Refinery Company, and Cushing Refining Company took place on the Site. *See* Ex. 9 (Vandeven) ¶ 39; Ex. 12 (Fuqua) ¶¶ 11, 13; *see also* Ex. 29, Sanborn Maps 1917 (Stillman Refining on East side), 1924 (Inland Refining (west side) and Cushing Oil & Gasoline (east side), 1931 (Cushing Oil & Gasoline on both sides), 1938 (Vandeven Aff., Exs. Sanborn 2-5); Historical Deeds to Jane Oil and Gas Company (1912); Colonial Refining Company (1913); Newham Oil Co., Inc. (1921); Cushing Oil & Gas Company (1922). Cushing Refining & Gasoline Company began the initial modernization of the

Refinery in 1934 with the addition of a 1,400 bpd thermal cracking unit. *See* Ex. 12 (Fuqua) ¶ 13; Ex. 21 (Joint Ex. 127, Fuqua Refinery History 1915-1983). In 1939, the Refinery was further upgraded with a new crude unit, which ended the shell still era, boosted refinery capacity to approximately 4,000 bpd, and began the progressive development of the modern refinery. *See* Ex. 12 (Fuqua) ¶ 13; Ex. 21 (Joint Ex. 127, Fuqua History 1915-1983 (1998)). In 1943, when Midland purchased the Refinery, the capacity was 4,500 bpd. Ex. 21 (Joint Exs. 118, 127). Under Midland, the Refinery capacity increased in stages to 6,500 bpd (1948), to 10,500 bpd (1953), to 13,000 bpd (1960), to 15,000 (1964), and finally to 19,000 (1966). Ex. 21 (Joint Ex. 118). The Refinery was designed to process low sulfur crude oil. *See* Ex. 16 (Williams) ¶¶ 143-44; Ex. 13 (Gaskins) ¶¶ 82-87. As described by several witnesses herein (both fact and expert), a maze of underground piping relating to Refinery operations criss-crossed the Site. *See* Ex. 4 (Baugher) ¶¶ 34-37; Ex. 13 (Gaskins) ¶¶ 88-109; Ex. 20 (Wright) ¶¶ 177-98; Ex. 16 (Williams) ¶ 55-76; Ex. 11 (Brady) ¶¶ 574-76.

B. 1943 to 1977—The Midland Era

The era of Midland's ownership and operation of the Refinery commenced in approximately April 1943. *See* Ex. 12 (Fuqua), ¶ 15; Ex. 30. Midland purchased the Refinery for the purpose of providing fuels to its local cooperative farmers who were facing fuel shortages during World War II. *See* Ex. 12 (Fuqua) ¶ 15. During Midland's operations, it refined crude oil into a series of petroleum products such as gasoline, kerosene, diesel, propane, butane, No. 5 fuel oil, No. 6 fuel oil, petroleum coke, JP-4 (for a short timeframe), and slurry (from the catalytic cracking unit). *See* Ex. 12 (Fuqua) ¶¶ 76-77; Ex. 21 (Joint Exs. 70, 71, 118, 127). During the Midland era, the Refinery evolved from a thermal cracking process on the South Refinery in the 1940s to a modern refinery producing higher gasoline yields, higher octanes, and more valuable

petroleum by-products. A modernization and expansion into the North Refinery portion of the Site occurred in 1953. *See* Ex. 20 (Wright), ¶¶ 39-44.

The principal petroleum processing units and their operational timeframe at the Refinery are as follows:

1. Thermal Reformer (1948-1953), which was converted to the:
2. Crude Unit No. 2 (1953- 1982)
3. Crude Unit No. 1 (1939-1982)
4. Polymerization Unit (1940-1953)
5. Dubbs Thermal Cracker (1934-1953), which was converted to the:
6. Vacuum Vis-Breaker Unit (1953-1969), which was reconfigured to a portion of the:
7. Coker Unit (1969-1982)
8. Fluid Catalytic Cracking (FCC) Unit (1953-1982)
9. Gas Concentration Unit (1953-1982)
10. Polymerization Unit (1953-1960), which was replaced by the:
11. HF Alkylation Unit (1960-1982)
12. Platformer/Catalytic Reforming Unit (1956-1982)
13. HDS Unit (1971-1982)

See Ex. 20 (Wright), ¶¶ 41-52; Ex. 12 (Fuqua) ¶¶ 76-81; Ex. 16 (Williams) ¶¶ 39-54.

Midland added the Coker Unit to the Refinery in 1969 and generated petroleum coke as an additional and more valuable petroleum product. Petroleum coke was sold for making carbon electrodes for the aluminum industry and for use as a fuel (primarily in factories). Ex. 20 (Wright) ¶¶ 162-65; Ex. 16 (Williams) ¶¶ 124-30; Ex. 13 (Gaskins) ¶¶ 44-46; Ex. 12 (Fuqua) ¶¶99-100. The Coker Unit created petroleum coke from the residual heavy ends of petroleum from the Refinery's Crude Units, which were formerly sold as No. 6 fuel oil. *See* Ex. 20

(Wright), ¶¶ 44(f), 153-56; Ex. 12 (Fuqua) ¶ 100; Ex. 16 (Williams) ¶¶ 115-18; Ex. 13 (Gaskins) ¶¶ 36-37.

During Midland's ownership and operation tenure, the Refinery was a well-run operation with a history of production and waste handling improvements, regulatory compliance, and environmental awareness. *See* Ex. 4 (Baugher) ¶¶ 9, 24-33; Ex. 20 (Wright) ¶¶ 57-67; Ex. 9 (Vandeven) ¶¶ 22, 51-54; Ex. 16 (Williams) ¶¶ 58-76, 79; Ex. 13 (Gaskins) ¶¶ 103-10; Ex. 12 (Fuqua) ¶¶ 116-26. Midland also was progressive in its waste handling and pollution abatement practices, in many cases implementing such improvements and initiatives in advance of legal/regulatory requirements. *See* Ex. 12 (Fuqua) ¶¶ 32-39; Ex. 13 (Gaskins) ¶ 104-10; Ex. 16 (Williams) ¶ 91; Ex. 20 (Wright) ¶¶ 67-68, 75-82; Ex. 9 (Vandeven) ¶ 51. These ranged from improvements to tank berms, oil recovery systems, process water treatment, spill prevention and countermeasures, to employee health and safety requirements. *Id.*

By the mid-1970s, Midland's management retained Turner, Mason & Solomon as a consultant to evaluate a potential sale of the Refinery and the purchase of a stake in a much larger refinery in East Chicago, Indiana to achieve economies of scale and reduce costs. Ex. 16 (Williams) ¶¶ 149-50, 153. As a consequence, Midland marketed the Refinery for sale and moved to acquire an interest in that East Chicago refinery. *See* Ex. 16 (Williams) ¶¶ 149-50, 153. After months of negotiations, on February 1, 1977, Midland sold the Refinery to Hudson Refining Company, Inc. ("Hudson"). *See* Exs. 31, 32.

At the time of Midland's sale of the Refinery to Hudson, the Refinery was well-maintained, in excellent operating condition, and processing crude oil near its rated capacity of 19,000 bpd. *See* Ex. 9 (Vandeven) ¶¶ 22, 51-54, 57; Ex. 20 (Wright) ¶¶ 57-67; Ex. 16 (Williams) ¶¶ 58-76, 79; Ex. 13 (Gaskins) ¶¶103-10; Ex. 12 (Fuqua) ¶¶116-26. As of early

1977, all of the Refinery's tankage and buildings were painted and in good condition. *See* Ex. 12 (Fuqua) ¶¶ 59, 118; Ex. 21 (Joint Ex. 165). General housekeeping at the Refinery was also very good. Containment berms were in good condition, and there were no spills or environmental conditions that needed to be addressed. Ex. 12 (Fuqua) ¶¶ 59, 118; Ex. 21 (Joint Ex. 165) *see also* Ex. 9 (Vandeven) ¶¶ 59-62. The Refinery's excellent condition at the time of its sale to Hudson is attributable to Midland's practices and investments, which met or exceeded best industry standards/practices. By way of example, Midland installed and commenced operating a state of the art oxidation pond system on the North Refinery in the 1960s—well in advance of water quality laws or requirements. Midland's state of the art oxidation pond system used biological processes to handle and treat process wastewater prior to discharge into a local creek. *See* Ex. 9 (Vandeven) ¶ 62; Ex. 12 (Fuqua) ¶ 121; Ex. 20 (Wright) ¶ 62; Ex. 16 (Williams) ¶¶ 55-76; Ex. 13 (Gaskins) ¶¶ 21-27. At the time of the Refinery's sale to Hudson, and in advance of new regulatory discharge requirements, there was an on-going project to improve process wastewater control, treatment, and discharge, and to improve clean stormwater runoff management. The project involved design, engineering, and construction of new facilities. *See* Ex. 9 (Vandeven) ¶ 67; Ex. 12 (Fuqua) ¶¶ 121, 126; Ex. 20 (Wright) ¶ 67; Ex. 16 (Williams) ¶¶ 73-76; Ex. 13 (Gaskins) ¶ 27. Midland did not use pits for acid sludge, but rather incinerated this material. All Refinery waste streams were managed within the accepted industry practices and regulations. A collection of photographs taken of the Refinery during the Midland era (as discussed and authenticated by former Midland employees) demonstrate a clean, well-managed, and well operated Refinery. *See* Ex. 21 (Joint Ex. 165).

Years after Midland sold the Refinery to Hudson, Land O'Lakes and Midland executed a merger agreement on October 22, 1981. Effective January 1, 1982, Midland merged into Land O'Lakes, with Land O'Lakes as the surviving corporation. *See* Ex. 33.

C. 1977 to 1989—Hudson's Refining Operations and Subsequent Bankruptcy

On February 1, 1977, Hudson assumed sole ownership and operation of the Refinery. Hudson operated it consistently and without interruption for nearly six years until December 30, 1982, when the Refinery was permanently shut down. *See* Ex. 9 (Vandeven) ¶ 12; Ex. 12 (Fuqua) ¶ 23. Neither Midland nor Land O'Lakes ever owned or operated the Refinery, or any portion thereof, after it was transferred to Hudson on February 1, 1977. *See* Ex. 12 (Fuqua) ¶ 22.

During Hudson's nearly six years of operating the Refinery, it operated the Refinery at capacity. *See* Monthly Minutes of the Refinery Management Staff Meetings reporting lagging month bpd crude runs compared to previous year and projecting upcoming month, *e.g.*, Ex. 34 (4/26/1977); Ex. 35 (8/30/1977); Ex. 36 (1/27/1978); Ex. 37 (6/29/1978); Ex. 38 (9/22/1978); Ex. 39 (12/1/1978); Ex. 40 (2/1/1979); Ex. 41 (7/26/79); Ex. 42 (1/31/1980); Ex. 43 (5/28/1980); Ex. 44 (8/27/1980); Ex. 45 (12/4/1980); Ex. 46 (1/29/1981); Ex. 47 (6/25/1981); *see also* Ex. 48, Hudson Refinery Proposal for the purchase and rehabilitation of the Hudson Refinery and Terminal located in Cushing, Oklahoma (average barrels per day 1978-1980). Refinery records and employees document that Hudson conducted two major "turnarounds" of the Refinery, in 1977 and 1982, budgeted at $1.372 million and $1.7 million respectively, during the course of which the Refinery's processes were temporarily shut down, cleaned, repaired, and placed back into operation. *See* Ex. 20 (Wright) ¶¶ 123-24; Ex. 13 (Gaskins) ¶ 64; Ex. 16 (Williams) ¶¶ 88-89. The purpose of these turnarounds was to: (1) inspect Refinery equipment for preventative maintenance for purposes of efficient operations and environmental management; (2) make repairs and remove materials; and (3) upgrading Refinery equipment and processes. *See* Ex. 16

(Williams) ¶ 81; Ex. 20 (Wright) ¶ 111. On December 30, 1982, due to economic conditions and other events, Hudson suspended refining operations at the Refinery. *See* Ex. 9 (Vandeven) ¶ 12; Ex. 12 (Fuqua) ¶ 21; Ex. 29. While other non-refining operations took place on the Site after Hudson's shutdown (described, *infra*), December 30, 1982 represents the final day that the refining of crude oil ever occurred at the Site. *See* Ex. 12 (Fuqua) ¶ 23.

When Hudson shut down refining operations in 1982, it expected the stoppage to be temporary. Thus, as part of suspending refining operations, Hudson took several actions to preserve the Refinery as an asset ready for either restart and future operation, or for sale as an operational refinery. Hudson sold existing product in inventory, maintained equipment, preserved vessels (emptying, encasing in natural gas blanket), preserved piping (by leaving product and crude oil in the lines), sold certain refinery feedstocks (including crude oil) that were in inventory, and continued inspections and repairs of pipeline and tank leaks. *See* Ex. 9 (Vandeven) ¶¶ 13-15 and Ex. 34 thereto at 10-12; Ex. 12 (Fuqua) ¶ 137-48; Ex. 4; (Baugher) ¶¶ 33-43. On January 3, 1984, Hudson filed for reorganization bankruptcy in the United States Bankruptcy Court for the District of Kansas. *See* Ex. 49. Among the primary contributing factors to Hudson's financial problems were "[t]he cost of maintaining a non-operating refinery." *See* Ex. 50 at 16.

1. *United States v. Hudson*

In 1984, more than seven years after Hudson purchased the Refinery, and more than two years after Hudson permanently shut down the Refinery, EPA initiated a Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, *et seq.* ("RCRA") enforcement action against Hudson relating to environmental conditions of the Hudson Land Treatment Unit ("RCRA LTU"), and the Refinery in general. RCRA regulations become effective after Midland's sale of the Refinery to Hudson. In particular, on August 8, 1984, the United States, "**at the request of the**

United States Environmental Protection Agency," filed suit against Hudson Refining Co., Inc., in the United States District Court for the Western District of Oklahoma (Case No. CIV-84-2027). In its *Complaint*, the United States alleged violations of federal and state hazardous waste management requirements, and sought injunctive relief and civil penalties against Hudson pursuant to RCRA. *See* Ex. 51.

In particular, the United States alleged that Hudson generated the following hazardous wastes at the Site under RCRA:

- Decanter tank car sludge from coking operations (K087);[7]
- Dissolved air flotation float (K084);
- Slop oil emulsion solids (K049);
- Heat exchanger bundle cleaning sludge (K050);
- API separator sludge (K051); and
- Tank bottoms (K052).

See id. at ¶ 4. EPA further alleged that Hudson violated hazardous waste management regulations addressing groundwater monitoring and assessment, precipitation and runoff, requirements for a land treatment unit, agreements with emergency response teams and contractors, and closure and post-closure requirements, including financial responsibility and insurance. *Id.* at ¶¶ 9-11.

On September 11, 1985, Hudson filed its Motion to Dismiss and/or Motion for Summary Judgment. In a statement that was both prescient and accurate, Hudson called the Court's attention to the all-encompassing allegations that EPA was making against Hudson:

> [R]efining operations have been conducted at the present Hudson site since about 1915. In essence, the Plaintiff [United States] is seeking to make Hudson responsible for all such releases on the property since 1915.

[7] As discussed and demonstrated below, K087 was never generated by the Refinery. *See, infra*, Section VIII.B.3.

See Ex. 29 at 39. In that same filing, Hudson also stated to the Court its on-going maintenance efforts at the Refinery:

> During the period between suspension of refinery operations and institution of this suit, Hudson has kept personnel on site to maintain the refinery, operate the refinery wastewater system and ensure the security of the refinery property.

See Ex. 29, ¶ 25.

During the course of the litigation, EPA and Hudson partially resolved EPA's allegations in a *Partial Consent Decree*, which was entered by the Court on May 1, 1986. The *Partial Consent Decree* required Hudson to undertake "Site Investigation" activities as more particularly spelled out in an extensive "Addendum: Work Plan" attached thereto. The following elements were required by the "Addendum: Work Plan":

- An inspection of all tanks and API separators, justification as to which are not subject to regulation as hazardous waste storage units, and information concerning those that are subject to regulation as hazardous waste storage units.
- Removal of accumulated sludge from operating API separators in excess of 40% of volumetric capacity.
- A Site survey to assess: (i) the physical condition of tanks, (ii) records of reportable spills and response, and (iii) storm or process water drainage ditches that would receive contamination from the Site.
- A Site-wide groundwater investigation.
- A soil sampling and characterization investigation.
- An evaluation of the Hudson LTU.

See Ex. 52, Addendum: Work Plan. Between the entry of the 1986 *Partial Consent Decree* and the 1987 *Final Consent Decree*, EPA's Superfund Program reviewed the Site under CERCLA and determined that the Site did not "warrant an immediate removal action." This determination was set forth in a June 23, 1987 Memorandum. *See* Ex. 53.

Ultimately, EPA and Hudson fully resolved all of EPA's allegations with the entry of a *Final Consent Decree*, which was lodged on October 13, 1987 and entered by the Court on December 11, 1987. *See* Ex. 54. Among other things, the *Final Consent Decree* required Hudson to perform the environmental corrective action work in the "Addendum A: Work Plan" to the *Final Consent Decree* and within the timeframes specified therein. The following elements of environmental corrective action were required by the "Addendum A: Work Plan":

1. Tank Cleanout;
2. Soil Excavation;
3. Biotreatment of Contaminated Soils;
4. Removal of North Oily Water Pond Sludges and Contaminated Soils; and
5. Groundwater Remediation.

See Ex. 54, Addendum A.

As predicted by Hudson, and as set forth in the *Partial Consent Decree* and the *Final Consent Decree*, EPA required Hudson to conduct a Site-wide investigation and corrective action. The environmental investigation and remediation/corrective actions required of, and completed by, Hudson under the *Partial Consent Decree* and the *Final Consent Decree* were broad and addressed all media and areas of the Site. *See* Ex. 12 (Fuqua) ¶¶ 158-80; Ex. 20 (Wright) ¶ 202; Ex. 9 (Vandeven) ¶¶ 73-109; *see generally* Ex. 8 (Saba).

2. Hudson's Work under the *Final Consent Decree*

In the Unsecured Creditors' Committee's Third Amended Disclosure Statement to Plan of Reorganization (July 16, 1990), Counsel for the Unsecured Creditor's Committee wrote of the EPA's enforcement litigation against Hudson:

> As a result of **Hudson's failure to comply** with various regulations concerning the operation of waste treatment facilities located on a portion of the refinery site in Cushing, Oklahoma, and prior to the bankruptcy filing, the EPA initiated an action in the Federal District Court in Oklahoma. Shortly after the filing of the

> bankruptcy petitions the EPA sought injunctions against Hudson Refining with respect to regulatory violations and demanded civil penalties for past violations in an amount in excess of $20,000,000. The Trustee immediately instituted negotiations with the EPA concerning settlement of these claims.
>
> **In May, 1984, the EPA filed an amended complaint to include allegations under a recently enacted federal statute which permits the EPA to pursue corrective action as to any release of toxic materials into the environment. This new complaint expanded the issues beyond the waste treatment facility to include the entire refinery site....**
>
> The EPA's claim was settled prior to trial in October, 1987. **Prior to settlement the estate expended approximately $1,000,000 for feasibility studies and remedial evaluation**. Pursuant to an Order of the Bankruptcy Court, the debtors' obligations to the EPA will survive confirmation of a Plan of Reorganization and the debtors are required to perform certain corrective action at the Cushing Refinery. The Agreement also contains provisions for cash outlays by the debtor after confirmation, including maintaining a million dollar escrow account to provide funding of corrective expenses as well as closing and post-closing costs. **Through April 30, 1990, the Trustee expended $709,000 from the escrow account performing required corrective action**. On May 1, 1990, the escrow account contained $291,000; the closure account contained $59,980; and the postclosure account contained $169,342. **The Trustee believes that the remedial work required by the Final Consent Decree has been substantially concluded, and that further corrective requirements are minimal, with an estimated expense not exceeding $30,000.** Any unused portion of the escrow account is to be returned to the Bankruptcy Estate in [accordance] with the Final Consent Decree.

Ex. 50 at 21-22 (emphasis added).

In October 1994, the Hudson Bankruptcy Trustee commissioned Technico Environmental, Inc. to conduct final soil and groundwater testing to confirm compliance with the *Final Consent Decree*. The Technico Report, titled "Final Soil and Groundwater Testing for the Hudson Oil Refinery in Cushing, Oklahoma" concluded that the requirements of the *Final Consent Decree* had been met:

> [T]he goals of soil biotreatment and ground water remediation are successfully achieved and the remediation goals and standards of the Final Consent Decree are fulfilled. No further sampling and analysis of the soil and ground water is required.

Ex. 55 at 6. That same month, on October 25, 1994, the Court entered its *Order for Closure of the Final Consent Decree* thereby closing the *Final Consent Decree*, ending the litigation, terminating Hudson from further work under the *Final Consent Decree*, and releasing Hudson and its immediate predecessor in interest to the Refinery. *See* Ex. 56. The Technico Report was thereafter filed in the Hudson RCRA enforcement litigation on November 2, 1994. *Id.* (title page).

D. 1989 to 1997—Post-Hudson Ownership and Operations

1. U.S. Refining

The Hudson bankruptcy estate entered into an Agreement for Sale and Purchase of Assets with an entity named U.S. Refining and Marketing Company, Inc. (together with U.S. Refining, L.P., collectively, "USR") dated February 16, 1989. *See* Ex. 57; Ex. 58, ¶ 6. That agreement provided for the sale of the Refinery, including real property and personal property, to USR. *See* Ex. 57. In response to objections by the United States, the Agreement was amended on March 10, 1989 to, among other things, incorporate the use limitations in the *Final Consent Decree* into the sale and transfer documents. *See* Ex. 58, ¶ 10; Ex. 59. By Order dated March 17, 1989, the Hudson bankruptcy court approved the form of the Agreement, as amended, between the Hudson Bankruptcy Estate and USR and the form of the deed that affected the transfer of the Refinery to USR. *See* Ex. 58, and Ex. A thereto. On August 30, 1989, the Refinery was transferred from the Hudson bankruptcy estate to USR by Warranty Deed. *See* Ex. 60. That Warranty Deed included language from the *Final Consent Decree* that imposed restrictions and limitations on use of the Site. *See id.* Specifically, the Warranty Deed provided:

A. The Grantee recognizes that Grantor is a party-defendant in United States of America v. Hudson Refining Co., Inc. and Hudson Oil Co., Inc., Civil Action No. 84-2027-A in the United States District Court, Western District of Oklahoma. A Final Consent Decree, dated December 10, 1987, and filed on December 11, 1987, was entered in this litigation. Pursuant to paragraph III.A. of such Final Consent Decree, Grantee, by accepting this Deed, agrees that Grantee shall be bound by the requirements of the Final Consent Decree and the addendum as set forth therein from and after the date of this conveyance, and that the United States shall be a third party beneficiary for the purpose of enforcing the requirements of the Final Consent Decree.

B. The Grantor recognizes and agrees that there are remnants and effects of certain industrial activities and practices conducted in the past upon the property being transferred by this instrument. The Grantee therefore agrees to limit the future uses of and activities upon said property. **Accordingly, it is expressly agreed and covenanted that no property transferred by this instrument shall be used for residential or agricultural purposes. The property may be used for industrial or commercial purposes where: 1) access is limited to business invitees; and 2) the general public is not invited for retail, entertainment, recreational or educational activities.** This agreement and covenant with respect to the restriction on use of the property is hereby declared to be a covenant running with the land and shall be fully binding (until terminated or modified by the United States Environmental Protection Agency or any successor agency) upon all persons acquiring said property or any part thereof, or any interest therein, whether by descent, devise, purchase or otherwise, and any person by the acceptance of title to said property or any part thereof, or any interest therein, shall thereby agree to abide by this covenant. Upon any violation or attempted violation of this agreement and covenant, the United States or the State of Oklahoma (including, without limitation, the United States Environmental Protection Agency or any successor agency) shall be entitled to institute and prosecute appropriate proceedings to restrain or remedy such violation or attempted violation.

Id. at 2-3, Book 913, Pages 797-798 (emphasis added).

Shortly after the Hudson's bankruptcy court's approvals, described above, an asbestos issue at the Refinery surfaced, "which would require substantial corrective expense." *See* Ex. 61, ¶ 2; Ex. 62 at CABK00705, CABK00710. This led the Hudson bankruptcy estate and USR to

reduce the purchase price of the Refinery by $500,000. *See* Ex. 61, ¶ 2. This reduction was approved by the Hudson bankruptcy court. *See* Ex. 61, ¶¶ 1-3. In the Unsecured Creditors' Committee's Third Amended Disclosure Statement to Plan of Reorganization (July 16, 1990), Counsel for the Unsecured Creditor's Committee wrote of this sale of the Refinery:

> Before the Trustee could offer the Cushing Refinery for sale, it was necessary to conclude operations, secure the facility and complete the environmental evaluation and remedial requirements under the terms of the EPA Consent Decree. The Trustee incurred operational losses in excess of $3,500,000 in the process of closing and securing the facility.
>
> On February 16, 1989, the Trustee entered into a contract to sell the Cushing Refinery to [USR]....
>
> The essential terms of the agreement provided that [USR] acquire all of the personal property located at or affixed to the Refinery...as well as the real estate on which the property is situated and all buildings, structures, improvements, fixtures, processing units, storage tanks, pipelines and other material associated with the real property.
>
> [USR] had been advised by the Trustee that [Hudson] had been sued by the United States for alleged violations at the Refinery under the Resource Conservation and Recovery Act and the Oklahoma Controlled Industrial Waste Disposal Act, and [USR] agreed to the terms of the Partial Consent Decree previously entered in that litigation. The Trustee will continue to have access to the premises in connection with the completion of investigatory or other work required under the EPA work plan associated with the aforementioned litigation.
>
> ****
>
> An asbestos condition was discovered at the Cushing Refinery, which allegedly required substantial corrective expenses. The Trustee and the Buyer's engineers estimated the remedial expense for the asbestos removal at a range from $500,000 to $2,000,000. In order to preserve the sale and avoid further responsibility with respect to removal or treatment of the asbestos, the Trustee...re-negotiated the purchase price.... The Buyer, [USR] assumed responsibility of removing the asbestos.

Ex. 50 at 35-38.

It was USR's plan to rehabilitate the Refinery and its associated storage assets, and to restart refining operations. *See*, *generally*, Ex. 63. Until USR filed its own bankruptcy in 1991, it worked to make the Refinery ready for restart of refining operations, including general housekeeping, maintaining utilities, and operating pumps, compressors, and other equipment. *See* Ex. 20 (Wright) ¶¶ 16-19; 203-12; Ex. 12 (Fuqua) ¶¶ 181-97. While rehabilitating the Refinery itself was proving to be expensive, USR pressed the Refinery's associated storage assets into operation. *See* Ex. 64 ¶¶ 7, 8; Ex. 65; Ex. 12 (Fuqua) ¶¶ 185, 195. USR performed preparatory work to ready the Refinery's pipelines and associated storage assets (which consisted of the Refinery Tank Farm, South Tank Farm, and East Tank Farm):

> Prior to re-opening the storage facilities, all the big crude oil tanks were professionally cleaned with hydraulic water pressure and vacuum trucks ....
>
> The pipelines were hydrostatic tested to 120 bbls. [sic] pressure and no leaks were found. The pipelines were said to be essentially empty. The remains were said to be a mixture of oil and water.

Ex. 66 at CABK01456. Existing pipelines through the Refinery were intended to be, and actually were used, for USR's crude oil storage operations. *See* Ex. 66 at CABK01455; Ex. 65 at CABK01988; Ex. 12 (Fuqua) ¶ 185.

USR entered into a Crude Oil Storage Agreement with Bear, Stearns N.Y., Inc. ("Bear Stearns") dated May 30, 1990 wherein USR agreed to receive and store up to 200,000 barrels (bbls.) of crude oil in the Refinery's associated storage assets. *See* Ex. 66 at CABK01441; *see also* Ex. 12 (Fuqua) ¶ 185. By the end of July 1990, USR was storing over 740,000 bbls. of crude oil in the Refinery's associated storage assets for multiple customers. *See* Ex. 67; Ex. 12 (Fuqua) ¶ 185. USR and Bear Stearns amended their Crude Oil Storage Agreement in August 1990, and perhaps again in September 1990. *See* Ex. 66 at CABK01448, CABK01450.

By September 1990, USR had abandoned efforts to rehabilitate and restart the Refinery "due to lack of funding." *See* Ex. 66 at CABK01456. USR redelivered stored crude to its customers during August through November 1990. *See id.* USR's product storage operations associated with the Refinery led to allegations of missing product. *See* Ex. 64 at CABK00623, ¶ 12. The underground pipelines were calculated to have a capacity of 1,357 bbls. and USR was unable to re-deliver to its customers' crude oil in the underground pipelines and at least one tank. *See* Ex. 66 at 3 (CABK01459). One analysis attributed the storage losses to several factors, including clingage, leftovers in pipelines, sediments/sludge at the tank bottoms, seepage, leakage, etc. *See* Ex. 66 at 3 (CABK01464).

In this same timeframe, several pieces of litigation ensued between the various stakeholders of USR, and USR declared bankruptcy. Walter Kellogg, the former Hudson Bankruptcy Trustee, was appointed as a receiver for the Refinery, and ultimately as a bankruptcy trustee for an entity known as "Hudson RAM," which was a USR stakeholder. *See* Ex. 68 at CABK00363; Ex. 69 at CABK00297, ¶ 1. In the fall of 1993, the USR receiver, Walter Kellogg, stated in a Declaration, as follows:

> In 1989, in my capacity as the Trustee for the bankruptcy estate of the Hudson Oil Company, I sold the Refinery to USR for $4 million. At that time, USR had an asbestos environmental company come out to the Refinery and produce an estimate of $500,000 for asbestos abatement costs, which was deducted from the purchase price, netting the purchase price down to $3.5 million. No asbestos abatement has occurred. Asbestos remains at the Refinery today in worse condition than it was when the Refinery was sold to [USR] in 1989.

Ex. 69 at CABK00300, ¶ 8. Continuing, the USR receiver wrote: "[t]here are 34 miles of packed lines within the Refinery that cannot be left in place. Those pipelines must be cut, purged, capped, and removed." Ex. 69 at CABK00300, ¶ 9.

To a point, even after the 1991 bankruptcy of USR, the Refinery was preserved for potential restart of operations by the USR Bankruptcy Trustee, Walter Kellogg. General housekeeping, vegetation control, environmental compliance work, inspection (*e.g.*, pressure testing), maintenance, and repair of process areas, tanks, and pipelines continued during this timeframe. *See* Ex. 20 (Wright) ¶¶ 208-10; Ex. 12 (Fuqua) ¶¶ 181-97. Tours and facilities inspections were conducted for prospective purchasers of the Refinery. *See* Ex. 20 (Wright) ¶ 211; Ex. 12 (Fuqua) ¶¶ 192, 195-96. Exhibit 23 to this *Petition* is a video of the Refinery taken in approximately 1991 that shows the Refinery's tanks, vessels, and process areas intact.

2. EPA's Superfund Office 1995 NFRAP

Less than a year after the *Closure Order*, in September 1995, EPA's contractor Roy F. Weston Company ("Weston")—under contract with EPA—issued a report summarizing data used to calculate an HRS score for the Site. *See* Ex. 70. Weston did not collect new data and only observed the Site from outside the property fence, however, it reviewed a significant amount of existing data and made first-hand observations. *See* Ex. 7 (Hathaway) ¶ 30; Ex. 9 (Vandeven) ¶ 112. The Site received a score of 0.03, significantly less than the 28.5 required for National Priorities List ("NPL") eligibility. According to Land O'Lakes' retained expert, William Hathaway, Weston's HRS scoring process was robust, met the required EPA factors for the HRS scoring requirements, and presented a meaningful HRS scoring, especially in light of the prior site-wide investigation and remediation efforts by Hudson under the *Partial Consent Decree* and *Final Consent Decree*. *See* Ex. 7 (Hathaway) ¶ 30.

Based on the Weston Site Inspection and HRS assessment, the EPA Superfund office issued a "No Further Response Action Planned" ("NFRAP") designation for the Site in October 1995. *See* Ex. 71. Therein, EPA stated:

> The Hudson Oil Refining Company site is an approximately 120 acre refinery that is totally fenced. The site was closed under the auspices of the State of Oklahoma in 1994. Currently, the only CERCLA eligible source remaining on the facility would be contaminated soil. There is no ground water use within a mile of the facility and the nearest perennial stream is over 2 miles from the facility. The site is surrounded by several residences; however, the fence prevents exposure to contaminated soil on-site.
>
> Due to the lack of receptors and limited hazardous quantity, the Hudson Oil Refining Company site does not meet the minimum criteria of a viable candidate for inclusion on the Superfund National Priorities List; therefore, the site is designated a disposition of No Further Remedial Action Planned (NFRAP), and at this time does not warrant further investigation under Superfund.

See Ex. 71. EPA communicated the NFRAP decision to ODEQ by correspondence dated January 10, 1996. *See* Ex. 72. According to Mr. Hathaway, EPA's January 10, 1996 referral to ODEQ and NFRAP terminated any further CERCLA action by EPA at the Site, which was consistent with the *Closure Order*. *See* Ex. 7 (Hathaway) ¶ 32. It was subsequent, intervening events that drew EPA back into the Site's situation and ostensibly required EPA to take further action. *See id.* at ¶ 33.

3. USR/Western Environmental

By 1996, the outlook for continued operations and sale of the Refinery was dimming. As such, USR "engaged in negotiations with Western Environmental of Oklahoma, L.L.C. … ("Western"), concerning, among other things, the dismantling of the Refinery, salvage and remediation and abatement services." Ex. 73 at CABK00514. These negotiations led to "the preparation and execution of the Dismantling, Processing and Salvage Agreement, and the First Addendum to Dismantling, Processing and Salvage Agreement…." ("Western/USR Agreement"). *See id.*

Pursuant to the Western/USR Agreement, Western agreed:

> to provide services to the Debtor which are to be divided into four (4) separate stages. **Stage 1** was comprised of general maintenance and clean up of the Refinery premises, recovery and sale of all moveable personal property and inventory, and recovery and sale (or disposal) of crude oil and other petroleum products currently held in underground pipelines. During **Stage 2**, Western is to provide a written environmental audit and propose a remediation and abatement schedule, among other things. **Stage 3** is broken into two substages: **Stage 3A** consists of purging, cleaning, dismantling and sale of the storage tanks; **Stage 3B** consists of, among other things, remediation and abatement of all lead and asbestos and salvage and sale of all tankage at the Refinery. **Stage 4** consists of the salvage and sale of any remaining property at the Refinery, dismantling and sale of all remaining structures and improvements, grading and leveling of the land owned by Debtor and the ultimate sale of the property (if the Debtor chooses to involve Western in such sale). The parties contemplate that the four stages shall be completed within approximately 18 months.

See id. at CABK00514-15 (emphasis added). As part of the Western/USR Agreement, Western provided USR with an environmental indemnification for liabilities relating to Western's services that, among other things, arose out of any actual, alleged, threatened discharge, dispersal, release, storage, treatment, generation, disposal, escape or exposure of any hazardous substances, that arose out of failure to properly perform environmental audits or perform remediation/abatement of hazardous substances required by the Western/USR Agreement. *See* Ex. 73, at CABK00529. Western's work was to be supervised by an entity called Turner, Mason and Company. *See* Ex. 73 at CABK00523. On September 10, 1996, the USR bankruptcy court approved the Western/USR Agreement. *See* Ex. 74 at CABK00507.

While the precise dates are unclear, it is clear that in 1996, during USR's ownership, dismantling and salvaging activities at the Refinery had commenced and captured the concern and attention of those in the Cushing community. For example, on March 27, 1996, a citizen complaint to ODEQ stated that "[a]n abandoned refinery is being torn down, and complainant

feels there is asbestos involved. The demolition is being taken out on trucks." *See* Ex. 75 at LOL0406688. A month later, another citizen complaint stated that "the Hudson Refinery in Cushing is being torn down and [complainant] believes the pipes have asbestos on them. They are breaking them open in the yard." *See* Ex. 76 at LOL0406691. Two months after that, on June 5, 1996, a citizen complaint stated: "[t]he Complainant reported that Hudson Refinery is tearing open the oil and gas tanks. Then they are burying them underground. They are doing it now." Ex. 77 at LOL0406694. Shortly thereafter, a June 24, 1996 citizen complaint reported "that Hudson Refinery is placing oil on the ground and then bulldozing it over with dirt." *See* Ex. 78 at LOL0406700. A day later, on June 25, 1996, a citizen complaint stated: "Complainant reported the Old Hudson Refinery is being torn down. It appears that the bottoms of old crude oil tanks are being taken off and the contents dumped onto an old parking lot. Complainant is concerned there may be "hot spots" in the area also." *See* Ex. 79 at LOL0406697. On June 26, 1996, an ODEQ representative reportedly visited the Site and confirmed that "there was oil and dirt that was being mixed." *See* Ex. 78 at LOL0406702.

4. Quantum/Western

Effective October 1, 1996, USR executed a Special Warranty Deed where by USR conveyed the Refinery to Quantum Realty Company, L.C. ("Quantum"). *See* Ex. 80. Quantum and Turner, Mason & Company shared the same address in Dallas, Texas. *Compare,* Ex. 73 at CABK00533 to Ex. 80 at EPAFOIA0000300. Nearly simultaneously with Quantum's purchase of the Refinery, Quantum entered into an October 7, 1996 "Agreement for Salvage/Environmental Cleanup – Cushing Refinery Project" with Western (the "Western/Quantum Agreement"). *See* Ex. 81.

The Western/Quantum Agreement, among other things, required Western to salvage and remove Tank Nos. 27, 90, 19, and "about ten 500 barrel tanks" from the Refinery. *See* Ex. 81 at

LOL0053014. Western was also required to "clean and remediate the coke pit located on the south refinery area." *See* Ex. 81 at LOL0053014. Removal of other structures on the South Refinery and asbestos abatement was also required of Western, as was cooperation with a specialized contractor to remove tetraethyl lead ("TEL"). *See* Ex. 81 at LOL0053014. Work under the Western/Quantum Agreement was to commence in November 1996 with a target end date of April 1, 1997. *See* Ex. 81 at LOL0053014.

E. 1998 to 2009—EPA Returns

1. Quantum UAO; EPA Emergency Removal; EPA Conducts Second HRS

Because of the hazard caused by the asbestos and the conditions caused by Western, the ODEQ requested assistance from the EPA in late 1997. *See* Ex. 9 (Vandeven) ¶ 116. On January 30, 1998, an EPA START team, with the presence of ODEQ, inspected the Site—ostensibly because "[p]etroleum contamination was reported to be abundant on-site with contamination spilling into a creek on-site." *See* Ex. 82 at ODEQ37157. As stated in the resulting February 2, 1998 report (POLREP No. 1), "[t]he refinery property is allegedly owned by Mr. Malcolm Turner, Quantum Realty Co....and possibly Mr. Greg Turner..." *See id.* The START report also contains important insight into the effects of the salvaging and degradation of the Site and the equipment thereon:

> B. Description of threat
>
> The south refinery grounds consists of disrepaired equipment and structures. Some salvage or cleanup activities have taken place in the past which have left behind debris piles and partially razed equipment and structures. Approximately 13 petroleum storage tanks are present and range in size from a few hundred gallons to approximately 15,000 gallons. Some stained soil was observed, mostly in the tank farm area where the tanks have been salvaged. Tank salvage operations were performed as recently as January, 1997. Partially salvaged tank debris remains on-site that may contain some sludges....some disking operations have been taking

> place within the tank farm area in an effort to bioremediate stained soils. Refinery structures are partially covered with an asbestos-looking material. Asbestos was reportedly removed from the site as recently as May\June, 1997.... In short, the South refinery is in a delapidiated and partially removed condition. **Obvious non-petroleum waste streams were not observed by START.**
>
> The North Refinery operations appear to be in better condition than the South and have reportedly been kept mostly intact in hopes of reopening the refinery sometime in the future. The process area appears to be fairly clean, despite some limited stained soils in localized areas. One approximately 10,000 to 20,000 gallon horizontal tank is present on-site, as well as a approximately 1,000,000 gallon capacity petroleum storage tank. The million-gallon has been breached on two sides with tank cutting equipment in an initial effort to salvage it .... the county, at one time, was allowing various entities to deposit petroleum wastes of unknown makeup into the tank. The product was then spread onto refinery roads until local people began complain about odors, at which time the activity was ceased. In the mean time however, the tank volume and specific contents was apparently forgotten and the tank was discovered **to contain petroleum product** when salvage operations began. Thus the gaping holes in either side. Current volume within the tank is approximately 170,000 gallons. The tank represents a problem in that precipitation events may add to the tank contents, which is already at a maximum level. Freeboard appeared to be less than one foot at the time of inspection. An adequate containment berm was not observed by START. **Some stained soil was observed at the base of the tank.... Obvious non-petroleum waste streams were not observed by START.**

See Ex. 82 at ODEQ37158 (emphasis added). Next steps spelled out in the START report included stabilizing the compromised storage tank on-site, removal of petroleum contents, and determining "if CERCLA wastes are on-site." *See* Ex. 82 at ODEQ37160.

At some point, relations between Quantum and Western soured. Western initiated litigation against Quantum on February 3, 1998 alleging breach of a real property sales contract. *See* Ex. 83. Quantum answered and counterclaimed against Western on March 19, 1998 for breach of the Western/Quantum Agreement. Specifically, Quantum alleged that:

> Western has breached the cleanup agreement in various ways, including but not limited to its failure to complete the required

> clean up and remediation...of the refinery property lying South of Highway 33. In addition, Western has removed valuable assets from the Cushing Refinery site to which it was not entitled.

See Ex. 84 at 3.

During the pendency of this litigation between Quantum and Western, on August 10, 1998, the EPA's Superfund Division Director gave verbal approval for the expenditure of up $1 million to initiate an emergency removal action to address the presence of loose and friable asbestos containing material ("ACM") on the South Refinery. *See* Ex. 7 (Hathaway) ¶ 36; Ex. 9 (Vandeven) ¶ 116. EPA's Emergency Removal Action commenced in September 1998. *See* Ex. 9 (Vandeven) ¶ 116. As part of this effort, EPA issued a CERCLA 104(e) information request and a CERCLA 106(a) *Unilateral Order for Access and Noninterference* to Quantum effective September 11, 1998 ("Quantum UAO").[8] *See* Ex. 85. In general, the Quantum UAO required Quantum to: (1) grant EPA access to the Refinery to conduct CERCLA removal and remedial response activities; and (2) to refrain from conducting excavation, demolition, dismantling, or construction activities. *See* Ex. 85 ¶¶ 38, 41.

In the Quantum UAO, EPA made "Findings of Fact" demonstrating that the Refinery had been subject to environmentally harmful activities since the 1977 sale by Midland. These "Findings of Fact" provide powerful insight into the state of the Refinery in 1998, as well as the activities that caused the environmental conditions that EPA captured in the Quantum UAO. First, the Refinery was "inactive." *See* Ex. 85 at ¶ 10. Additionally, EPA found that:

> [t]he Site includes **partially razed and abandoned equipment and structures**, approximately 20 ASTs, drums, wastewater treatment impoundments, separators, stained soils, a land treatment unit, loose and friable ACM, and at least two buildings where various chemicals are stored.

[8] *In re Hudson Oil Refining Co., Inc. Superfund Site, Cushing Oklahoma, Quantum Realty Co., L.C.*, CERCLA Docket No. 6-13-98.

See Ex. 85 at ¶ 10 (emphasis added). Continuing, EPA stated that:

> There are actual or threatened releases of hazardous substances, contaminants and/or pollutants at the Site. **The ASTs containing oily sludge have been breached, and many have been left with tops removed. The EPA has observed separators on site overflowing.** When it rains, additional materials in ASTs and separators will be released and will enter runoff from the Site....**Releases from ASTs and separators are evidence by visibly stained soils.** Additionally, there are numerous drums and other containers of chemicals stored in and outside of buildings...An area resident reported to EPA a recent incident of vandalism on the Site involving breakage of containers taken from a building on site....ACM is exposed, torn, hanging on process equipment.

See Ex. 85 at ¶ 11 (emphasis added). EPA also stated that:

> [a]ltering, removing, damaging, or otherwise disturbing buildings on the Site is likely to cause migration of any hazardous substances, pollutants, or contaminants present there. Thus, the potential exists for harm to human health or welfare and the environment should buildings or their contents be altered, removed, damaged, demolished, or otherwise exposed to unprotected persons. Likewise, excavation, movement, or other disturbance of any material at the Site may pose a threat to human health or welfare and the environment, if contaminated material is rendered more likely to enter a human, animal, or plant exposure pathway. Further, disturbance of any aspect of the Site without specific advance authorization from EPA may render the cleanup of the Site more difficult, thus harming human health, welfare, and the environment.

See Ex. 85 at ¶ 15; *see also* ¶ 19.

According to EPA and the Quantum UAO, access was required for the purpose of performing a removal action, a remedial action, and for "taking" or "effectuating" a response action under CERCLA. *See* Ex. 85 at ¶ 33. Specifically, EPA required access to the Refinery to conduct activities that may include: (1) stabilization and removal of ACM; (2) taking building material, soil, sediment, tank, drum, separator, surface water and groundwater samples; (3) excavation and removal of contaminated soils; (4) demolition and removal of process

equipment, drums, tanks, buildings, and other contaminated material; (5) removal of sludge and other material found in drums, tanks, separators, and miscellaneous containers; (6) drilling and installing piezometers and monitoring wells, which will be permanently located for future monitoring of groundwater contamination; (7) periodic sampling of groundwater monitoring wells; and (8) other actions necessary to carry out removal and remedial actions. *See* Ex. 85 at ¶ 38. EPA also ordered Quantum to "Cease and Desist" from certain activities on the Refinery:

> Quantum must not conduct (or cause or permit to be conducted) any excavation, demolition, dismantling, or construction activities, nor move (or cause or permit to be moved) earth, slag, equipment, or other materials at the Site, without first submitting a written Work Plan to [EPA] OSC Engbloom at the following address, and receiving her written approval of the Work Plan....

See Ex. 85 at ¶ 41.

What EPA found when it entered the Site in the fall of 1998 was shocking—ripped tanks, petroleum and tank bottoms dumped on the ground, loose and friable asbestos hanging from piping and process vessels. Photographs attached to Mr. Vandeven's Affidavit at Attachment 8 depict what EPA and its contractors faced. *See* Ex. 9 (Vandeven) ¶¶ 117, 185.

A March 5, 1999, CERCLA 104(e) response by Quantum provides further important insights into conditions at the Refinery during this timeframe. For example:

> The personalty is far too numerous to list; however, the personalty that is of value, to some extent, that was owned by Quantum is as follows:
>
> > Crude distillation units, vacuum unit/delayed Coker unit, fluid catalytic cracking and gas concentration unit (including blower), HF alkylation unit, naptha hydrosulfurization until [sic] (including all gages [sic] and valves) platformer unit, de-salting unit, merox treater, remaining storage tanks and other such property.[9]

[9] These assets were the subject of a September 1, 1998 Bill of Sale from Quantum to Balboa Site, S.A. *See* Ex. 80 at EPAFOIA0000301.

> As EPA knows, all of that property was sold to third parties previously. In addition to the foregoing, there was other personalty at the location that was stolen by Western Environmental, **a company well known to EPA**, and while removing same, they did a great deal of alleged environmental damage.

See Ex. 86 at 2 (emphasis added). Continuing, Quantum stated:

> Western Environmental was to deal with the South side of the plant, only; however, they ripped-and-tore on not only that side but the North side and all other locations of Quantum, stealing much steal [sic], making a mess of all items located thereon, and they stole all of the storage tanks of Quantum. Virtually all of the environmental problems now complained of by EPA are as a result of (a) the condition in which the property was left by Hudson, hence the bankruptcy proceedings to avoid liability, or (b) Western.

See Ex. 86 at 3. Quantum also stated that "rumor has it that Western and Joseph Henry buried chemicals, etc. on site against all rules, the requests of Quantum and to avoid discovery." *See* Ex. 86 at 6.

As described by EPA, the Emergency Removal Action was necessary because:

> There were uncontrolled leaks and releases of friable asbestos, and HF acid and vapors, and TEL and vapors from vessels and structures on the Site into the environment. Asbestos, HF acid, and TEL are hazardous substances. The emergency removal actions were conducted to address releases of asbestos, HF acid, and TEL; to demolish and dispose of the South Refinery's 38 towers, 50 vessels, and associated piping; a North Refinery HF storage tank; the North Refinery's HF alkylation plant; two TEL tanks; and two lab buildings. The removal action included the demolishing and disposal of six structurally unsound buildings, the abatement of friable ACM, and the disposal of liquid waste materials collected from pipes and tanks/vessels. The 1998 removal action work also addressed hazardous substances found on the North Refinery portion of the Site. 5,600 gallons of anhydrous HF liquid waste and vapors were neutralized and disposed of. The majority of the facility buildings and structures demolished and disposed of were constructed and operated by Midland during its facility expansion and operation of the Site.

See Ex. 1, ¶ 29. Evidence of all demolition and releases caused by salvaging and neglect visible in 1998 are presented on Attachment 8 to the Affidavit of Mr. Vandeven. *See* Ex. 9 (Vandeven), Attachment 8 (Photo Nos. 328, 329, 334, 335, 336, 407, 408, 410, 411, 414, 415, 416, 421, 424, 603, 611, 612, 622, 625, 709, 716, 903, 906, 907, 920, 1123, 1124, 1209, 1316).

Concurrent with its Emergency Removal Action, EPA initiated an Expanded Site Inspection and prepared another HRS. *See* Ex. 7 (Hathaway) ¶ 38; Ex. 9 (Vandeven) ¶ 117. This time the Site scored 29.34 (as compared to the 0.03 the Site scored three years earlier). *See* Ex. 9 (Vandeven) ¶ 117. According to Mr. Hathaway, this second HRS scoring action demonstrates EPA's strong desire to achieve funding eligibility through an NPL listing. *See* Ex. 7 (Hathaway) ¶ 38. The Site was proposed for listing on the NPL on April 23, 1999 and listed on July 22, 1999. *See* Ex. 9 (Vandeven) ¶ 117.[10] The ATSDR issued a Public Health Advisory in 1999. *See* Ex. 9 (Vandeven) ¶ 122. Therein, ATSDR recognized the conditions that warranted the Emergency Removal Action (noting the actions of Western) and supported EPA's actions underway to address asbestos, hydrofluoric ("HF") acid, and TEL at the Site. *See* Ex. 9 (Vandeven) ¶ 122.

2. EPA's Demand to Conduct RI/FS

Land O'Lakes received from EPA a Special Notice Letter for RI/FS dated January 18, 2001 and demand for payment of **$8,902,414.97** in costs. *See* Ex. 87. By letter dated March 26, 2001, Land O'Lakes responded to the Special Notice Letter, and the factual allegations in the accompanying draft Administrative Order on Consent with an analytical report[11] challenging the interpretations of historical, black and white aerial photographs by EPA's consultant Lockheed

[10] Land O' Lakes was not notified by EPA of the NPL listing process or its rights to participate in the process, (Ex. 18 (Wilson) ¶¶ 5-9) and first learned that the site had been placed on the NPL by letter dated August 2, 2000, after the Site had been placed on the NPL one year earlier. *Id.* at ¶¶ 7-8, Ex. C.

[11] Titled *Analysis and Response to Interpretations of Aerial Photographs of the Hudson Refinery Superfund Site, Cushing Oklahoma* (William E. Coons, Ph.D.; March 2001). *See* Ex. 88.

alleging that releases had occurred during the period 1949-1974. *See* Ex. 19 (Wolski) ¶¶ 7-8; Ex. 88 (March 2001 Report). Land O'Lakes declined to undertake or fund the RI/FS but added that, as a matter of corporate policy, Land O'Lakes wished to cooperate and work toward the amicable resolution of any allegations of legal liability, and therefore would consider any other information EPA had "that it believes indicates that Land O'Lakes has responsibility under CERCLA for the disposal of hazardous substances at the Site." *See* Ex. 18 (Wilson) ¶ 17, Ex. H; Ex. 19 (Wolski) ¶ 8. No response or information was provided by EPA.

During this timeframe, most of the Site was subject to tax forfeiture and was resold to individuals by Payne County at a tax sale. *See* Ex. 89. EPA also filed a Superfund Lien on the Site in June 2001, which was later amended in 2002. *See* Ex. 3 at 9.

3. EPA's Non-Time Critical Removal Action

"On September 25, 2001, EPA determined that a Non-Time Critical Removal Action was appropriate for the Site to address imminent and substantial endangerments to public health and the environment present at the Site." Ex. 1, ¶ 30. EPA conducted a Non-Time Critical Removal Action at the Site from September 2002 to June 2003. *See* Ex. 9 (Vandeven) ¶ 30.

> The non-time critical action addressed the North Refinery superstructures including 22 towers, 216 process vessels, cooling towers, TEL buildings (North and South refineries), collection basins, sumps, piles of tank bottoms, and associated above-ground piping. Other items addressed include the contents of collection basins, cooling towers and a caustic sump, miscellaneous containers and drums, ASTs outside the refinery superstructure, and structurally unsafe buildings.

Ex. 1, ¶ 31. During the Non-Time Critical Removal Action, EPA and its contractors engaged in activities that further impacted the Site, including the removal of pumps that allowed liquids to drain, the breaching of pipes and vessels that resulted in the release of liquids, and the covering or removal of building foundations. *See* Ex. 9 (Vandeven) ¶ 30. As summarized in the ROD, the

Non-Time Critical Removal Action was intended to "remove or eliminate principal threat wastes, thereby eliminating or reducing risks from potential exposure pathways from those wastes...." Ex. 3, § 9.2. More specifically:

> The areas addressed in [the Non-Time Critical Removal] action were the: 1) superstructures, refinery process units containing potential hazardous chemicals and substances; and 2) miscellaneous items, including unlined collection basins, a sump, and structurally unsafe buildings. Existing refinery process equipment and structures were dismantled and removed from the site. Friable ACM was removed from process equipment and piping in coordination with decontamination and removal activities. Decontamination and removal of the process equipment required a three-step process that consisted of first draining or evacuating residual liquid contents, followed by disassembly and removal of the equipment, and finally a thorough cleaning of the equipment to remove residual sludge and solids. Few structures currently remain on the site.

Id.

4. ATSDR's 2006 Public Health Assessment

Following: (1) the Site-wide investigation and remediation required by the *Partial Consent Decree* and *Final Consent Decree*; (2) EPA's completion of the Emergency Removal Action; (3) EPA's completion of the Non-Time Critical Removal Action; and (4) EPA's and ODEQ's completion of the RI/FS, the ATSDR issued a Public Health Assessment ("PHA") in 2006. *See* Ex. 90; Ex. 9 (Vandeven) ¶ 123. The ATSDR took note of the Site's more recent operational history and cleanup history:

> In 1997, the then-current owners began efforts to salvage equipment and metal from the south refinery site and hired a contractor to remove asbestos-containing material. The contractor left asbestos-containing materials torn and hanging from equipment and left aboveground storage tanks open to the environment. In November 1997, the Oklahoma Department of Environmental Quality (DEQ) requested EPA's assistance at the site. EPA initiated an emergency removal action to address immediate hazards at the site. In addition, the U.S. Coast Guard participated to address oily waste at the site. In support of the

> emergency removal and due to the immediate hazards posed by hydrofluoric acid, asbestos, and tetraethyl lead on the site, ATSDR issued a public health advisory on March 4. 1999. The emergency removal was completed on September 4, 1999. An expanded site inspection (ESI) conducted in December 1998 supported the site's proposal to the NPL on April 23, 1999. In 2001, the EPA, working with the U.S. Army Corps of Engineers, initiated non-time critical removal actions to disassemble and remove 22 towers, 216 process vessels, 8 buildings, two tanks containing tetraethyl lead, and aboveground piping at the site. The removals were completed by summer of 2003. DEQ has assumed the lead role for remediation of remaining site contamination and completed the remedial investigation/ feasibility study (RI/FS) in 2006.

Ex. 90 at 2-3 (internal citations omitted). The conclusions reached by the ATSDR in its PHA were unequivocal – the Site posed no apparent public health hazard. *See* Ex. 90 at 1; Ex. 9 (Vandeven) ¶¶ 125-26. Using standard risk assessment protocols (identification of exposure pathways, identification of contaminants of concern and site concentrations, comparison of site contaminant of concern data to health-based levels), the ATSDR determined that there was no hazard posed to human health through exposure to Site soil, sediment, air, or groundwater. *See* Ex. 90 at 1; Ex. 9 (Vandeven) ¶¶ 125-26.

5. EPA's 2007 ROD

Notwithstanding **three** prior cleanups of the Site,[12] and virtually ignoring the ATSDR's recent PHA, EPA proceeded with issuing its ROD for the Site on November 23, 2007.[13] *See* Ex. 3; *see also* Ex. 9 (Vandeven) ¶¶ 127-33. The ROD established Remedial Action Objectives, cleanup levels, and a remedy for soil areas of concern, sediment areas of concern, surface water areas of concern, groundwater areas of concern, and "Other Media" (ACM, "Coke Tar," and scrap metal). *See* Ex. 3, §§ 15.1, 19.2, and Figures 9, 10, and 11 thereto. The ROD also stated

[12] Hudson's *Partial Consent Decree* and *Final Consent Decree* investigation and remediation activities, EPA's Emergency Removal Action, and EPA's Non-Time Critical Removal Action.

[13] EPA did not notify Land O' Lakes of the ROD process or its participation rights until months after the ROD was final. Ex. 18 (Wilson) ¶¶ 18, 20, 22; Ex. 19 (Wolski) ¶¶ 9-13.

that "principal threat wastes for the Site consist of waste pond sediment, coke tar, LNAPL, and ACM." *See* Ex. 3, § 18.0 at 66.

For soil, the ROD selected excavation and off-site disposal as the remedy. *See* Ex. 3, § 19.2.2. ROD COCs in soil and their corresponding cleanup levels (commercial/industrial) were as follows:

SOIL COCs	CLEANUP LEVEL
Benzo(a)pyrene	4.22 mg/kg
Arsenic	31.8 mg/kg
Lead	1000 mg/kg

See Ex. 3 (ROD) § 15.1. The ROD estimated that approximately 32,000 cubic yards of soil would be excavated and disposed off-site. *See id.* at § 19.2.2. Importantly, the ROD established a BGL floor for chemically driven excavations (*i.e.,* soil COCs above cleanup levels), but also contained a requirement to excavate all "visual contamination" without regard to depth:

> If cleanup levels have not been met, additional soil shall be excavated until the surface soil cleanup levels have been met to a maximum of two feet or the extent of visual contamination.

See id. This language was the only occurrence of the term "visual contamination" in the ROD. The ROD did not define "visual contamination," it set forth no objective remedial criteria for identifying "visual contamination," or for determining when "visual contamination" had been excavated to its "extent." The ROD soil remedy also required the use of an institutional control document. *See id.*

Water in waste ponds was required to be pumped or drained, treated on-site, and discharged to Skull Creek or transported offsite for disposal. *See* Ex. 3, § 19.2.4. As to "waste pond sediment," the ROD selected excavation, stabilization, and off-site disposal as the remedy.

See Ex. 3, § 19.2.3. ROD COCs in such sediment and their corresponding cleanup levels (commercial/industrial) were as follows:

SEDIMENT COCs	CLEANUP LEVEL
Benzo(a)anthracene	42.2 mg/kg
Benzo(a)pyrene	4.22 mg/kg

See Ex. 3 (ROD) §§ 15.1. The ROD estimated that approximately 21,000 cubic yards of sediment would be excavated, stabilized and disposed off-site. *See id.* at § 19.2.3.

The ROD selected two remedial components for groundwater. First, in wells where LNAPL was observed, the ROD required the installation of hydrocarbon belt skimmers. Recovered hydrocarbon would be stored and disposed off-site.[14] *See id.* at § 19.2.5. Secondly, the ROD selected a "ground water restoration monitoring program" that would monitor groundwater until cleanup levels are achieved. *See id.* at § 19.2.6. Groundwater use restrictions were also required. *See id.* ROD COCs in groundwater and their corresponding cleanup levels (commercial/industrial) were as follows:

GROUNDWATER COCs	CLEANUP LEVEL
Benzene	5.0 ug/l
Thallium[15]	2.0 ug/l
LNAP	0.1 ft. (threshold thickness)

See id. at § 15.1.

[14] This component of the remedy was never required or constructed. Only one well at the Site (OW-D—a monitoring well installed by Hudson under the *Final Consent Decree*) had measureable LNAPL at the initiation of work under the UAO and ROD. *See* Ex. 3, § 12.8. In October 2009, approximately one (1) gallon of LNAPL was removed from that monitoring well. *See* Ex. 22, SAIC, Initial Surface Water and Groundwater Monitoring Report (Mar. 4, 2011) at 17. Since that time, OW-D has maintained compliance with the ROD's RAOs and cleanup criteria for LNAPL in groundwater. *See* Ex. 22, Enviro Clean Services, LLC, Fifth Annual Groundwater Monitoring Report (Jan. 21, 2015) at Table 1.

[15] In all of Land O'Lakes' required UAO groundwater monitoring at the Site, thallium was never detected. It was subsequently dropped as a groundwater COC by EPA's ESD. *See* Ex. 91 at 9; *see also, infra*, Section V.C.

Finally, the ROD established a remedy for "Other Media." *See id.* at § 19.2.1. A pile of approximately 10 cubic yards of ACM located in the North Refinery was required to be excavated, containerized, and disposed off-site. *See id.* The ROD also required the excavation, stabilization and off-site disposal of approximately 6,000 cubic yards of "Coke Tar" from the South Refinery—"mainly to the west and north of the Coke Pond."[16] *See* Ex. 3, § 19.2.1, and Figure 10. Finally, the ROD required Land O'Lakes to remove "metal debris" as a "public safety hazard and site management hazard." *See* Ex. 3, § 19.2.1.

The ROD paid lip service to the *Final Consent Decree*, but EPA either misrepresented the true nature of the conclusion of the *Final Consent Decree* work or fundamentally failed to investigate the *Final Consent Decree* work:

> Since the early 1980s, areas of the Site have been sampled pursuant to the requirements of the Final Consent Decree or RCRA compliance monitoring. After Consent Decree funds allocated for the cleanup were depleted on November 30, 1993, Hudson filed a motion in the United States District Court of the Western District of Oklahoma (Court) to terminate the Final Consent Decree. The Court recognized that all of the requirements of the Final Consent Decree had not been met; however there were no financial resources remaining, so the Court moved to release Hudson from the obligations of the Final Consent Decree (E&E, 1999). An Order of Closure of the Final Consent Decree was issued in 1994 (ODEQ, 2003).

See id. In reality, there were additional funds offered by Hudson for work under the *Final Consent Decree*, but the United States demurred on the use of these additional funds, and agreed that the work under the *Final Consent Decree* was concluded. *See* Ex. 25, ¶¶ 30-33. EPA's ROD never mentioned the covenant not to sue in the *Final Consent Decree* or provided an

[16] As established in this *Petition*, this alleged "Coke Tar" was a mischaracterization. "Coke Tar" was never generated at the Site. *See* Ex. 4 (Baugher) ¶¶ 20, 87, 88; Ex. 5 (Boehm) ¶¶ 54(b), 90; Ex. 13 (Gaskins) ¶ 44; Ex. 12 (Fuqua) ¶175. EPA's "Coke Tar" was, in reality, crude oil and/or petroleum product subject to CERCLA's petroleum exclusion. *See* Ex. 4 (Baugher) ¶¶ 87, 88; Ex. 5 (Boehm) ¶¶ 54(b), 90.

accurate statement concerning the termination of obligations and release of liability in the *Final Consent Decree* and *Closure Order*.

6. EPA's 2008 Request to Perform the RD/RA and Demand for Reimbursement of Costs

Less than three months after it issued the ROD, EPA sent another Special Notice letter dated February 19, 2008 to Land O'Lakes requesting that Land O'Lakes enter negotiations to perform the RD/RA specified in the ROD and pay EPA and ODEQ past costs of $20.9 million for ODEQ investigation costs and the costs of the two EPA removal actions. *See* Ex. 92; Ex. 18 (Wilson) ¶ 19, Ex. I. Land O'Lakes responded to EPA on May 28, 2008 and challenged EPA's authority to impose CERCLA liability against Land O'Lakes on a closed RCRA site as follows:

> C. Site Addressed and Received Closure Under RCRA
>
> LOL understands that the Site was an interim-status RCRA facility long before it became a Superfund site. On December 10, 1987, the U.S. District Court approved a Final Consent Decree wherein EPA and the Trustee in Bankruptcy for Hudson Refining Company, Inc. and Hudson Oil Co., Inc. agreed to specific RCRA corrective action for the refinery site. Subsequently, the Court ordered closure of the refinery site pursuant to RCRA. In 1996, the Oklahoma Department of Environmental Quality, acting pursuant to RCRA, issued a permit to the Hudson bankruptcy trustee for monitoring and maintenance of the closed land treatment unit (LTU) located in the northwest comer of the Site. In April, 2001, the bankruptcy trustee submitted a final, post-RCRA closure report regarding measures that were taken to stabilize the former LTU.
>
> Though LOL's information about RCRA activities at the Site is limited, it raises questions.
>
> If there has been RCRA closure of one or more portions of the Site, approved by U.S. EPA and the Oklahoma Department of Environmental Quality, why is EPA proceeding to undertake a CERCLA remedy of the same areas? As a matter of policy, EPA is required to promote coordination of RCRA corrective action and CERCLA response action when they come into play at the same facility. Generally, a corrective action and closure of a RCRA unit will satisfy the requirements of both RCRA and CERCLA. At a minimum, there needs to be conscious coordination between the

> programs in order to avoid duplication of effort and imposition of inappropriate cleanup standards.
>
> As stated above, LOL does not understand how Midland could have CERCLA liability for the LTU. Additionally, the fact of RCRA closure of one or more portions of the Site raises additional questions about how Midland could have liability under CERCLA.

Ex. 19 (Wolski) ¶ 19, Ex. D at 4-5 (footnote omitted). Among the issues raised by Land O'Lakes in that correspondence were CERCLA's petroleum exclusion and divisibility. *See* Ex. 93 at 2-4; Ex. 19 (Wolski) Ex. D at 3-4. Land O'Lakes also raised technical concerns about EPA's ROD, the RI/FS, and with the ATSDR's PHA. *See* Ex. 93 at 5-6; Ex. 19, Ex. D at 5-6. At no time did EPA respond to Land O'Lakes' May 28, 2008 assertion that Midland could not have CERCLA liability for the Site based upon the *Final Consent Decree* and the *Closure Order*. *See* Ex. 19 (Wolski) ¶ 20.

7. UAO

On January 6, 2009, EPA issued the UAO to Land O'Lakes, which directed Land O'Lakes "to perform a remedial design for the remedy described in the [ROD] for the [Site]..., and to implement the design by performing a remedial action." *See* Ex. 1, ¶ 1. Like the ROD, the UAO paid lip service to the *Final Consent Decree*, but again fundamentally failed to take into account the full breadth of the investigation and remedial work conducted by Hudson, and the judicial proceedings preceding and following the *Final Consent Decree*. The *Final Consent Decree's* covenant not to sue and the *Closure Order* release and termination of obligations were either negligently omitted or purposely avoided with the following incomplete description:

> In 1987, as a part of Hudson Refining Company bankruptcy hearings, the District Court for the Western District of Oklahoma issued a Partial Consent Decree. This decree led to a 1994 Final Consent Decree (FCD) between the EPA and Hudson Refining Co., Inc. The FCD required Hudson to set aside $1 million for proper closeout including: 1) tank clean-out; 2) soil excavation; 3) biotreatment of contaminated soil; 4) removal of north oily water

pond sludges and soils; 5) groundwater remediation; and 6) groundwater monitoring at the LTU.

Ex. 1, ¶ 24.

8. Land O'Lakes FOIA Requests and FOIA Appeal

Because Land O'Lakes never owned or operated the Refinery, and was allegedly liable under CERCLA only as a result of a decades-old merger, Land O'Lakes possessed very little information relating to the Site. Thus, on January 9, 2009, Land O'Lakes, through counsel, served EPA with three requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. *See* Exs. 94, 95, 96. One of these FOIA requests broadly asked for information relating to permitting, compliance, and enforcement issues under RCRA for activities at the Site. *See* Ex. 94. The second FOIA request broadly asked for information relating to permitting, compliance, and enforcement under the Clean Water Act and the National Pollution Discharge Elimination System for activities at the Site. *See* Ex. 95. The third FOIA request broadly asked for information relating to the Site, including EPA's efforts to identify PRPs for the Site, decisions associated with the response actions, response contractor documents, Interagency Agreements, and expenses associated with response actions. *See* Ex. 96.

During the 14 months that followed Land O'Lakes' FOIA requests, EPA occasionally provided partial responses and repeatedly asked for extensions of the deadline to respond fully, which Land O'Lakes agreed to in good faith.[17] EPA's final[18] FOIA response was encapsulated in correspondence dated March 8, 2010, where EPA asserted numerous exemptions from FOIA disclosure in support of its failure to produce documents. *See* Ex. 98. Notably, EPA provided

[17] Independent of Land O'Lakes' FOIA requests, Land O'Lakes requested and received limited access to documents belonging to Midland in EPA's possession in July 2008 and January 2010. These documents, despite belonging to Land O'Lakes through its merger with Midland, remain in the possession of EPA.

[18] By correspondence dated October 28, 2011, EPA provided an addendum to its March 8, 2010 final FOIA response enclosing an Oil Insurance Association Fire Map of the Refinery dated May 19, 1953. *See* Ex. 97.

redacted copies of 35 documents, fully withheld from production documents listed in a 56-page table, and also withheld "16,327 pages of records received by or created by Management Division...." *See* Ex. 98 at 4. On April 6, 2010, Land O'Lakes appealed the EPA's March 8, 2010 FOIA response. *See* Ex. 99. By letter dated September 30, 2011, EPA provided an update on the status of Land O'Lakes' FOIA appeal and advised that EPA had "assigned a target date for completion of your appeal. Based upon current projections, we anticipate that your appeal should be completed by November 30, 2011." Ex. 100. Now, more than five years after Land O'Lakes initiated its appeal, EPA's target date has passed. Land O'Lakes' counsel have received no further information, and Land O'Lakes' FOIA appeal is still pending with no known timing or prospects for resolution or decision.

V. LAND O'LAKES' COMPLIANCE WITH UAO

On January 6, 2009, EPA issued the UAO. *See* Ex. 1 at 30. In sum, the UAO directed Land O'Lakes "to perform a remedial design for the remedy described in the Record of Decision for the ... Site, dated November 23, 2007, and to implement the design by performing a remedial action." *See* Ex. 1, ¶ 1. As set forth in the UAO, Land O'Lakes' alleged responsibility for the Site under CERCLA was based upon: (1) Midland's ownership and operation of the Site from 1944 through 1977; (2) alleged releases of hazardous substances during Midland's 1944 through 1977 ownership and operation of the Refinery; and (3) Land O'Lakes' 1982 merger with Midland. *See* Ex. 1, ¶¶ 11a, 21.

A. Land O'Lakes' Notice of Intent to EPA

Paragraph 5 of the UAO required Land O'Lakes to provide written notice to EPA stating whether it would comply with the terms of the UAO. Specifically, the UAO required:

> The Respondent shall provide, not later than five (5) days after the effective date of this Order, written notice to EPA's Remedial Project Manager (RPM) stating whether it (they) will comply with

> the terms of this Order. If the Respondent does not unequivocally commit to perform the RD and RA as provided by this Order, it shall be deemed to have violated this Order and to have failed or refused to comply with this Order. The Respondent's written notice shall describe, using facts that exist on or prior to the effective date of this Order, any "sufficient cause" defenses asserted by the Respondent under sections 106(b) and 107(c)(3) of CERCLA.

Ex. 1, ¶ 52. On February 9, 2009, Land O'Lakes submitted to EPA its *Combined Notice of Intent to Comply, Response to Unilateral Administrative Order, Statement of "Sufficient Cause" and other Defenses, Offer of Proof, and Petition for Remand to Supplement the Administrative Record with the UAO to EPA ("Notice of Intent")*. *See* Ex. 24. As demonstrated by the Appendix to the *Notice of Intent*, Land O'Lakes provided a wealth of reference and support documentation, disks, and expert evaluations of risk, analytical data, and aerial photographs.[19] By statute, Land O'Lakes could not challenge the UAO, or the response action ordered under the UAO, in federal court until the response action is completed. 42 U.S.C. § 9613(h).

In its *Notice of Intent*, and as specifically required by paragraph 52 of the UAO, Land O'Lakes stated: "LOL will comply with the terms of the UAO and unequivocally commits to perform the RD and RA as provided by the UAO."[20] *See* Ex. 24, ¶ 1. However, Land O'Lakes reserved "all legal rights to challenge the requirements of the UAO and to recover its costs and expenses relating to its compliance with the UAO." *See id.* at ¶ 2.

Without waiving any of its legal rights, Land O'Lakes provided responses and objections to the UAO's Findings of Fact and Conclusions of Law. *See* Ex. 24, ¶¶ 6-36. Land O'Lakes

---

[19] A complete copy of the *Notice of Intent* is provided at Ex. 22.

[20] As part of its compliance with the UAO, Land O'Lakes immediately embarked on efforts to obtain access to various parcels of real estate that comprised the Site. *See* Ex. 101. On February 17, 2009, Land O'Lakes formed a real estate holding company affiliate, Cushing Oklahoma Brownfields, LLC, a Delaware limited liability company, ("COB") to purchase and hold any portions of the Refinery real estate that could be purchased. *See* Ex. 22 (Land O'Lakes March 6, 2009, "Report on Site Access and 'Best Efforts' to Obtain Site Access). On February 18, 2009, COB made offers to, and began negotiations to purchase with, all owners of the Refinery property. *Id.* Ultimately, COB acquired ownership of all Refinery property, except for the BNSF railroad right-of-way.

also made additional factual allegations in support of its *Notice of Intent*, including factual allegations in support of its position and defenses (*e.g.*, divisibility) as to the UAO. *See* Ex. 24, ¶¶ 37-48. In Section III of its *Notice of Intent*, Land O'Lakes stated, and supported with evidence, a series of defenses to the UAO, including:

A. The UAO's Soil Remedy Is Arbitrary and Capricious, Not Supported by the Administrative Record, Inconsistent with the NCP and CERCLA, and Not Cost Effective.

   1. The soil removal delineation areas in the ROD are arbitrary and capricious because they are not based on the industrial/commercial use soil cleanup standards set forth in the ROD and do not comply with recorded deed restrictions imposed by EPA on the Site.

   2. The soil removal areas and volumes delineated in the ROD are unsupported by the analytical data in the record.

   3. The UAO impermissibly requires remedial action "of a naturally occurring substance in its unaltered form ... from a location where it is naturally found."

   4. The UAO requirement of off-site disposal of contaminated soil is inconsistent with the NCP.

   5. The ROD's remedy for soil and waste pond sediment is inconsistent with EPA policies requiring "green remediation."

   6. The ROD's soil remedy is inconsistent with the NCP because it is not appropriate or cost effective.

B. Scientific Data in the Administrative Record, and Other EPA Risk Assessments Based on the Same Data Used in the RI/FS Risk Assessment Establish: (a) There Is No Imminent and Substantial Endangerment Posed by the Site; (b) The Remedies Required by the UAO Are Not Necessary to Protect the Public Health and Welfare and Environment; (c) The Arbitrariness of the Risk Assessment in the RI Report; and (d) A Fund-Financed Remedy or a UAO Mandated Remedy Are Inconsistent with the NCP and the Superfund Statute.

C. The UAO Surface Water and Pond Sediment Remedies Are Arbitrary and Capricious, Not Supported by the

Administrative Record, Inconsistent with the NCP, and Not Cost Effective.

D. Because Substantial Portions of the RD and RA Activities Are Attributable Solely to Releases or Threatened Releases Caused by Third Parties and Sufficient Evidence Exists to Apportion the Cause of the Contamination, Liability Is Divisible in Whole or in Part.

E. The Costs of the RD and RA Activities Attributable to Releases of Petroleum and "Substances Indigenous in Petroleum Substances" Cannot Be Allocated to LOL Under CERCLA.

See Ex. 24, ¶¶ 49-145.

Land O'Lakes' *Notice of Intent* also made an Offer of Proof regarding additional studies and materials that could have been submitted for the administrative record on the proposed remedy if Land O'Lakes had received notice of the proposed remedial action and a reasonable opportunity to comment before the EPA's decision approving the ROD. *See* Ex. 24 at 43-45. Finally, citing, *inter alia*, the pre-enforcement bar of 42 U.S.C. § 9613(h), EPA's discretion to supplement the record under the NCP (40 C.F.R. § 300.825), and EPA's failure to follow CERCLA's requirements relating to rights of participation, 42 U.S.C. § 9613(k)(2)(B), Land O'Lakes requested:

> that the docket be remanded for further development of the administrative record for the RD and RA selected for the site, under a schedule that provides LOL, and its cleanup experts, with a reasonable opportunity to obtain and examine the data and site information and provide comments and criticisms on the proposed remedy.

See Ex. 24 at 46-51. In its letter of March 18, 2009, EPA acknowledged receipt of the *Notice of Intent*, but: (1) denied Land O'Lakes Offer of Proof and Petition for Remand; and (2) did not respond to Land O'Lakes defenses in the *Notice of Intent*. *See* Ex. 102.

B. Land O'Lakes' Selection and EPA Approval of RD/RA Contractors

As early as July 2008, in response to demands made by EPA, and as part of good faith negotiations, Land O'Lakes informed EPA that it intended to perform the remedy specified in the ROD and was going to use a request for proposal ("RFP") process to select environmental engineering and construction firms for the ROD's required RD/RA activities. *See* Ex. 103; Ex. 17 (Wilson) ¶ 5. True to its representation to EPA, on August 11, 2008, Land O'Lakes sent RFPs to five firms: (1) Envirocon; (2) Kleinfelder; (3) Shaw Environmental and Infrastructure Group; (4) Golder Associates Inc.; and (5) Terracon. *See id.* at ¶ 6 and Exhibit "A" thereto. By correspondence dated August 19, 2008, Land O'Lakes provided additional information to the prospective bidders. *See id.* at ¶ 7 and Exhibit "B" thereto. Four of the five firms submitted bids to Land O'Lakes in September 2008 and were evaluated by Land O'Lakes. Three (Envirocon, Golder, and

Shaw) of the four firms providing Land O'Lakes with bids were selected for final interviews. *See id.* at ¶¶ 7, 8 and Exs. C, D, and E thereto.

During negotiations with EPA in September and October 2008, Land O'Lakes informed EPA of its RD/RA RFP contractor selection process/schedule. Land O'Lakes also advised EPA that it would interview Envirocon, Golder, and Shaw on September 25, September 26 and October 8, 2008, with a goal of choosing an RD/RA contractor and executing a contract by mid-October 2008. *See id.* at ¶ 9. During these discussions, Land O'Lakes' sought EPA input with regard to Land O'Lakes' pending selection of an RD/RA contractor as follows: (a) a preliminary decision on whether any of the contractors Land O'Lakes was considering would be disapproved by EPA; (b) approval from EPA to conduct RD work as soon as RD/RA contractors were selected; and (c) an early meeting between Land O'Lakes' selected RD/RA contractor and EPA technical staff to discuss the scope and schedule for the work. *See id.* at ¶ 10. EPA declined to

approve Land O'Lakes' RD/RA contractors or to allow work unless and until a final, global settlement relating to the Site was reached between EPA and Land O'Lakes. *See id.* at ¶ 11.

At the conclusion of Land O'Lakes' RFP and interview process, on October 13, 2008, Land O'Lakes selected the team of Envirocon and Benham Companies as its RD/RA contractors. *See id.* at ¶ 12; Ex. 15 (Penn) ¶ 6. EPA was informed about Land O'Lakes' selection of the team of Envirocon and Benham as its RD/RA contractors for the Site. While EPA did not object to Land O'Lakes' selection, EPA again confirmed that it would not approve Land O'Lakes' RD/RA contractor selection, commencement of work or technical meetings with EPA staff to begin implementation of the RD/RA work until all documentation for a consent decree was completed. *See* Ex. 17 (Wilson) ¶ 13.

EPA issued the UAO on January 6, 2009. By correspondence dated February 12, 2009, Land O'Lakes' RD consultant, Benham/SAIC, provided information required by the UAO (specifically paragraphs 58 and 98) identifying Land O'Lakes' RD (Benham/SAIC) and RA (Envirocon) consultants, and such consultants' key personnel, relevant experience, and other required information. *See* Ex. 22 (Letter from Lawmaster, Benham, to Stankosky, EPA, dated February 12, 2009); *see also* Ex. 17 (Wilson) ¶¶ 14, 15. In that same correspondence, Land O'Lakes designated Byron Starns as the Project Coordinator. *See id.*; *see also* Ex. 17 (Wilson) ¶ 16. EPA approved this submission (tentatively, with comments) by correspondence dated March 11, 2009, and finally by correspondence dated April 20, 2009. *See* Ex. 22 (Letter from Stankosky, EPA, to Starns, Project Coordinator, dated March 11, 2009), Letter from Lawmaster/Foreman, Benham/Envirocon, to Stankosky, EPA, dated April 1, 2009, Letter from Stankosky, EPA, to Starns, Project Manager, dated April 20, 2009); *see also* Ex. 15 (Penn) ¶ 5. In its April 20, 2009 correspondence, EPA also issued Land O'Lakes with an authorization to

proceed in accordance with paragraph 58 of the UAO. *See* Ex. 22 (Letter from Stankosky, EPA, to Starns, Project Coordinator, dated April 20, 2009).

As required by EPA and EPA guidance, by correspondence dated October 27, 2009, Land O'Lakes nominated Terracon Consultants, Inc. ("Terracon") as its proposed Independent Quality Assurance Team ("IQAT") for RD/RA activities at the Site. *See* Ex. 22 (Letter from Stankosky, EPA, to Starns, Project Coordinator, dated October 27, 2009). EPA approved Terracon by correspondence dated December 10, 2009 with modifications, pursuant to paragraph 84 of the UAO. *See* Ex. 22 (Letter from Stankosky, EPA, to Starns, Project Manager, dated December 10, 2009). Land O'Lakes timely responded to EPA's approval with modifications by correspondence dated December 21, 2009. *See* Ex. 22 (Letter from Starns, Project Coordinator, to Stankosky, EPA, dated December 21, 2009). Throughout the course of the RD/RA, Terracon acted as the IQAT.

C. Explanation of Significant Differences; Preliminary Close Out Report

With no notice or opportunity to comment, EPA issued an Explanation of Significant Differences ("ESD") for the Site on November 19, 2010. *See* Ex. 91. The ESD outlined six "significant" changes and five "minor" changes from the ROD. In summary, EPA's "significant" changes were:

1. **Wastewater Pond 6, Treatment Pond 8, and Runoff Pond 9**. Wastewater Pond 6, Treatment Pond 8, and Runoff Pond 9 will remain in service following Site remediation so that during a given precipitation event, storm water runoff from the Site will not be discharged to Skull Creek at higher flow rates than would currently occur for a like precipitation event. Ponds that required removal of contaminated sediment (Aeration Pond 7, Wastewater Ponds 1 through 3, and the Coke Pond) were not completely backfilled, but backfilled to provide a minimum of 2 ft. of clean cover soils, and then graded to promote runoff and prevent ponding of storm water runoff during precipitation events. Wastewater Ponds 4 and 5 were backfilled and/or graded as necessary to promote runoff and prevent ponding of storm water runoff during precipitation events. Clean soils contained in the berms of Aeration Pond 7 and Wastewater Ponds 1-5 were utilized as borrow materials during Site backfilling and grading operations.

2. **Asbestos-Containing Material.** ACM volume addressed during RA construction increased in volume from the ROD estimate. The ROD estimated the volume of ACM requiring removal as 10 cubic yards. Additional ACM was found during the RA. 460.8 cubic yards of ACM impacted soil/debris were removed from the Site and properly disposed. A total of 719 linear feet of ACM wrapped pipe was also removed; the piping weighed 1.7 tons.

3. **Scrap Metal and Construction Debris.** The volume/weight of tank and scrap metal debris, along with excavated piping, addressed during RA construction increased from the ROD estimate. The term "construction debris" was used by the landfill for general debris, building material, and contaminated soil mixed with concrete chunks, brick, and metal waste. The landfill waste manifests identify a total of 11,983 tons of construction debris removed during the RA. This tonnage would include an undetermined amount of commingled soil. Scrap metal, tank metal and piping hauled off-site for recycle or disposal was logged separately. The final weight for scrap metal, tank metal, and piping was 242.62 tons.

4. **Ground Water Monitoring for Thallium**. Thallium monitoring has been removed from ground water monitoring requirements. Thallium monitoring was conducted during the RD and during RA construction. Thallium was not detected in any of the ground water samples. Laboratory detection levels were well below the ROD cleanup level of 2.0 µg/L. Proper Plugging and Abandoning of Site Wells – Site wells which will not be part of operation and maintenance activities for ground water monitoring will be required to be properly plugged and abandoned.

5. **Institutional Controls.** Site ownership has changed which affects filing of institutional controls required by the ROD.

See Ex. 91 at 1-2, 14-20. EPA's "minor" changes from the ROD included:

1. the Aeration Pond sumps were remediated, filled with crushed rock, sides folded in, and left in place;

2. additional monitoring wells will be required to more fully define LNAPL contamination and to ensure that there is no movement into off-site areas;

3. additional wells will be required to identify if a benzene source lies up-gradient of monitoring well OW-B and down-gradient to determine if benzene has the potential to migrate off-site;

4. contaminated wastewater pond sediment did not have to be stabilized to address hazardous levels of chromium to meet landfill requirements; and

5. surface water did not have to be treated to address benzo(a)pyrene (B(a)P) contamination.

See Ex. 91 at 2, 21-24. By correspondence dated January 7, 2011, Land O'Lakes submitted comments in response to EPA's ESD. Among its myriad comments, Land O'Lakes' commented

on EPA's decision to issue the ROD without seeking public comment, or input/comment from Land O'Lakes. *See* Ex. 104 at 1. Land O'Lakes also questioned the necessity and purpose of the ESD, while commenting that the one "significant" change that should have been included in the ESD was "visual contamination"—due to a substantial increase in cost, scope and performance. *See* Ex. 104 at 2-3. Also among the comments were questions regarding the *Final Consent Decree*, and the interplay between land use restrictions required by the *Final Consent Decree* and inserted in the chain of title-in-the Warranty Deed between the Hudson Bankruptcy Estate and USR in comparison to the requirements of the ROD and ESD. *See* Ex. 104 at 3, 9-11. These comments and questions were driven by EPA's unilateral decision—as announced in the ESD—to ignore and unwind the *Final Consent Decree's* requirement on land use restrictions/institutional controls without Court approval:

> [T]he ROD and this ESD represents EPA's decision to modify the institutional controls for the Site, and the 1987 [Final] Consent Decree institutional controls no longer govern the Site.

See Ex. 91 at 11; *see also* Ex. 104 at 9-11. The *Final Consent Decree* provides that its "land use restriction...may be altered or terminated upon mutual agreement between the parties hereto or their successors. Any such alteration or termination agreement shall be recorded in records of title in the manner prescribed by law." *See* Ex. 54 at 4-5. EPA never responded to Land O'Lakes' January 7, 2011 letter and comments on the ESD.

On November 23, 2010, EPA issued its Preliminary Close Out Report. *See* Ex. 105. Therein, EPA addressed the quality of the work performed under the UAO by Land O'Lakes and its RD/RA contractors:

> The EPA and ODEQ conducted continued oversight during RA construction activities to determine compliance with quality assurance and quality control (QA/QC) protocols and the Construction Quality Assurance Plan. Construction activities at the Site were determined to be consistent with the ROD and

> adhered to the approved quality assurance plan which incorporated all EPA and State requirements. Confirmatory inspections, independent testing, audits, and evaluations of materials and workmanship were performed in accordance with the technical specifications and plans. An independent quality assurance contractor, hired by LOL in accordance with EPA guidance, visited the site during construction activities to review construction progress and evaluate and review the results of QA/QC activities. No significant deviations or non-adherence to QA/QC protocols, or specifications were identified.
>
> The quality assurance project plan incorporated all EPA and State QA/QC procedures and protocols. All monitoring equipment was calibrated and operated in accordance with the manufacturer's instructions. EPA analytical methods were used for all confirmation and monitoring samples during RA activities. Contract laboratory program-like procedures and protocol were followed for soil, sediments, and water analyses during the RA using private laboratories.

See Ex. 105 at 16-17.

D. All Actions Required Under the UAO Have Been Completed

Land O'Lakes conducted its initial site inspection with EPA and ODEQ on April 30, 2009. What Land O'Lakes and its consultants found was a property that did not resemble an abandoned petroleum refinery. *See* Ex. 11 (Brady) ¶ 37. Open, pastoral land; heavy vegetation; no disposal pits, no disposal ponds, no other solid waste disposal units. *See* Ex. 11 (Brady) ¶ 37, Attachment F (Initial Site Inspection photographs).

In September/October 2009, Land O'Lakes conducted RD activities at the Site with the installation of approximately 70 soil borings and the collection of approximately 210 samples to further delineate the areas within the SAOCs that contained COCs exceeding the ROD cleanup levels. EPA required Land O'Lakes to conduct a second investigation of the SAOCs, referred to as the Hot Spot sampling. In May 2010, Land O'Lakes conducted the Hot Spot sampling with the installation of 62 additional soil borings and the collection of 186 additional soil samples.

Additional borings were installed related to delineating "visual contamination," but no additional samples were collected from those borings.

The Preliminary Remedial Design was submitted to EPA on November 3, 2009. After a round of comments and tentative approval from EPA, Land O'Lakes submitted its Intermediate Remedial Design on December 14, 2009. On the Eve of Christmas 2009, EPA provided comments and tentative approval of the Intermediate Remedial Design. On February 1, 2010, Land O'Lakes submitted its Pre-Final Design. EPA provided a Notice of Deficiency on March 3, 2010. A revised Pre-Final Remedial Design (Rev. 1) was submitted on March 11, 2010. EPA approved the Pre-Final Remedial Design on April 19, 2010, thereby making the Pre-Final Remedial Design (Rev. 1) the Final Remedial Design. *See* Ex. 22, Remedial Action Report (December 4, 2014), at 18 and § 3.0.

Mobilization for the RA activities started on December 7, 2009, and RA construction activities concluded on October 25, 2010. *See* Ex. 22, Remedial Action Report (Dec. 4, 2010) at 50. In October 2011 and October 2012, Land O'Lakes excavated approximately 900 cubic yards of soil with EPA-designated "visual contamination" that EPA designated as "Coke Tar" from an area on the South Refinery named AA-1. In May 2013, Land O'Lakes conducted an EPA-required investigation of the North East South Tank Farm ("NESTF") area, south of AA-1, with the installation of six soil borings and the collection of 18 soil samples. None of the samples exceeded the ROD cleanup levels or any of the screening levels for an expanded chemical list required by EPA. *See* Ex. 11 (Brady) ¶¶ 511-17, Attachment L; Ex. 22, NESTF Report (July 2, 2013). In total, Land O'Lakes excavated and removed from the Site 50,715 cubic yards of soils and 28,457 tons of sediment-related material. *See* Ex. 22, Remedial Action Report (Dec. 4, 2010), Table 1.

In accordance with paragraph 75 of the UAO, Land O'Lakes notified EPA by correspondence dated November 19, 2013 that it had concluded that the RA had been fully performed and requested that the Second Pre-Final Inspection scheduled for December 19, 2013, as the Pre-Certification Inspection if the Pre-Final Inspection was determined to be a final inspection. *See* Ex. 106. On December 19, 2013, the Second Pre-Final Inspection was conducted at the Site.[21] As a result of this inspection, EPA concluded as follows:

> Based on the inspection the RA appears to be constructed per the RD. No additional pre-final inspections are anticipated at this time. Based on the conditions of the site at the time of the December 19, 2013, pre-final inspection, this inspection also serves as the final inspection per Section 6.1.2 of the Statement of Work (SOW) (Attachment 3 Unilateral Administrative Order (UAO)).
>
> On November 19, 2013, Land O'Lakes notified EPA that it had concluded that the Remedial Action has been fully performed per paragraph 75 of the UAO and requested that the December 19, 2013, pre-final inspection also serve as the pre-certification inspection if the pre-final inspection was determined to be a final inspection. Since the December 19, 2013, pre-final inspection was determined as the final inspection, the December 19, 2013, inspection may also serve as the pre-certification inspection. Land O'Lakes must comply with the additional requirements in paragraph 75 of the UAO and other applicable UAO conditions.

See Ex. 107 at 7. As required by paragraph 75 of the UAO, and in compliance with the schedule set with EPA, Land O'Lakes submitted its Data Evaluation Report on February 21, 2014 and its Remedial Action Report on March 19, 2014. *See* Ex. 22 (Letter from Kristin Druquer, Leidos, to Laura Stankosky, EPA, dated February 21, 2014). By correspondence dated June 27, 2014, EPA disapproved both submissions pursuant to paragraph 84(c) of the UAO and directed revision (to address EPA's comments) and resubmission within twenty-one (21) days. *See* Ex. 108.

[21] The December 19, 2013 inspection was preceded by an October 19, 2010, Pre-Certification Inspection.

On June 30, 2014, Land O'Lakes requested an extension of the twenty-one (21) day deadline to August 18, 2014 to submit the revised Remedial Action Report and revised Data Evaluation Report in accordance with EPA's June 27, 2014 correspondence due to Land O'Lakes' consultant's already established summer vacation schedules. *See* Ex. 109. EPA granted Land O'Lakes' an extension to August 8, 2014 to submit the revised Remedial Action Report and revised Data Evaluation Report. *See* Ex. 110. Land O'Lakes timely revised and submitted its revised Remedial Action Report and revised Data Evaluation Report to EPA by correspondence dated August 7, 2014. *See* Ex. 111.

Terracon submitted its IQAT Report to EPA on or about March 19, 2014. *See* Ex. 22, Terracon Consultants, Inc. Independent Quality Assurance Team (IQAT Report) (Mar. 19, 2014). Therein, Terracon concluded and certified, among other things and as more specifically described in the IQAT Report, "that the RA was completed in substantial conformance with the final, EPA-approved, RD." *See id.* at 19. On August 27, 2014, Land O'Lakes submitted an IQAT Report Addendum prepared by Terracon, restating its March 19, 2014 IQAT Report to include its review of the Remedial Action Report and Data Evaluation Report submitted by Land O'Lakes to EPA on August 8, 2014. *See* Ex. 112. In its IQAT Report Addendum, Terracon noted that EPA had not commented on, or taken any action with regard to, Terracon's March 19, 2014 IQAT Report. *See* Ex. 112 at 2. By correspondence dated September 4, 2014, EPA stated that it had no comments on Terracon's March 19, 2015 IQAT Report. *See* Ex. 113.

EPA transmitted correspondence dated September 18, 2014, which provided its Notice of Deficiency as to Land O'Lakes' August 8, 2014 Remedial Action Report and Data Evaluation Report and directed Land O'Lakes to make a series of new revisions to such reports and resubmit within ten (10) days. *See* Ex. 114. On September 29, 2014, Land O'Lakes timely responded to

EPA's correspondence of September 18, 2014 and submitted a revised Remedial Action Report and revised Data Evaluation Report as directed by EPA. *See* Ex. 115.

By correspondence dated November 18, 2014, EPA approved (with modifications) Land O'Lakes' September 29, 2014 submission of the Remedial Action Report and Data Evaluation Report pursuant to paragraph 84(b) of the UAO, and directed Land O'Lakes to submit a revised Remedial Action Report and Data Evaluation Report by December 4, 2014. *See* Ex. 116. In response, Land O'Lakes submitted another revised Remedial Action Report and revised Data Evaluation Report on December 4, 2014. *See* Ex. 117. In February 2015, EPA and ODEQ issued an initial Five-Year Review Report which concluded:

> The remedy at the [Site] is protective of human health and the environment. Contamination at the former refinery has been addressed. Both short and long term protectiveness of the remedial action will be assured by continuing to monitor the Site ground water and maintaining that [sic] the institutional controls to address the potential contamination remaining at greater than two feet in depth.

Ex. 22, EPA, Five-Year Review Report for Hudson Refinery Superfund Site, Payne County (Feb. 27, 2015) at 1.

On June 19, 2015, nearly six and half months after Land O'Lakes' December 4, 2014 re-submittal of the Data Evaluation Report and Remedial Action Plan, EPA transmitted correspondence to Land O'Lakes stating that these reports were "approvable" and no additional modifications were required. *See* Ex. 118 at 1. EPA also stated that "the Remedial Action construction work has been completed in satisfaction with the requirements of the order and the Remedial Action work has attained required performance standards, except for performance standards required for ground water...."[22] *See* Ex. 118 at 3. On June 25, 2015, Land O'Lakes

[22] In its June 19, 2015 correspondence, EPA also made vague and unspecified references to alleged violations of the UAO. In its June 25, 2015 response, Land O'Lakes pointed out that at no time during the six and a half years of

responded to EPA's June 19, 2015 correspondence with its own correspondence, stating that Land O'Lakes interprets EPA's June 19, 2015 letter as approval of the RA in accordance with paragraphs 75 and 84 of the UAO. As of the filing of this *Petition*, EPA has not responded to Land O'Lakes' June 25, 2015 correspondence.

E. Payment of EPA's UAO Oversight Costs

By correspondence dated June 23, 2015, EPA transmitted its "Demand for Reimbursement of Costs Expended," which included, among other alleged cost elements, costs associated with EPA's oversight of the RD/RA performed by Land O'Lakes under the UAO. EPA explained that the total for all cost elements "identified through February 28, 2015, for the Site are **$23,424,243.76** and **$4,818,215.45** in interest." *See* Ex. 120 at 2 (emphasis added). Since EPA's June 23, 2015 "Demand" did not include an itemization of EPA's oversight costs under the UAO, Land O'Lakes requested EPA provide such an itemization by correspondence dated June 25, 2015. *See* Ex. 121.

EPA provided the requested itemization by e-mail correspondence on July 2, 2015. *See* Ex. 122. By correspondence dated July 15, 2015, EPA stated that it considered July 2, 2015 as the date of Land O'Lakes' receipt of EPA's accounting report in accordance with paragraph 112 of the UAO. *See* Ex. 123 at 1. Thus, the due date for payment of UAO oversight costs became August 3, 2015, and no interest would accrue on such amounts until the passage of the due date. *See* Ex. 123 at 1. Land O'Lakes tendered payment in full (by wire transfer) of all EPA oversight costs under the UAO (totaling **$1,690,039.084**) on July 22, 2015, under full reservation of rights. *See* Exs. 124, 125.

Land O'Lakes work to implement the UAO and ROD, had EPA ever notified Land O'Lakes of any violation of the UAO or that any civil penalties were accruing under the UAO for any alleged violations. *See* Ex. 119 at 3; *see also* Ex. 14 (Lawmaster) ¶¶ 14, 18.

In the six and a half years since issuance and service of the UAO on Land O'Lakes, at no time has Land O'Lakes been cited or assessed civil penalties for non-compliance with the UAO. At no time since the issuance of the UAO has EPA ever notified Land O'Lakes of a specific instance of non-compliance with the UAO or notified Land O'Lakes that civil penalties are accruing under the UAO due to violations of the UAO. *See* Ex. 14 (Lawmaster) ¶¶ 14, 17, 18.

F. Timeliness of the Petition

Under CERCLA, "[a]ny person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the [EAB] for reimbursement...for the reasonable costs of such action, plus interest." 42 U.S.C. § 9606(b)(2)(A). In this matter, the UAO provides in relevant part as follows:

> Within thirty (30) days after the Respondent concludes that the Remedial Action has been fully performed, the Respondent shall notify EPA and shall schedule and conduct a pre-certification inspection to be attended by the Respondent and EPA. The pre-certification inspection shall be followed by a written report submitted within thirty (30) days of the inspection by a registered professional engineer and the Respondent's Project Coordinator certifying that the Remedial Action has been completed in full satisfaction of the requirements of this Order.... **If EPA concludes, following the initial or any subsequent certification of completion by the Respondent that the Remedial Action has been fully performed in accordance with this Order, EPA may notify the Respondent that the Remedial Action has been fully performed.**

Ex. 1, ¶ 75 (emphasis added). Paragraph 84 of the UAO provides:

> After review of any deliverable, plan, report or other item which is required to be submitted for review and approval pursuant to this Order, EPA may: (a) approve the submission; (b) approve the submission with modifications; (c) disapprove the submission and direct the Respondent to re-submit the document after incorporating EPA's comments; or (d) disapprove the submission and assume responsibility for performing all of [sic] any part of the response action.

Ex. 1, ¶ 84. As stated above, and pursuant to the UAO and under the relevant authorities of the EAB, EPA's June 19, 2015 letter constitutes "completion of the required action" under CERCLA § 106(b)(2)(A). *See In re Glidden Co. and Sherwin-Williams Co.*, 10 E.A.D. 738, 746 (EAB 2002); *In re Solutia, Inc.*, 10 E.A.D. 193 (EAB 2001); *In re Asarco, Inc.*, 6 E.A.D. 410, 419 (EAB 1996). Accordingly, the deadline for filing this Petition is **August 18, 2015**, which is sixty (60) days "after completion of the required action." *See* Ex. 7 (Hathaway) ¶ 28; Ex. 14 (Lawmaster) ¶¶ 19-21.

VI. COSTS INCURRED IN COMPLIANCE WITH UAO

A. Costs Incurred by Land O'Lakes to Implement the UAO

To track RD/RA contractor costs incurred by Land O'Lakes to comply with the UAO, Land O'Lakes and its RD/RA contractors developed and implemented a cost coding system that tracked and documented investigation and remediation costs by area of the Site. *See* Ex. 6 (Dovell) ¶¶ 50-52; Ex. 15 (Penn) ¶¶ 10, 13; Ex. 11 (Brady) ¶¶ 29, 30. Land O'Lakes' cost coding system also tracked costs for RD/RA work that were not directly and/or solely attributable to a specific area of the Site. *See* Ex. 6 (Dovell) ¶ 52, Ex. 15 (Penn) ¶ 10; Ex. 11 (Brady) ¶ 29. Non *Key Tronic*[23] costs incurred by Land O'Lakes to comply with the UAO were not tracked by Land O'Lakes cost coding system. *See* Ex. 6 (Dovell) ¶ 50. The process employed to track and allocate costs for the Land O'Lakes cost coding system is described in more detail in the Affidavits of David Brady and Eldon Penn. *See* Ex. 15 (Penn) ¶ 10-20; Ex. 11 (Brady) ¶¶ 29-33.

Land O'Lakes also retained the expert services of Raymond F. Dovell, of Smart Devine & Company, LLC, to analyze costs incurred by Land O'Lakes to comply with the UAO. *See*

[23] *Key Tronic Corp. v. United States*, 511 U.S. 809, 114 S. Ct. 1960 (1994).

Ex. 6 (Dovell) ¶ 6. As part of his analysis, Mr. Dovell and/or his staff reviewed a large amount of documentation, including the UAO, the ROD, Land O'Lakes' Remedial Action Report, invoices, spreadsheets, and proof of payment records. *See* Ex. 6 (Dovell) ¶ 7. Mr. Dovell also conducted discussions with accounting personnel and site personnel for Land O'Lakes' RD/RA contractors (Envirocon, Leidos Engineering, LLC, and Enviro Clean Services, LLC) and IQAT contractor (Terracon) relating to cost tracking, cost documentation, and proof of payment records. *See* Ex. 6 (Dovell) ¶¶ 8, 9.

According to the analysis of Mr. Dovell: (1) Land O'Lakes generated and maintained sufficient documentation to support the cost coding efforts and results by its RD/RA contractors; (2) Land O'Lakes' cost coding system represents a reasonable approach to distributing costs incurred by Land O'Lakes to comply with the UAO; and (3) Land O'Lakes' cost coding system fairly stated the costs incurred to cleanup specific areas of the Site. *See* Ex. 6 (Dovell) ¶¶ 50-60, 64.

Based upon his analysis, Mr. Dovell concluded that, as of December 31, 2014, Land O'Lakes has paid a total of **$12,935.805** to contractors for RD/RA work required by the UAO and ROD, and a total of **$157,788** to ODEQ for ROD RD/RA oversight activities. *See* Ex. 6 (Dovell) ¶¶ 11, 28-35, 43, 61, 65. As of December 31, 2014, Land O'Lakes has also paid a total of **$2,319,563** to legal counsel for project coordination, site access, and technical/regulatory support that was closely tied to the RD/RA work required by the UAO and ROD, in accordance with the standard set forth in *Key Tronic*. *See* Ex. 6 (Dovell) ¶ 11, 36-43, 45, 65. On July 22, 2015, Land O'Lakes paid EPA **$1,690,040** for oversight costs in accordance the UAO. *See* Ex. 6 (Dovell) ¶¶ 11, 44-45, 65; Ex. 125. Using the applicable Superfund rate, Land O'Lakes has incurred prejudgment interest in the amount of **$543,306** through August 14, 2015. *See* Ex. 6

(Dovell) ¶¶ 13, 46-49, 62, 65. To a reasonable degree of accounting certainty, a total of all of the RD/RA costs incurred by Land O'Lakes outlined above is **$17,646,502**. *See* Ex. 6 (Dovell) ¶¶ 13, 65. To a reasonable degree of accounting certainty, Land O'Lakes, its contractors and attorneys, have maintained sufficient documentation to support these costs in a manner that satisfies the accurate accounting requirements of the National Contingency Plan ("NCP"). *See* Ex. 6 (Dovell) ¶ 63.

B. Costs Incurred by Land O'Lakes to Implement the UAO Were Reasonable and Necessary

Documents and information, including cost documentation, relating to Land O'Lakes' required UAO activities to implement the ROD were given to Mr. Jay Vandeven, an expert in Superfund remediation. Mr. Vandeven reviewed this documentation, along with other evidence presented herein, and concluded that the costs incurred by Land O'Lakes to comply with the UAO and implement the ROD were reasonable and necessary. *See* Ex. 9 (Vandeven) ¶¶ 371-78.

VII. STANDARD FOR RECOVERY UNDER 106(B)(2)(C) AND (D)

Parties who receive and comply with an administrative order issued under CERCLA Section 106(a) may petition for reimbursement from the Superfund the "reasonable costs of such action, plus interest." CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A). The President's authority to decide claims for reimbursement under Section 106(b) has been delegated to the EPA Administrator, and the Administrator has re-delegated that authority to the EAB. *See* Exec. Order 12580; U.S. Envtl. Prot. Agency, *Delegation of Authority* 14-27, *Petitions for Reimbursement* (June 2000). The EAB is also authorized, as appropriate, to authorize payments of such claims. *See Delegation of Authority* 14-27 § 1.a.

One ground for such recovery is provided in CERCLA § 106(b)(2)(C), which states that "the petitioner shall establish by a preponderance of the evidence that it is not liable for response

costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order." 42 U.S.C. § 9606(b)(2)(C). Under this provision, the EPA's preliminary conclusion that a party is liable under CERCLA "is entitled to no consideration, let alone the deference afforded the typical administrative agency adjudication." *Kelley v. E.P.A.*, 15 F.3d 1100, 1107 (D.C. Cir. 1994); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, n.24 (11th Cir. 1996); *General Electric Co. v. Johnson*, 362 F. Supp. 2d 327, 341 (D.D.C. 2005). Congress "has designated the courts and not EPA as the adjudicator of the scope of CERCLA liability." *Kelley,* 15 F.3d at 1107-08; *Redwing,* 94 F.3d at n.24; *General Electric,* 362 F. Supp. 2d at 341. Land O'Lakes relies upon this provision.

Additionally, Land O'Lakes relies upon CERCLA § 106(b)(2)(D), which allows a "petitioner who is liable for response costs under section 9607(a) ... [to] recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law." 42 U.S.C. § 9606(b)(2)(D). Should the EAB determine that Land O'Lakes is liable under § 107(a) of CERCLA, Land O'Lakes should nonetheless be reimbursed for the costs it expended in responding to the UAO and other EPA required actions.

The EAB has held that under both CERCLA § 106(b)(2)(C) and (D), that the burden is upon the petitioner to prove its claim for recovery. *See, e.g., In re CoZinCo, Inc.*, 7 E.A.D. 708, 728 (EAB 1998); *In re Solutia*, 10 E.A.D. 193, 204 (EAB 2001). Accordingly, to obtain reimbursement under Section 106(b)(2)(C) and (D), Land O'Lakes must demonstrate that, more likely than not, it is not liable for response costs. *Solutia,* 10 E.A.D. at 204. Land O'Lakes must first establish its right to reimbursement before the issue of the reasonableness of the costs incurred is raised. *Solutia*, 10 E.A.D. at 204.

The first basis for recovery (not liable for response costs under section 9607(a)) is discussed first below. The second basis for recovery (the arbitrary and capricious nature of the UAO and other EPA required actions) is discussed thereafter. The third basis for recovery (the unconstitutionality of the UAO, which implemented the ROD, and the UAO regime) is addressed below.

VIII. LAND O'LAKES IS NOT LIABLE UNDER CERCLA

A. Land O'Lakes Is Not Liable Under CERCLA Because of the Covenant Not to Sue in the *Final Consent Decree* and the Release and Termination of Obligations in the *Closure Order*

Land O'Lakes is covered by, and the beneficiary of, the protections from environmental liability it received in the Court's Orders regarding the Site. The United States District Court for the Western District of Oklahoma entered its 1987 *Final Consent Decree* and 1994 *Closure Order* regarding the Site in Case No. CIV-84-2027-A. The Court's *Final Consent Decree* and *Closure Order* provided protections from liability to Land O'Lakes for the Site. These protections included a covenant not to sue in the *Final Consent Decree* and a release from liability and termination of further obligations in the *Closure Order*.

Through the course of EPA's litigation against Hudson relating to the Refinery in Case No. CIV-84-2027-A, EPA amended its *Complaint* on two occasions, resting ultimately on its *Second Amended Complaint* filed on August 15, 1985. *See* Ex. 126. The *Second Amended Complaint* echoed the allegations of the *Complaint*, but also added expansive allegations in its "Third Claim for Relief" (sometimes referred to as "Count III" in subsequent filings). The *Second Amended Complaint* and Count III expanded the environmental allegations against Hudson and the Refinery to encompass the entire Refinery and Site:

> 29. The Regional Administrator has determined that the Hudson facility is a hazardous waste facility authorized to operate under Section 3005(e) of RCRA, and that there are or have been

releases into the environment of **arsenic**, barium, cadmium, chromium, **lead**, mercury, nickel, **benz(a)anthracene**, **benz(a)pyrene**, benzo(b)fluroanthane, and chrysene.

30. Such substances are listed in Appendix VIII, of 40 C.F.R. Part 261 and are hazardous wastes within the meaning of Section 3008(h) and 1004(5) of RCRA.

31. **The releases of hazardous wastes have contaminated the soil throughout the site, and because of subsurface conditions at the facility, such wastes are likely to migrate to the groundwater and surface water.**

32. Unless enjoined by this court, the release of hazardous wastes at the Hudson facility will continue.

Ex. 126 at 11-12 (emphasis added). Based upon these allegations of the *Second Amended Complaint*, the United States requested injunctive relief requiring Hudson to perform site-wide environmental investigation and remediation activities, as follows:

(a) **excavate, in so far as possible, the soil contaminated by releases of hazardous wastes.** Such excavation, and subsequent treatment or disposal, shall be pursuant to a plan submitted to the plaintiff for approval. The plan, which shall include a time-table for completion of activities, is to be submitted within sixty days of the issuance of an injunction by this Court;

(b) **investigate and monitor the impact of releases of hazardous wastes to the surface water and to the groundwater.** Such investigation and monitoring shall be pursuant to a plan which shall first be submitted to the plaintiff for approval. The plan, which shall include a timetable for completion of the activities, is to be submitted within sixty days of an injunction by this Court; and

(c) **undertake any other corrective or other response measures deemed necessary to protect human health or the environment.**

Ex. 126 at 12-13 (emphasis added).

During the course of the litigation, EPA and Hudson partially resolved EPA's allegations as set forth in the *Second Amended Complaint*, including Count III, with the entry of a *Partial Consent Decree*, which was entered by the Court on May 1, 1986. *See* Ex. 52. The *Partial*

Consent Decree required Hudson to undertake "Site Investigation" activities as more particularly spelled out in an extensive "Addendum: Work Plan" attached thereto. The following elements were required by the "Addendum: Work Plan":

- An inspection of all tanks and API separators, justification as to which are not subject to regulation as hazardous waste storage units, and information concerning those that are subject to regulation as hazardous waste storage units.
- Removal of accumulated sludge from operating API separators in excess of 40% of volumetric capacity.
- A site survey to assess: (i) the physical condition of tanks, (ii) records of reportable spills and response, and (iii) storm or process water drainage ditches.
- A Site-wide groundwater investigation.
- A soil sampling and characterization investigation.
- An evaluation of the Hudson LTU.

See Ex. 52, Addendum at 1-10.

Ultimately, the EPA and Hudson fully resolved the EPA's allegations as set forth in the *Second Amended Complaint*, including Count III, with the *Final Consent Decree*, which was lodged on October 13, 1987 and entered by the Court on December 11, 1987. Among other things, the *Final Consent Decree* required Hudson to perform the environmental corrective action work in an "Addendum A: Work Plan" thereto, and within certain timeframes. The following elements of environmental corrective action were required by the "Addendum A: Work Plan":

- Tank Cleanout;
- Soil Excavation;
- Biotreatment of Contaminated Soils;
- Removal of North Oily Water Pond Sludges and Contaminated Soils; and
- Groundwater Remediation.

See Ex. 54, Addendum A at 1-41.

In exchange, the *Final Consent Decree* set forth a covenant not to sue Hudson, as follows:

> Except as provided below, the United States hereby covenants not to sue Defendants and their successors and assigns of the Cushing Refinery for corrective action claims under Section 3008(h) of RCRA, 42 U.S.C. § 6928(h), **for conditions addressed in the United States' Second Amended Complaint that were known by the United States and existing as of the date of lodging of this Decree.**

Ex. 54 at 19-20 (emphasis added). Importantly, the *Final Consent Decree's* covenant not to sue expressly applied to Land O'Lakes (successor to Midland by merger), as well as Hudson:

> **The covenant not to sue provisions of paragraph B. and C. of this section shall be applicable to Defendants' immediate predecessor in interest of the Cushing Refinery**, except that the United States expressly reserves its right to bring an action against any predecessors in interest of the Cushing Refinery arising under Section 3008(h) of RCRA in the event that such predecessor in interest becomes an "owner or operator" of the Cushing Refinery within the meaning of 40 C.F.R. § 260.10 following the lodging of this Final Consent Decree.

Ex. 54 at 21 (emphasis added). Midland merged into Land O'Lakes on January 1, 1982. Therefore, Land O'Lakes, as successor to Midland by merger, became Hudson's "immediate predecessor in interest" of the "Cushing Refinery," as referenced in the *Final Consent Decree*. *See* Exs. 31 and 33.

In October 1994 (then more than 17 years after Midland sold the Refinery to Hudson), the Court entered the *Closure Order*, which "[ordered] that the obligations under the Final Consent Decree and its incorporated Work Plan are hereby satisfied and terminated, thereby releasing the [Hudson companies] from any further obligations thereunder." *See* Ex. 56.

In the *Closure Order*, the Court found that Hudson satisfied all its obligations owing under the *Final Consent Decree* and its incorporated Work Plan, which satisfied obligations that fell within the scope of the covenant not to sue provisions of the *Final Consent Decree*.

Hudson's obligations were terminated by the Court, and Hudson was granted a release from any further obligations under the *Final Consent Decree*. Land O'Lakes is the immediate predecessor in interest to Hudson as to the Refinery and is the recipient, and beneficiary, of the covenant not to sue in the *Final Consent Decree*, as well as the subsequent release of further obligations pursuant to the *Closure Order*. Land O'Lakes therefore has the right to enforce the *Final Consent Decree* and *Closure Order* containing the covenant and release provisions.

1. EPA "Sued" Land O'Lakes by Issuance of the UAO

The UAO issued to Land O'Lakes ordered it to perform the RD/RA to implement EPA's ROD, at Land O'Lakes' expense, subject to penalties of $37,500 per day and punitive damages (treble costs incurred by the Superfund) for noncompliance. *See* Ex. 1, ¶¶ 120. Courts have held that the EPA's issuance of a unilateral administrative order such as the UAO, is a suit.[24] In

[24] *Travelers Cas. & Sur. Co. v. Ala. Gas Corp.*, 117 So. 3d 695, 696 (Ala. 2010); *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606, 622 (Colo. 1999); *R.T. Vanderbelt Co., Inc. v. Cont'l Cas. Co.*, 870 A.2d 1048, 1058 (Conn. 2005); *Boardman Petroleum, Inc. v. Federated Mut. Ins. Co.*, 926 F. Supp. 1566, 1582 (S.D. Ga. 1995), *rev'd on other grounds*, 150 F.3d 1327 (11th Cir. 1998); *see also Briggs & Stratton Corp. v. Royal Globe Ins. Co.*, 64 F. Supp. 2d 1340, 1345 (M.D. Ga. 1999); *U.S. Fire Ins. Co. v. Estate of Campbell*, No. 11-00006 LEK, 2011 WL 6934566 (D. Haw. Dec. 30, 2011); *see also Pac Emp'rs Ins. Co. v. Servco Pac., Inc.*, 273 F. Supp. 2d 1149, 1156-57 (D. Haw. 2003); *Aetna Cas. & Sur. Co., Inc. v. Pintlar Corp.*, 948 F.2d 1507, 1517 (9th Cir. 1991); *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 628 (Iowa 1991); *Travelers Indem. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926, 934 (Ind. Ct. App. 1999); *Aetna Cas. & Sur. Co. v. Com*, 179 S.W.3d 830, 837 (Ky. 2005); *Indus. Enterprises, Inc. v. Penn Am. Ins. Co.*, No. RDB-07-2239, 2008 WL 4120221, at *5 n.4 (D. Md. Sept. 2, 2008), *rev'd on other grounds*, 637 F.3d 481 (4th Cir. 2011); *Hazen Paper Co. v. U.S. Fid. & Guar. Co.*, 555 N.E.2d 576, 580 (Mass. 1990); *see also Whitaker Corp. v. Am. Nuclear Insurers*, 671 F. Supp. 2d 242, 253 (D. Mass. 2009); *Michigan Millers Mut. Ins. Co. v. Bronson Plating Co.*, 519 N.W.2d 864, 866 (Mich. 1994), *overruled on other grounds by Wilkie v. Auto-Owners Ins. Co.*, 664, N.W.2d 776 (Mich. 2003); *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 315 (Minn. 1995) (following *Aetna Casualty & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1516-17 (9th Cir. 1991), *overruled on other grounds by Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2009); *Pacific Hide & Fur Depot v. Great American Ins. Co.*, No. 12-36-BU-DLC, 2014 WL 2159330 (D. Mont. May 23, 2014) (also following *Aetna Casualty & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1516-17 (9th Cir. 1991); *Dutton-Lainson Co. v. Cont'l Ins. Co.*, 778 N.W.2d 433, 449 (Neb. 2010); *Coakley v. Maine Bonding & Cas. Co.*, 618 A.2d 777,787 (N.H. 1992); *C.D. Spangler Const. Co. v. Indus. Crankshaft & Eng'g Co., Inc.*, 388 S.E.2d 557, 569 (N.C. 1990); *Prof'l Rental, Inc. v. Shelby Ins. Co.*, 599 N.E.2d 423, 430 (Ohio Ct. App. 1991); *Land O' Lakes, Inc. v. Employers Ins. Co. of Wausau*, 728 F.3d 822, 829 (8th Cir. 2013); *Schnitzer Inv. Corp. v. Certain Underwriters at Lloyd's of London*, 104 P.3d 1162, 1168 (Or. Ct. App. 2005), *aff'd*, 137 P.3d 1282 (Or. 2006); *Anderson Brothers, Inc. v. St. Paul Fire & Marine Ins. Co.*, 729 F.3d 923 (9th Cir 2013); *Certain Underwriters at Lloyd's London v. Mass. Bonding & Ins. Co.*, 230 P.3d 103, 115-17 (Or. Ct. App. 2010), *modified on other grounds*, 260 P.3d 830 (Or. Ct. App. 2011); *Century Indemn. Co. v. Marine Group, LLC*, 848 F. Supp. 2d 1238, 1250-56 (D. Or. 2012); *PCS Nitrogen, Inc. v. Ross Development Corp.*, 2015 U.S. Dist. Lexis 60343, *28 (D.S.C. May 8, 2015); *Carrier Corp. v. Piper*, 460 F. Supp. 2d 827, 840-41 (W.D. Tenn. 2006); *Emhart Indus., Inc. v. Century Indem. Co.*, 559 F.3d 57, 75

other words, EPA has sued a person when EPA issues a potentially responsible party ("PRP") letter or a UAO. *See id.*

On February 10, 2009, Land O'Lakes submitted its *Notice of Intent* to comply with the UAO, despite Land O'Lakes' many objections. The *Notice of Intent* summarized many of Land O'Lakes' objections to the UAO, and requested a remand of the ROD's administrative record. By statute, Land O'Lakes cannot challenge the UAO, or the response action ordered under the UAO, in Federal court until the response action is complete. 42 U.S.C. § 9613(h); *General Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 11 (D.D.C. 2009), *aff'd*, 610 F.3d 110 (D.C. Cir. 2010). Thus, the UAO by EPA was a suit that directly falls within the *Final Consent Decree's* covenant not to sue by EPA in favor of Land O'Lakes.

2. The Actions Required by the UAO Fall Within "Conditions Addressed" in the *Final Consent Decree* and *Closure Order*

Courts have found that the matters addressed, or "conditions addressed," as stated in a decree, are essentially whether the claims "arise from the same subject matter as the settlement with the government." *Akzo Coatings, Inc. v. Aigner Corp.*, 803 F. Supp. 1380, 1387 (N.D. Ind. 1992) (holding that claims were barred because they arose from the same subject matter as a Consent Decree with EPA); *United States v. Pretty Products, Inc.*, 780 F. Supp. 1488, 1497 (S.D. Ohio 1991) (holding that claims were barred because they arose from the same subject matter as a Consent Decree with EPA). Various factors can be considered such as the site or location in question, the hazardous wastes at issue, the time frame covered by the settlement and the cost of the cleanup. *Pretty Products,* 780 F. Supp. at 1495.

(1st Cir. 2009); *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 868 F. Supp. 1278, 1309-10 (D. Utah 1994), *aff'd*, 52 F.3d 1522 (10th Cir. 1995); *State v. CAN Ins. Cos.*, 779 A.2d 662, 667 (Vt. 2001); *Time Oil Co. v. Cigna Prop. & Cas. Ins. Co.*, 743 F. Supp. 1400, 1420 (W.D. Wash. 1990); *see also Gulf Indus., Inc. v. State Farm Fire & Cas. Co.*, 326 P.2d 782, 790 (Wash. App. 2014); *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 665 N.W.2d 257, 264 (Wisc. 2003); *Hutchinson Oil Co. v. Federated Serv. Ins. Co.*, 851 F. Supp. 1546, 1552 (D. Wyo. 1994).

As applied, it is unequivocal that the *Final Consent Decree* and UAO both relate to the Site. As shown below, the environmental issues and COCs at issue in the *Final Consent Decree* and the UAO are same subject matter. With respect to the time frame, the "covenant not to sue' provisions in the *Final Consent Decree* shall "remain in effect sine die." *See* Ex. 54. Since these provisions remain in effect indefinitely into the future, they are in effect to the present, which includes when the UAO was issued. Thus, as discussed below, after the *Closure Order*, immunity to suit by EPA against Land O'Lakes was firmly in place at the Site.

The *Final Consent Decree* and *Closure Order* are the settlement with EPA. The key phrases to determine the scope of the matters addressed in the Decree are "corrective action claims" and "conditions addressed in the United States' Second Amended Complaint that were known by the United States and existing as of the date of lodging of this Decree." The term "corrective action" has been defined broadly by EPA:

> [c]orrective action typically includes five elements common to most, though not all, cleanup activities: initial site assessment, site characterization, interim actions, evaluation of remedial alternatives, and implementation of the selected remedy.

U.S. Environmental Protection Agency, *RCRA Orientation Manual*, EPA530-F-11-003, p. III-121 (Oct. 2011). Thus, the term "corrective action" typically refers to the cleanup process and all activities related to the investigation, characterization, and cleanup of a release of hazardous wastes or hazardous waste constituents. U.S. Department of Energy, *RCRA Corrective Action Definitions*, DOE/EH-413-044r, at 2 (Revised Sept. 2002). This U.S. Department of Energy publication describes the definition of "corrective action" as follows:

> [m]ore than 5,000 facilities are subject to RCRA corrective action, over three times the number of sites on CERCLA's National Priorities List (NPL). The degree of investigation and subsequent corrective action necessary to protect human health and the environment varies significantly across these facilities. Some facilities may require no cleanup at all or only minor corrective

> action, while others are as complex and highly contaminated as any Superfund site. To account for the variety of corrective action facilities and site-specific circumstances, EPA has emphasized a flexible, facility-specific approach to corrective action.

Id.

EPA's claims in the UAO arise from the same subject matter as the *Final Consent Decree.* The UAO ordered Land O'Lakes to perform an RD for the remedy described in the ROD for the Site and to implement the design by performing an RA. *See* Ex. 1, ¶ 1. As the term "corrective action" in the *Final Consent Decree* covers the evaluation of remedial alternatives, the implementation of the selected remedy and the cleanup process and the UAO's directive to perform the RD and RA for EPA's selected remedy, the UAO is covered as "corrective action" activities in the *Final Consent Decree.*

The second key phrase in the *Final Consent Decree* is "**conditions addressed** in the United States' Second Amended Complaint that were known by the United States and existing as of the date of lodging of this Decree." Ex. 54 at 20 (emphasis added). To ascertain the "conditions addressed," a review is necessary of: (1) the *Second Amended Complaint*; and (2) the *Final Consent Decree* and its incorporated "Addendum A Work Plan." EPA's *Second Amended Complaint* makes claims for "corrective action" against Hudson for the "release of hazardous wastes[25] into the environment" at the Site. *See* Ex. 126, ¶ 27. EPA's Prayer for Relief in the *Second Amended Complaint* requests an injunction requiring Hudson to undertake "corrective action or other response measures deemed necessary to protect human health or the environment." *See id.* at Prayer for Relief, ¶ 2(c).

[25] CERCLA § 9601(14) defines "hazardous substance" under CERCLA to include all "hazardous wastes" under RCRA. 42 U.S.C. § 9601(14).

The *Second Amended Complaint* addressed the "treatment, storage, or disposal of hazardous wastes." *See id.* at ¶ 16. It also addresses soil, surface water, ground water, storage tanks, surface water impoundments, refinery areas, industrial waste, land treatment facility, security, inspection, training, preparedness, prevention, groundwater monitoring, monitoring wells, quality assessment, precipitation and runoff which may become contaminated, run-off ponds, waste ponds, dikes, chemical and physical analysis of samples, waste analysis plan, sampling methods, hazardous waste management program, contingency plans, closure plans, post-closure monitoring and maintenance, post-closure cost estimate, run-off control system, soil monitoring, financial responsibility, financial mechanisms, environmental impairment liability insurance, costs, civil penalties of $25,000 per day, permits, waste activities, API separators used to separate oil, solids and water at the Refinery and excavation and disposal of soil. *See id.* at ¶¶ 4-9, 12-14, 16-25, 27-32, Prayer for Relief ¶¶ 1-2.

In addition, the *Second Amended Complaint* listed the following hazardous wastes and chemicals of concern: decanter tank car sludge, sludge from coking operations, petroleum refining wastes, dissolved air flotation float, slop oil emulsion solids, heat exchanger bundle cleaning sludge, API Separator sludge, tank bottoms, land treatment unit wastes, arsenic, barium, cadmium, chromium, lead, mercury, nickel, chrysene, benz(a)anthracene, benz(a)pyrene and benzo(b)fluroanthane. *See id.* at ¶¶ 4, 29.

Moreover, the *Final Consent Decree* and its incorporated "Addendum A: Work Plan" addressed numerous matters. The *Final Consent Decree* addressed releases of hazardous waste or hazardous constituents, investigation of releases, conveyances of title, covenants running with the land, remnants and effects of certain industrial activities and practices conducted on the Site, land use restrictions, no use for residential or agricultural purposes, use for industrial or

commercial purposes with access limited to business invitees and the general public is not invited for retail, entertainment, recreational or educational activities, land treatment unit, corrective action to be performed by Hudson, funding for corrective action, funding the cleanup activities, costs to comply with the *Final Consent Decree*, expenditures made for cleanup activities, cost estimate for the work, closure trust fund, costs under the *Final Consent Decree*, financial responsibility, sampling, site access, monthly reporting, closure plan and activities, post-closure plan and activities and effect of settlement. *See* Ex. 54 at 2-6, 11-13, 19-21, 23.

The incorporated "Addendum A: Work Plan" addressed tank cleanout, sludges, hazardous waste, total organic carbon, lead, wastewater, emulsions, decanting, slop oil, solids, sampling, analysis, cleaning procedures, materials transported offsite for disposal, soil excavation and disposal, oil and grease, secondary containment berms, ditches, erosion of soils, biotreatment of contaminated soils, air entrainment, storage tanks, bermed areas, unloading areas, loading rack, API Separator, PAH constituents, PAHs, benzo(a)pyrene, benzo(a)anthracene, chrysene, vegetative cover, refinery areas, soil moisture content, gravel cover, periodic reports, water ponds, waste ponds, liquids, removal of oily water pond and sludges, total PAHs, removal activities, cost estimates, EPA review and approval, regarding ponds, drainage, stormwater collection, ponding of stormwater, groundwater remediation, groundwater recovery system, monitoring wells, recovery wells, plume migration, chlorides, sulfates, anthracene, phenanthrene, pyrene, well plugging, pathways of migration of contaminants, land treatment unit, leaching, closure and post-closure. *See* Ex. 54, Addendum A: Work Plan.

EPA's UAO arises from the same subject as its *Second Amended Complaint*, the *Final Consent Decree*, and its incorporated "Addendum A: Work Plan." The UAO orders Land

O'Lakes to perform the design of the remedy selected by EPA in the ROD and to perform the cleanup. Under the Statement of Basis and Purpose, EPA states that the ROD is the "decision document [that] presents the "Selected Remedy" for the Hudson Refinery Superfund Site." *See* Ex. 3, ¶ 2.0. Under Description of the Selected Remedy, EPA states: "[t] he overall cleanup strategy for this Site is to reduce the amount of contamination in soil, waste pond sediment, waste pond surface water and ground water to protect both human and ecological receptors." *See* Ex. 3, ¶ 4.0. Under Known or Suspected Sources of Contamination, EPA states: "[t]he RI confirmed that leakage and spills from refinery vessels, storage tanks, the dumping of contaminated material into on-site impoundments, and runoff has resulted in contaminated soil, surface water, sediment, and ground water." *See* Ex. 3, ¶ 12.6. Under Types of Contamination and Affected Media, EPA lists the chemicals of concern at the Site as benzo(a)pyrene, arsenic, lead, benzo(a)anthracene, benzene, and thallium. *See* Ex. 3, 12.7. Virtually all of the COCs in the UAO's ROD are addressed in EPA's *Second Amended Complaint*, the *Final Consent Decree*, and its incorporated "Addendum A: Work Plan."

Land O'Lakes also had the *Second Amended Complaint*, *Final Consent Decree*, the *Closure Order*, "corrective action," and "conditions addressed" analyzed by experts, including an environmental engineer and environmental chemist. The environmental engineer, Mr. Vandeven, made the following findings:

> The FCD [*Final Consent Decree*] and the Closure Order provided Hudson and its immediate predecessor (Midland-Land O'Lakes) liability protection (a covenant not to sue) from any further corrective action "for conditions addressed in the United States' Second Amended Complaint that were known by the United States and existing as of the date of the lodging of this Decree." I have independently studied and analyzed the conditions at the Site known by USEPA and existing at the time of the lodging of the FCD. The response actions required of, and completed by, Hudson under the PCD [Partial Consent Decree] and FCD were broad and

> addressed all conditions and operational areas of the Site potentially impacted by historic refining operations. The response actions taken at the Site by USEPA in its ERA [Emergency Removal Action], its NTCR [Non-Time Critical Removal], and required in the 2009 UAO were directed at conditions known by the United States and existing at the time the FCD was lodged. Refining operations permanently shut down on December 30, 1982. The costs associated with the response actions taken under the UAO are therefore costs for which Land O'Lakes received the protections afforded to it under the FCD and the Closure Order and is therefore not responsible or liable.
>
> ****
>
> By October 1987, numerous investigation and characterization efforts had been conducted at the Site that provided the United States – primarily though the USEPA – a wealth of knowledge on the conditions of the Site, both environmental conditions (soil, pond sediment, and groundwater contamination) and conditions of the tanks, vessels, and piping.
>
> ****
>
> Considered in their entirety, these studies provided the USEPA with full and complete knowledge of the refinery, the Site, and the environmental conditions. There were no conditions that Land O'Lakes was ordered to address in the ROD and UAO that were not known by the United States in October 1987.

See Ex. 9 (Vandeven) ¶¶ 26, 79, 80.

In addition, the environmental chemist, Dr. Saba, made the following findings:

> The 2007 ROD and 2009 UAO addressed environmental conditions that EPA knew existed at the Site before the FCD lodging date of October 13, 1987. For some Site areas, the conditions addressed by the ROD/UAO resulted from post 1994 intervening activities by EPA and other parties. These activities, unrelated to Hudson or Land O'Lakes, disturbed, redistributed, and modified Site conditions that were known to EPA to exist prior to October 1987. These modified conditions did not include any new chemicals that were not known to EPA as of October 1987.
>
> ****
>
> To reach this opinion, I reviewed and analyzed information contained in Site documents that were available to EPA prior to the lodging of the FCD. These documents included meeting minutes, communication memos, site inspections, environmental investigation reports, and consent decrees, among other

> documents. In addition, to determine what chemical conditions were known by EPA to exist at the time of lodging the FCD, I prepared **Table 1** attached to this affidavit. **Table 1** contains a total of 2,419 measurements for hundreds of samples collected from the Site between 1974 and 1987.... The data found in this compilation contributed to the comprehensive understanding of the chemicals present at the Site that EPA possessed and knew before October 13, 1987. The extensive amount of information and data (as compiled in Table 1) demonstrate the conditions that existed at the Site for all environmental media, as well as, the conditions and contents of the Refinery units after it was shut down were characterized, documented and known to EPA at the time of lodging the FCD.
>
> ****
>
> In the ROD/UAO EPA re-addressed Site areas where conditions were known and existing as of October 13, 1987, the lodging date of the FCD.

See Ex. 8, ¶¶ 21, 22 and Opinion 6.1.

In summary, the matters addressed in the UAO arise from the same subject matter as the *Final Consent Decree* and its incorporated "Addendum A: Work Plan." The matters addressed in the covenant not to sue provisions of the *Final Consent Decree* cover and bar the actions by EPA against Land O'Lakes through the UAO. EPA, however, ignored these protections and immunity owing to Land O'Lakes.

3. The Covenant Not to Sue in the *Final Consent Decree* and the Release of Liability in the *Closure Order* Establish the Non-Liability of Land O'Lakes for CERCLA Claims

A cleanup under RCRA satisfies the requirements of both RCRA and CERCLA. The EPA has stated:

> Generally, cleanups under RCRA corrective action or CERCLA will substantively satisfy the requirements of both programs. We believe that, in most situations, EPA RCRA and CERCLA site managers can defer cleanup activities for all or part of a site from one program to another with the expectation than no further cleanup will be required under the deferring program. For example, when investigations or studies have been completed

> under one program, there should be no need to review or repeat those investigations or studies under another program. Similarly, a remedy that is acceptable under one program should be presumed to meet the standards of the other.

USEPA, *Coordination between RCRA Corrective Action and Closure and CERCLA Site Activities* (Sept. 24, 1996); USEPA, *The Environmental Site Closeout Process Guide* (Sept. 1999) ("In general, cleanups under RCRA corrective action or CERCLA can satisfy the requirements of both programs.").

By entering into the *Final Consent Decree*, the Government knew that a release of liability and/or a covenant not to sue under RCRA § 3008(h) terminates the liability of a party unless the Government expressly reserves the right to take additional action under CERCLA. The EPA's own guidance warns its staff about the use of covenants not to sue, as follows:

> Releases from liability and covenants not to sue may be sought by parties negotiating § 3008(h) orders. These provisions terminate or seriously impair the Federal Government's right of action against a party.... In addition, EPA personnel should exercise particular care in drafting such provisions to ensure that they do not restrict the operation and enforcement of the on-going RCRA regulatory program. Moreover, the order should also contain a provision reserving the Agency's right to take additional action under RCRA and other laws. For example, EPA should reserve the right to expend and recover funds under CERCLA....

U.S. Environmental Protection Agency, *Interpretation of Section 3008(h) of the Solid Waste Disposal Act* (December 16, 1985) (which was in effect at the time of the lodging of the FCD). The Government has applied this *Interpretation* to issue RCRA orders that reserve CERCLA rights.

In EPA's RCRA action Case No. CIV-84-2027-A, the Government in the covenant not to sue in the *Final Consent Decree* references Section 3008(h) but it contains no reservation of rights under CERCLA. Further, the limited reservations found in the *Final Consent Decree* in

Section XVI EFFECT Of SETTLEMENT, Paragraph C. 1-4 under RCRA were either satisfied (1-3) or not applicable (4) to this action. The *Closure Order* terminated all liability for the obligations of Hudson to complete the *Final Consent Decree* Work Plan, and this release applied to Land O'Lakes, as the immediate predecessor in interest, including any liability for Site conditions known by the United States and existing upon lodging the *Final Consent Decree*. This Court's release of liability in the *Closure Order* has no reservation of rights under CERCLA.

In addition, the *Final Consent Decree* and *Closure Order* are res judicata (often referred to as claim preclusion). Res judicata prohibits the Government from asserting any claims or legal theories, such as a CERCLA claim or legal theory, in any subsequent suit that was or could have been asserted in the first suit. In this case, the Government could have asserted a CERCLA claim or theory in the RCRA action, but chose not to do so. The Government, therefore, is barred from asserting a CERCLA claim or theory in the UAO.

Finally, the facts underlying the claims, not the parties' characterization of the claims, determines whether the claims arise from the same subject matter as the settlement with the government and are barred. *Akzo Coatings, Inc. v. Aigner Corp.*, 803 F. Supp. 1380, 1386 (N.D. Ind. 1992) (Plaintiffs' claims, which are barred, attempt to circumvent the immunity in the settlement with the government. The determining test is the facts underlying the claims and not the parties' characterization of the claims); *United States v. Pretty Products, Inc.*, 780. 1488,1494-97 (S.D. Ohio 1991) (Third Party Plaintiff's claims under CERCLA, Ohio state law and common law theories of indemnity, breach of express and implied contract, quasi-contract, quantum meruit, restitution and unjust enrichment are barred as an attempted end run around the immunity provisions in the settlement with the government; Held, claims were barred because

they arose from the same subject matter as the Consent Decree with EPA); *Asarco, LLC v. Union Pacific,* 2014 U.S. App. Lexis 15285, *11 (8th Cir. Aug. 8, 2014) (The district court correctly recognized that all of Asarco's claims are prohibited contribution claims even though some are disguised—like wolves 'clad, so to speak, in sheep's clothing'…—as breach of contract claims.); *Crown Cork & Seal Co. v. Dockery*, 907 F. Supp. 147, 151 (M.D. NC 1995) (Defendant's counterclaim on common law and indemnity theories is barred as an attempted end run); *Alcan Aluminum Corp. v. Butler Aviation*, 2003 U.S. Dist. Lexis 16435, *23-24 (M.D. PA Sept. 19, 2003) (Plaintiff's state law claims are barred as an attempted end run around the protections in the settlement with the government).

As covered above, the matters addressed in the UAO arise from the same subject matter as the *Final Consent Decree*, its incorporated "Addendum A: Work Plan," and the *Closure Order*. The immunity provisions provided in the *Final Consent Decree* and *Closure Order* therefore bar the UAO.

4. Land O'Lakes Filed Pending Oklahoma Litigation to Enforce the *Final Consent Decree* and *Closure Order*

On June 23, 2015, Land O'Lakes filed its Declaratory Judgment Complaint against the United States, which has acted by and through the EPA, in the United States District Court for the Western District of Oklahoma (Case No. CIV-15-683-R). The Declaratory Judgment Complaint, its exhibits and any amended complaints are incorporated herein by reference. *See* Ex. 25.

B. Land O'Lakes is not Liable Under CERCLA Because the UAO Mandated Remedy in the ROD Required the Remediation of Petroleum, Including Crude Oil and Fractions of Crude Oil, in Violation of CERCLA's Petroleum Exclusion

When Land O'Lakes first entered the Site under the UAO, what was most notable was what the Site did not have. There were no disposal pits. Ex. 11 (Brady) ¶ 37. There were no

disposal ponds. *Id.* There was no evidence of solid waste disposal, other than Hudson's Land Treatment Unit and EPA's Land Treatment Unit. The only areas of the Site that were not covered by CERCLA's petroleum exclusion at that time were the existing waste management/oxidation ponds on the North Refinery (Aeration Pond 7, Wastewater Ponds 1 through 6A).[26]

The Site had a singular purpose and operational history—the refining of crude oil into various refined petroleum products, principally gasoline. Consequently, it is a straightforward proposition that releases at the Site—independent of who may have caused the releases—and any resulting contamination consists of crude oil or a fraction thereof. These releases are covered under CERCLA's petroleum exclusion. *See* Ex. 9 (Vandeven) ¶¶ 64, 65.

1. Legal Standards Applicable to CERCLA's Petroleum Exclusion

Under CERCLA, a person is only liable for the costs of remediating a "hazardous substance." 42 U.S.C. § 9607(a). "Hazardous substance" is a defined term under CERCLA that expressly excludes petroleum. Section 9601(14) provides that "the term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance…and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)." 42 U.S.C. § 9601(14). Similarly, CERCLA's definition of "pollutant or contaminant" also provides that this term "shall not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance…and shall not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas)." 42 U.S.C. § 9601(33). The

[26] Land O'Lakes is not liable under CERCLA for these ponds for the other reasons set forth in this *Petition*.

statute, however, does not define the terms "petroleum," "crude oil," or "fraction." As a result, the precise scope of CERCLA's petroleum exclusion has been determined by legislative history,[27] EPA guidance, and federal case law.

In determining the scope of the petroleum exclusion, EPA has issued a guidance document on which a number of federal courts have relied and granted *Chevron* deference. *See* U.S. EPA Memorandum, Office of General Counsel, *Scope of the CERCLA Petroleum Exclusion Under Section 101(14) and 104(a)(2)* (July 31, 1987) (hereinafter "*Petroleum Exclusion Guidance*"). In the *Petroleum Exclusion Guidance*, EPA stated that the term "petroleum" under CERCLA:

> includes hazardous substances normally found in refined petroleum fractions but does not include either hazardous substances found at levels which exceed those normally found in such fractions or substances not normally found in such fractions.

Petroleum Exclusion Guidance, at 5. In outlining the legal basis for this interpretation, EPA reasoned that substances "found naturally in all crude oil and its fractions," but deemed hazardous under CERCLA, "must be included in the term 'petroleum' for [the petroleum exclusion] to have any meaning." *Id.* Furthermore, EPA deemed the term "petroleum" to include "hazardous substances which are normally mixed with or added to crude oil or crude oil fractions during the refining process," including substances "the levels of which are increased

---

[27] CERCLA's legislative history is sparse. However, when Congress considered the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221, which amended the Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, 79 Stat. 977, Senator Durenberger provided introductory comments on the legislation that offer insight into the Congressional perception of the petroleum exclusion's scope. Specifically, Senator Durenberger stated that the federal government has no authority under CERCLA to "respond [to] or clean up a spill if it involves petroleum products," and that "spills of fuel cannot be cleaned up under the Superfund law because it is a petroleum product." 130 Cong. Rec. 52,028, 52,080 (daily ed. Feb. 29, 1984). In 1985, Congressman Downey introduced legislation that would have repealed the petroleum exclusion and would have specifically applied CERCLA to petroleum, crude oil, or crude oil fractions if they contained designated hazardous substances. *See* H.R. 1881, 99th Cong. (1985). The bill never progressed beyond introduction. *Wilshire Westwood Assocs. v. Atl. Richfield Corp.*, 881 F.2d 801, 806 (9th Cir. 1989). Courts have thus concluded that Congress intended the petroleum exclusion to accomplish what its plain language indicates—an exclusion of petroleum, crude oil, and crude oil fractions from CERCLA liability even if those materials contain substances otherwise designated as hazardous under CERCLA. *Id.* at 808.

during refining." *Id.* Because the addition or increase of these substances "is part of the normal oil separation and processing operations," the definition of "petroleum" should encompass them. *Id.* However, EPA interpreted the petroleum exclusion to end at "hazardous substances which are added to petroleum or which increase in concentration solely as a result of contamination of the petroleum during use." *Id.* at 4. Thus, the EPA's reading of the petroleum exclusion includes "only indigenous, refinery-added hazardous substances." *Id.*

In response to concerns that this reading of the exclusion might be overly narrow and apply CERCLA to too broad a spectrum of petroleum products, EPA noted that this definition "leaves a significant number of petroleum spills outside the reach of CERCLA," including "spills of crude or refined petroleum," and "spills or releases of gasoline." *Id.* at 5. Citing to the Congressional Record, EPA explained that "leakage[s]of gasoline from underground tanks," which "appear[] to be the greatest source of groundwater contamination in the United States," would still be within the EPA's interpretation of the exclusion. *Id.* (citing 130 Cong. Rec. 52,027, 52,028 (daily ed. Feb. 29, 1984) (Sen. Durenberger)). Furthermore, the interpretation does not even extend so far as to expose "all releases of used oil" to CERCLA liability "since used oil does not necessarily contain non-indigenous hazardous substances in elevated levels." *Id.* Under EPA's *Petroleum Exclusion Guidance*, therefore, the threshold question is whether the hazardous substances are inherent to the petroleum or added during the refining process, as contrasted to hazardous substances added during use after the completion of the refining process. Federal courts have accorded considerable deference to the EPA's *Petroleum Exclusion Guidance*. *See, e.g., Cose v. Getty Oil Co.*, 4 F.3d 700, 706 (9th Cir. 1993); *United States v. Western Processing Co.*, 761 F. Supp. 713, 721 (W.D. Wash. 1991). This deference stems, in part, from a recognition that the EPA's interpretations "harmonize the petroleum exclusion with

the goal of CERCLA in order that the fullest remedial nature of the statute may be realized." *Getty Oil*, 4 F.3d at 706.

Independent of the *Petroleum Exclusion Guidance*, Courts have provided definitions of "petroleum." For example, the 9th Circuit defined "petroleum" as:

> an oily flammable bituminous liquid . . . that is essentially a compound mixture of hydrocarbons of different types with small amounts of other substances (as oxygen compounds, sulfur compounds, nitrogen compounds, resinous and asphaltic components, and metallic compounds) . . . and that is subjected to various refining processes (a fractional distillation, cracking, catalytic reforming, hydroforming, alkylation, polymerization) for producing useful products (as gasoline, naphtha, kerosene, fuel oils, lubricants, waxes, asphalt, coke, and chemicals).

Wilshire, 881 F.2d at 803;[28] *see also Cose*, 4 F.3d at 705; *U.S. v. Apex Oil Co.*, 132 F.3d 1287, 1290 (9th Cir. 1997) (citing *McGraw-Hill Dictionary of Scientific and Technical Terms*) (interpreting the word oil as petroleum under the 1980 Act to Prevent Pollution from Ships, 33 U.S.C. § 1901-1915). Consistent with the *Petroleum Exclusion Guidance*, federal courts have repeatedly noted that the petroleum exclusion applies to "unrefined and refined gasoline even though certain of its indigenous components and certain additives during the refining process have themselves been designated as hazardous substances." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153-54 (8th Cir. 1999) (affirming district court's determination that pollution plume that contained refined and unrefined petroleum hydrocarbon products does not give rise to CERCLA liability); *see also KFC Western, Inc. v. Meghrig*, 49 F.3d 518, 523 n.6 (9th Cir. 1995) (determining that plaintiff had no remedy because "CERCLA's petroleum exclusion covers refined petroleum products such as gasoline"). Courts also have confirmed that the petroleum

---

[28] The *Wilshire* court's ultimate conclusion was that "the petroleum exclusion...[applies] to unrefined and refined gasoline even though certain of its indigenous components and certain additives during the refining process have themselves been designated as hazardous substances within the meaning of CERCLA." *Wilshire*

, 881 F.2d at 810.

exclusion applies to petroleum products even when a hazardous substance, such as lead, is added to such products during the refining process. *Wilshire*, 881 F.2d at 801. However, a petroleum product that is mixed with a hazardous substance through use is not protected by the petroleum exclusion. *United States v. Amtreco, Inc.*, 858 F. Supp. 1189 (M.D. Ga. 1994).[29]

What is presented below in the remainder of this Section is a demonstration of the applicability of CERCLA's petroleum exclusion to the UAO's required implementation of the ROD. This is presented first with EPA's knowledge and withholding of information pertinent to the applicability of the petroleum exclusion, then with a description of Refinery processes and locations, detailed observations of conditions in the field and sources of materials that required excavation under the ROD, and then finally through chemical forensic analysis.

2. Prior to Development of the ROD, EPA Knew that Remediation of the Site Would Involve CERCLA's Petroleum Exclusion

Prior to the lodging of the *Final Consent Decree* in October 1987, EPA knew of the CERCLA petroleum excluded materials on the Site's surface and sub-surface. *See* Ex. 8 (Saba) ¶¶ 68-74, Opinion 5. Shortly thereafter, but while the *Final Consent Decree's* requirements were being implemented by Hudson, EPA knew that CERCLA's petroleum exclusion would apply to any effort to investigate and remediate the Refinery under CERCLA. By way of example, a May 1, 1990 Internal EPA Memorandum titled "FIT Task Request," authorized the performance of an HRS Prescore Analysis and directed the preparation of a "paper on applicability of petroleum exclusion." *See* Ex. 127.[30]

---

[29] Courts have analyzed CERCLA's petroleum exclusion and determined that it applies at petroleum refining operations. *See, e.g., Organic Chem. Site PRP Group v. Total Petroleum Inc.*, 58 F. Supp. 2d 755, 758 (W.D. Mich. 1999) (CERCLA does not impose liability for disposal of non-hazardous substances that later become hazardous due to volatilization and biodegradation of other petroleum components over time); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1144 (8th Cir. 1999) ("no fact finder could reasonably conclude that the petroleum exception does not apply.").

[30] While Land O'Lakes broadly requested such documents under the Freedom of Information Act, to date, EPA has failed or refused to provide a copy of such "paper on applicability of petroleum exclusion."

As demonstrated by an ODEQ document titled "Hudson Refining Activity Log," EPA's skepticism about the use of CERCLA authority at the Site was again evident as of 1994/1995:

> **February 23, 1994**[31] - ....
>
> * * * *
>
> Lon Biasco [EPA] returned my call. Told him what I was looking for. He asked what the State's position on the site is—do we want EPA to relook at the site? Do we want EPA to stay away? Told him I really did not know—will try to get an answer. He said that Eddie Sierra asked him about the site last week. He referred me to David Vogler –RCRA for RCRA docs.... **Lon did not hold out much hope that CERCLA could do anything because of the petroleum exclusion**. I called Vogler and left message.

See Ex. 128 at 1-2 (emphasis added).

While EPA clearly understood what should be self-evident—that CERCLA's petroleum exclusion would apply to a very large degree at a petroleum refinery—the issue is wholly unaddressed by the ROD. EPA's ROD ignores CERCLA's petroleum exclusion, and contains no statement of basis as to what locations of the Site are covered by CERCLA's petroleum exclusion, and what locations are not. The ROD does not even provide a hint as to whether EPA gave CERCLA's petroleum exclusion any thought at all. Ignoring CERCLA's petroleum exclusion—especially in light of all of all of the prior remediation history and data—in this fashion is clearly arbitrary, capricious, and contrary to law.

3. Petroleum Products Generated by the Refinery and Areas of the Refinery Storing, Transporting, and Processing Crude Oil and Petroleum Products

During Midland's operations, it refined crude oil into a series of petroleum products such as gasoline, kerosene, diesel, propane, butane, No. 5 fuel oil, No. 6 fuel oil, petroleum coke, JP-4 (for a short timeframe), and slurry (from the catalytic cracking unit). *See* Ex. 12 (Fuqua) ¶¶ 76-77; Ex. 21 (Joint Exs. 70, 71, 118, 127). After Midland's sale of the Refinery to Hudson in 1977,

[31] This 1994 date is likely in error. Given the full context of the document, it is likely a 1995 entry.

Hudson continued refining crude oil into largely the same product mix. *See* Exs. 12 (Fuqua) ¶¶ 117, 127-29; Ex. 20 (Wright) ¶ 58; Ex. 4 (Baugher) ¶ 33. While the Refinery's process returned oil from separators to be refined, at no time during Midland's or Hudson's operation of the Refinery did either entity re-refine waste oil or contaminated oil. *See* Ex. 16 (Williams) ¶¶ 143-48; Ex. 13 (Gaskins) ¶ 87; Ex. 20 (Wright) ¶ 176. It is highly unlikely that any used oil or waste oil was ever refined or processed at the Site prior to the Midland era. Certainly, there is no evidence of this occurring during the pre-Midland time period. Midland and Hudson only refined native crude oil into petroleum products. *See* Ex. 16 (Williams) ¶¶ 141-48; Ex. 13 (Gaskins) ¶¶ 82-87; Ex. 20 (Wright) ¶¶ 172-76.

Land O'Lakes retained the services of D. Keith Baugher to review available Site and Refinery operational data and records. Mr. Baugher is a chemical engineer with over 50 years of experience in the petroleum refining industry. *See* Ex. 4 (Baugher), ¶¶ 1, 3. Among his tasks was to provide an analysis and testimony on how ROD COCs and EPA-designated "visual contamination," which Land O'Lakes was required by the UAO to remediate, are attributable to former petroleum refining operations on the Site. Mr. Baugher specifically opines, from a refinery operations standpoint, that CERCLA's petroleum exclusion applies to areas of the Site that Land O'Lakes was required to remediate under the UAO. *See* Ex. 4 (Baugher) ¶¶ 13-22

Mr. Baugher also demonstrates that these materials from Hudson's operations were leaked after the 1982 shutdown due to soil side galvanic corrosion in pipes and tanks. *See* Ex. 4 (Baugher) ¶¶ 42-43.[32] What Mr. Baugher presents, in this regard, is sound science and not unsupported theory. Subsequent owners (Hudson, USR) worked to maintain the Refinery as an

[32] Part of Mr. Baugher's analysis included an evaluation and opinion on the length of time that any feedstocks, product, crude oil, additives, etc. would remain in the Refinery's operating vessels, pipes, and tanks. His conclusion is that any such materials attributable to Midland would have been quickly eliminated through refining operations. *See* Ex. 4 (Baugher) ¶¶ 34-43.

asset ready for sale or restart. *See, supra*, Section IV.C. In preparation for its large scale crude storage operation, USR hydrostatically tested pipes in the 1990 timeframe and found the pipes capable of holding pressure to 120 bbls [sic]. *See* Ex. 66; *see also*, *supra*, Section IV.D.1. Unsurprisingly, then, when the Refinery ownership focus shifted from preservation to salvage in the mid-1990s, the condition of Refinery vessels, tanks, and piping was affected. Specifically, in late 1998, EPA clearly pointed out the direct causal link between damaged and leaking pipes and petroleum products draining and causing visibly stained soils:

> In support of the asbestos abatement efforts on the South Refinery, the EPA has already recovered over 30,000 gallons (over 700 barrels) of material, including **gasoline, crude oil**, and butane from tanks, vessels, and **pipes**. In locations where the **pipes have been previously damaged, visibly stained soils indicate that the material drained to the soil at the damaged location.**

See Ex. 10 (Joint Expert Reference Documents), Tab 183 (USEPA 1998c Memo) at LOL0239922 (emphasis added).

Broken, breached, and rusted piping leaking petroleum products (attributable to others, according to Mr. Baugher's analysis) into surrounding soils dominated Land O'Lakes' required RD/RA activities under the UAO and ROD. As described and documented by Mr. David Brady[33] in his Affidavit, much of the EPA-designated "visual contamination" occurred with breached piping. *See* Ex. 11 (Brady), ¶¶ 178, 188, 263, 274, 296, 302, 313, 318, 324, 332, 345, 347, 350, 358, 360, 376, 395, 400, 421, 425, 426, 453, 482, 484. According to Mr. Baugher,

[33] Attached hereto as Exhibit 11 is the Affidavit of David S. Brady, who was the Site Superintendent for Benham/SAIC/Enviro Clean during all of the RD/RA activities required by the UAO. *See* Ex. 11 (Brady) ¶¶ 51, 129. Mr. Brady describes, in detail and through the presentation of photographic evidence taken during the required RD/RA activities, the reasons for required remedial action by location, first hand observations relating to the nature of the material required to be addressed, and sources of such material. Photographic evidence taken during ROD-required RD/RA activities verify Mr. Brady's observations. According to Mr. Brady, based upon his observations in the field, the impacted media in areas the UAO required be addressed were not impacted by tank bottoms, sludges, API separator wastes, and other waste streams. *See* Ex. 11 (Brady) ¶ 134. Rather, the impacted media stemmed from oil spills and leakage from numerous pipelines in the areas of these excavations.

ROD COCs and EPA-designated "visual contamination" are attributable to crude oil and refining petroleum products. *See* Ex. 4 (Baugher), ¶¶ 13, 48-50.

Mr. Baugher concludes that UAO soil excavations on the North Refinery and South Refinery are attributable to leaks and spills of crude oil and petroleum products, including additives in such products. *See* Ex. 4 (Baugher), ¶¶ 49, 50, Figures 7, 8. Mr. Baugher specifically analyzed the Refinery layout and its changes over time, operational records, and environmental data and concluded that the required RD/RA activities in EPA's designated "Coke Tar Area," what became the "Coke Pond Expansion," SAOC-1, SAOC-2, SAOC-3, SAOC-4, SAOC-5, SAOC-7, and AA-1 are attributable to leaks and spills of crude oil and petroleum products, and thus subject to CERCLA's petroleum exclusion. *See* Ex. 4 (Baugher), Opinions 7, 8, 9, 12, ¶¶ 55-82, 88, Figures 1, 2A, 2B, 7, 8, 11-41.[34] According to Glen Wright, a former refinery employee, underground piping at the Refinery principally carried crude and petroleum products and water. *See* Ex. 20 (Wright) ¶¶ 177-98.

Mr. Baugher also finds that the materials in the Coke Pond are subject to the CERCLA petroleum exclusion. *See* Ex. 4, Opinion 6, ¶¶ 15, 52-54, Figures 9, 10. It is Mr. Baugher's expert opinion that what EPA labeled as "sediment" in the Coke Pond was, in reality, petroleum coke fines, which are a petroleum product subject to CERCLA's petroleum exclusion. *See* Ex. 4 (Baugher), ¶ 53, Figure 10. His conclusion, in this regard, is verified by former Refinery employees, Land O'Lakes environmental forensic chemistry expert, Dr. Paul D. Boehm, and Mr. Jay Vandeven. *See* Ex. 5 (Boehm), ¶¶ 54(d), 103-06; Ex. 9 (Vandeven) ¶ 187; Ex. 12 (Fuqua) ¶¶ 99; Ex. 13 (Gaskins) ¶¶ 44-46; Ex. 16 (Williams) ¶¶ 116-17.

[34] To the extent any of these excavations were to excavate arsenic above ROD cleanup standards, such arsenic is attributable to natural background or third-party operations. *See* Ex. 4 (Baugher) ¶¶ 14, 51.

Either evading or ignoring CERCLA's petroleum exclusion, EPA used the undefined "visual contamination" catchall and a principal threat waste designation for "coke tar." *See* Ex. 3, §§ 18.0, 19.2.2. As demonstrated in this Section, however, it is clear that "visual contamination" at the Site is, in reality, crude oil and/or petroleum products. EPA's "coke tar" principal threat waste designation is equally off-base. As demonstrated by Mr. Baugher, and verified by former Refinery employees, the Refinery never generated "coke tar." *See* Ex. 4 (Baugher), ¶¶ 83-88. In fact, EPA's reliance on the "K087" RCRA designation for the presence of "coke tar" at the Refinery is wholly misplaced as "K087" is "coke tar" from coal coking operations, and the Refinery never processed coal. *See* Ex. 4 (Baugher), Opinion 10, ¶¶ 19, 44, 83-86; Ex. 13 (Gaskins) ¶ 44; Ex. 20 (Wright) ¶ 162. What EPA incorrectly designated as "coke tar" is, in reality, crude oil, residuum coker feed, and/or a heavy petroleum product (*e.g.*, No. 6 fuel oil). *See* Ex. 4 (Baugher) ¶¶ 83-88; Ex. 5 (Boehm) ¶¶ 54(b), 90; Ex. 12 (Fuqua) ¶ 175. This material in what EPA-designated as the "Coke Tar Area" was addressed during the *Partial Consent Decree* and the *Final Consent Decree*, and ultimately released in the *Closure Order*.[35] *See* Ex. 12 (Fuqua) ¶ 175.

It cannot be claimed that the crude oil and petroleum products that Land O'Lakes was required to remediate under the UAO were mixed or commingled with waste materials or hazardous wastes.[36] [37] First, arsenic at the Refinery is not attributable to Refining operations, but

---

[35] EPA also incorrectly designated the alleged "coke tar" as a principal threat waste in the ROD. *See* Ex. 3, § 18.0. For the reasons described by Mr. Vandeven, this designation was arbitrary, capricious, and contrary to law. *See* Ex. 9 (Vandeven) ¶¶ 164-67.

[36] During Midland's operation of the Refinery, its refining process generated certain, limited waste streams. *See* Ex. 12 (Fuqua) ¶¶ 87-109. Mr. Baugher's Declaration identifies those limited wastes/waste streams as including DAF float (KO48), slop oil emulsion solids (KO48), heat exchanger sludge (KO50), API Separator sludge (KO51) leaded gasoline tank bottoms (KO52), crude tank sediment (K169), clarified slurry tank sediment (K170), spent hydrofining catalyst (K171), and spent hydrotreating catalyst (K172). *See* Ex. 4 (Baugher) ¶ 44; *see also* Ex. 129 (LOL0036234-37) "Projected Operational Lifetime of Facility." Life of "soil farm" projection identifies five (5) waste streams: (1) cooling tower sludge; (2) API sludge; (3) petroleum coke fines; (4) biological sludge (waste treatment plant sludge); and (5) tank bottom sludge. *See* Ex. 129 (LOL0036234). As part of its on-going Refinery

rather is sourced from other, non-Refinery operations or natural background. *See* Ex. 4 (Baugher), Opinion 5, ¶¶ 14, 51; Ex. 5 (Boehm), ¶¶ 51, 52. Occurrences of lead in soils at the Refinery stem directly from spills of gasoline product with TEL. *See* Ex. 4 (Baugher), Opinion 8, ¶¶ 17, 89-104. Waste streams attributable to the Refinery under Midland operations and later subject to RCRA were identified and addressed before and as part of the *Partial Consent Decree* and the *Final Consent Decree*. *See* Ex. 4 (Baugher), Opinion 8, ¶¶ 44-47; *see also* Ex. 5 (Boehm), ¶¶ 43, 44, 46. To the extent hazardous wastes from subsequent owners/operators of the Refinery were present after the *Final Consent Decree* and *Closure Order*, they were addressed by EPA's Emergency Removal Action and/or Non-Time Critical Removal Action. *See* Ex. 4 (Baugher), Opinion 8, ¶¶ 44-47; *see also* Ex. 5 (Boehm), ¶¶ 43, 44, 46.

Land O'Lakes' expert, Dr. Paul D. Boehm, analyzed these same issues through the lens of his expertise—environmental forensics and chemistry. *See* Ex. 5 (Boehm) ¶¶ 11-17. To support his systematic analysis, Dr. Boehm analyzed environmental soil and sediment sampling data and analyses collected before and during the UAO's required activities. *See* Ex. 5 (Boehm), ¶¶ 34-40. Dr. Boehm also generated, as part of his own environmental forensics investigation, sampling and analysis that occurred during Land O'Lakes' required UAO activities.[38] *See* Ex. 5

---

operations, Hudson managed its waste streams. By way of example, Hudson cleaned out its API separators. *See* Ex. 146 ; Ex. 147; Ex. 148; Ex. 149; Ex. 150.

[37] EPA may try to make to assert this position, however, that would be contrary to statements made by EPA's RPM to the media. *See, e.g.*, Ex. 145 STILLWATER NEWS PRESS, "*Refinery Wastewater Worries Residents*" (April 21, 2010). Stankosky quote: "We've tested the soil and while it is contaminated, it is not what's called a hazardous waste."

[38] Under Dr. Boehm's forensic investigation program, representative media (*e.g.*, soils/EPA-designated "visual contamination," sediments, groundwater, contents of pipelines, etc.) were sampled from time-to-time and analyzed for the purpose of identifying the source and nature of the media sampled. *See* Ex. 5 (Boehm) ¶¶ 35(q), 36, Appendix C (Exponent Forensic Data and Validation Report); *see also* Ex. 11 (Brady) ¶ 556. These samples were collected in accordance with written work plans developed by Exponent and in accordance with other applicable plans relating to the Site. *See* Ex. 5 (Boehm) ¶ 36, Appendix C; *see also* Ex. 11 (Brady) ¶ 557. This forensic investigation program was conducted under the direction of Exponent, and all media sampling was conducted by, or under the direction of, Mr. David Brady. *See* Ex. 5 (Boehm) ¶¶ 35(q), 36; Ex. 11 (Brady) ¶¶ 558-64. All such forensic sampling activities were conducted during normal operating hours and while EPA, ODEQ, and/or their

(Boehm), ¶¶ 36, 40. Dr. Boehm's environmental forensics analysis included sampling and chemical analysis of soils, contents of pipes, sediments, groundwater, and other materials exposed during the RA. *See* Ex. 5 (Boehm) ¶ 36; Ex. 11 (Brady) ¶¶ 562-73.

Dr. Boehm lays out a number of important statistical conclusions based on his chemical and forensic analysis and evaluation. His first fundamental conclusion is not only relevant to the petroleum exclusion issue, but goes to the basic necessity of EPA's remedy—namely, that only 157 of the 1,110 soil, sediment, and groundwater samples that he evaluated contained at least one COC that exceeded the ROD cleanup levels. *See* Ex. 5 (Boehm) ¶ 81. Dr. Boehm then compares the concentration of COCs in these 157 samples to the constituent levels that would be expected in crude oil or refined petroleum product. *See* Ex. 5 (Boehm) ¶ 85. He uses as his point of comparison both literature values and, significantly, samples of products found in process piping at the Site. He concludes from this comparison that all but 52 of these samples are consistent with crude oil or refined petroleum product and covered by the petroleum exclusion. *See* Ex. 5 (Boehm) ¶ 85. As he notes at Ex. 16 to his Affidavit, 37 of these 52 samples were from locations within the railroad ROW and that the arsenic levels are due to railroad activities. *See* Ex. 5 (Boehm) ¶ 92. For the remaining 15 soil and sediment samples, Dr. Boehm shows that 8 locations are in areas impacted by EPA activities and 1 location is outside areas addressed by the ROD and UAO. *See* Ex. 5 (Boehm) ¶ 96. He then provides a

representatives were on-site for RD/RA oversight activities. *See* Ex. 11 (Brady) ¶ 565. Forensic sampling activities caused no delay or other issues with on-going RD/RA activities. *See id.* Pursuant to this forensic investigation program, a total of 97 samples were taken at and near the Site and analyzed for a range of constituents. *See* Ex. 5 (Boehm), Appendix C (Exponent Forensic Data and Validation Report) and Figures 1a and 1b thereto. Sample results were subjected to rigorous QA/QC protocols, both at the lab and by Exponent. Data generated by Exponent's forensic investigation program were validated by Exponent and determined to be reliable for purposes of assessing the sources of chemicals in the sampled media at the Site. *See* Ex. 5 (Boehm) ¶ 36, Appendix C (Exponent Forensic Data and Validation Report). Land O'Lakes notified EPA in advance that it would be conducting such forensic sampling activities and offered to conduct split sampling with EPA. *See* Ex. 130. EPA declined to participate. *See* Ex. 131. As discussed in the Affidavit of Paul Boehm, the data generated by this forensic sampling program demonstrates that the areas that the ROD required to be excavated (as depicted on maps attached to his affidavit) are areas impacted solely by crude oil and/or petroleum products, including coke fines in the Coke Pond. *See* Ex. 5 (Boehm) ¶¶ 107-138.

detailed explanation for the last six (6) soil and sediment samples, relying on arguments related to background levels, railroad impacts, and historical operational reasons to apply the petroleum exclusion. *See* Ex. 5 (Boehm) ¶¶ 93-102.

As demonstrated on Exhibit 6 to his Affidavit, Dr. Boehm concludes that analytical chemical data demonstrates that samples taken from the Coke Pond, Coke Pond Expansion, SAOC-1 through SAOC-3, SAOC-5, SAOC-7, EPA's designated "Coke Tar Area" and AA-1 are consistent with petroleum and petroleum products, and are therefore subject to CERCLA's petroleum exclusion. *See* Ex. 5 (Boehm), Exs. 6, 16.

Finally, Dr. Boehm demonstrates that the lone groundwater ROD COC exceedance at the Site (benzene at monitoring well OW-B), which Land O'Lakes has been, and continues to be, required to investigate and monitor under the UAO, is sourced from gasoline, which is excluded from CERCLA. *See* Ex. 5 (Boehm), ¶¶ 54(e), 111-14.

The detailed forensic investigation performed by Dr. Boehm provides conclusive confirmation of the applicability of the CERCLA petroleum exclusion to areas at the Site that Land O'Lakes was required to address under the UAO. *See* Ex. 5 (Boehm), ¶¶ 107, 110, Exs. 21-34, 41.

C. Land O'Lakes Is Not Liable Under CERCLA for Harms Addressed by the UAO as Land O'Lakes is Not a Responsible Party Under CERCLA § 107(a) and Such Harms Are Divisible

Many elements of the remedy set forth in the ROD were aimed at remediating harms that were not caused or contributed to in any way by Land O'Lakes or Midland. For such harms, Land O'Lakes has no liability under applicable CERCLA authorities and is therefore entitled to be reimbursed for expenditures to remediate harm caused or created solely by others. As described below, Land O'Lakes was not the owner or operator at the time of the release as required by 42 U.S.C. § 9607(a). *See Bob's Beverage, Inc. v. Acme, Inc.,* 264 F.3d 692, 697-98 (6th Cir.

2001) (defendants are not liable because no disposal during their period of ownership). Also, such harms at the Site are divisible, therefore, Land O'Lakes is not jointly and severally liable under Section 107 of CERCLA, and enforcement under Section 106 of CERCLA is available only to the extent of Land O'Lakes' divisible share. *See Burlington Northern and Santa Fe Ry. v. United States*, 556 U.S. 599, 613-19 (2009) ("*BNSF*"); *United States v. P.H. Glatfelter Co.*, 2014 U.S. App. Lexis 18436, *30-37 (7th Cir. Sept. 25, 2014) ("*Glatfelter*").

1. Legal Standards Governing Liability and Divisibility

For a person to be liable under CERCLA, the person must fall into one of four distinct categories: (1) current owner or operator; (2) owner or operator at the time of the disposal of any hazardous substance; (3) arrangers; and (4) transporters. 42 U.S.C. § 9607(a). As demonstrated, Midland sold the Refinery on February 1, 1977 and never owned or operated the Refinery or the Site thereafter. *See* Ex. 32; Ex. 12 (Fuqua) ¶ 22.

As to divisibility, the Supreme Court's watershed decision in BNSF made clear that divisibility is not an exception reserved for the rarest of cases; Congress intended it to be a viable alternative to joint and several liability based on "traditional and evolving principles of common law." *BNSF*, 556 U.S. at 613 (citing *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983)). Divisibility is a viable defense to joint and several liability under Section 107 of CERCLA. BNSF, 556 U.S. at 613-15. Divisibility is not a rare defense that can be established only with "exact" and "detailed" proof. *BNSF*, 556 U.S. at 617. The directive of BNSF and the Restatement (Second) is that apportionment is improper only in those cases where "no rational basis for division can be found." Restatement (Second) of Torts § 433A, cmt. I; BNSF, 556 U.S. at 618-619.

The "universal starting point" for divisibility of harm analyses in CERCLA cases is § 433A of the Restatement (Second) of Torts. *BNSF*, 556 U.S. at 614. The Restatement

establishes a "reasonableness" standard for divisibility: even a "single harm" may be "divisible in terms of degree" if there is a "reasonable basis for division," Restatement § 433A & cmt. d, such that each PRP is liable "only for the portion of the total harm" that it has caused. *BNSF*, 556 U.S. at 614-615. In other words, "apportionment is proper when 'there is a reasonable basis for determining the contribution of each cause to a single harm.'" *BNSF*, 556 U.S. at 614. To determine if the harm is divisible, courts follow a two-step approach. First, the harm must be "theoretically capable of apportionment," a question of law. *Id.* at 615. Second, there must be a reasonable basis for apportioning liability, a question of fact. *Id.*. at 614-615; *United States v. NCR Corp.*, 688 F.3d 833, 838 (7th Cir. 2012) ("NCR").

Under the first step of the divisibility analysis, a PRP can show that the harm is theoretically capable of apportionment if the PRP can show the extent to which it contributed to contamination at the site. *Glatfelter* at *36. Harm in CERCLA cases is properly characterized as "the contamination traceable to each" polluter. *Glatfelter* at *31. "Remediation costs" may be used as a relevant factor "to determine the level of contamination, and thus the level of harm, caused by each polluter." *Glatfelter* at *31, 36. With respect to the degree of harm, courts have approved the use of costs as a proxy for that harm because "[c]leanup costs reflect the damage caused by the pollution." NCR, 688 F.3d at 840. A harm is theoretically capable of apportionment if a party can demonstrate the extent to which it contributed to contamination at the site. *Glatfelter* at *36.

Upon showing the first step, the PRP can show a reasonable basis for apportionment by demonstrating the remediation costs necessitated by each polluter. *Glatfelter* at *36. "Thus, the cost of the remedial approach in a particular area is positively correlated with the level of contamination near … that area … and consequently, the harm." *Glatfelter* at *35-36. Once a

court has answered the theoretical step in the affirmative, it proceeds to the second step—whether there is a "factual basis for making a reasonable estimate that will fairly apportion liability." *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 903 (5th Cir. 1993); *BNSF*, 556 U.S. at 614-618. A reasonable apportionment calculation "need not be precise"; in fact, a "rather rough" estimate of apportionment is acceptable. *Id.* This is not a high bar. As the United States Court of Appeals for the Seventh Circuit has noted, "[s]howing a reasonable basis for apportionment is arguably *easier* than meeting the preponderance of evidence standard that would apply to a contribution counterclaim." *Bernstein v. Bankert*, 702 F.3d 964, 979 (7th Cir. 2012), *superseded on other grounds*, No. 11-1501, 2013 WL 3927712, at *1 (7th Cir. July 31, 2013). And in *BNSF*, the Supreme Court upheld the district court's apportionment calculation even after acknowledging uncertainties, rather than precision, in the apportionment. 556 U.S. at 617-18.

What is presented below is an application of these CERCLA liability and divisibility standards on area-by-area basis which demonstrates that certain of the harms to be addressed by the ROD did not stem from disposal of hazardous substances during Midland's ownership and operation of the Refinery, and are clearly not caused by the acts or omissions of Land O'Lakes or Midland. Indeed, as will be demonstrated, Land O'Lakes and Midland are not responsible persons under CERCLA § 107(a) for any of these harms.

2. Application of These Legal Standards to the Site

a. Aeration Pond 7 and Associated Sumps

A series of ponds located on the North Refinery portion of the Site handled and treated process water and stormwater generated by the Refinery. *See* Ex. 3, Figure 2; Ex. 27. These ponds are Aeration Pond 7 and Wastewater Ponds 1 through 6. *See* Ex. 3, Figure 2; Ex. 27. Before entering Aeration Pond 7, water would pass through Aeration Pond 7's associated sumps, which would remove oil to be reprocessed by the Refinery. Water would then flow into Aeration

Pond 7 where it was subjected to aeration and consequent increased biological action before flowing into subsequent ponds (sequentially, Wastewater Ponds 1 through 6). *See* Ex. 20 (Wright) ¶ 68. Aeration Pond 7 was partially lined with Gunnite. *See* Ex. 11 (Brady) ¶¶ 137, 140, Photo AP-003.

According to the ROD, two COCs were identified in sediments located in Aeration Pond 7 and its associated sumps: benzo(a)anthracene and benzo(a)pyrene. *See* Ex. 3 at 16. These sediment COCs represented "a probable source of contaminant migration" to surface water, uncontaminated pond sediments, and groundwater. *Id.* The remedy EPA selected for Aeration Pond 7 and its associated sumps in the ROD was dewatering, and excavation, stabilization, and off-site disposal of sediments at a permitted off-site disposal facility. *Id.* at 70, and Figure 10 thereto; *see also* Ex. 9 (Vandeven) ¶ 214. As part of its required work under the UAO, Land O'Lakes further investigated and prepared the RD, which covered Aeration Pond 7 and its associated sumps. *See* Ex. 11 (Brady) ¶¶ 53-56. Ultimately, Land O'Lakes conducted the RA for Aeration Pond 7 and its associated sumps by dewatering, removing 2,749 tons of material,[39] backfilling with clean borrow material, grading, and revegetating. *See* Ex. 11 (Brady) ¶¶ 137-43; *see also* Ex. 22, Remedial Action Report (Dec. 4, 2014), Table 1.

The harm associated with Aeration Pond 7 and its associated sumps is easily and conclusively divisible. Because Aeration Pond 7 and its associated sumps were constructed after Midland sold the Refinery to Hudson, the harm is "theoretically capable of apportionment" as neither Land O'Lakes nor Midland contributed in any way to the harm associated with Aeration Pond 7 that is addressed in the ROD. For the same reason, Land O'Lakes is not a responsible party for Aeration Pond 7 and its associated sumps under CERCLA § 107(a).

[39] For Aeration Pond 7 and its associated sumps, the total weight of material includes fly ash (used as a stabilizer), approximately 6 inches of underlying soil, and concrete liner. *See* Ex.22, Remedial Action Report (Dec. 4, 2014), Table 1; *see also* Ex. 11 (Brady) ¶ 141.

Hudson purchased and assumed operation of the Refinery as of February 1, 1977. *See*, *supra*, Section IV.B; *see also* Exs. 31, 32. At no time after Midland sold the refinery to Hudson did Midland or Land O'Lakes ever own or operate the Refinery. *See* Ex. 12 (Fuqua) ¶ 22. After Hudson purchased and assumed operation of the Refinery, Hudson initiated and completed design and construction of Aeration Pond 7 and its associated sumps. *See* Ex. 20 (Wright) ¶ 68; Ex. 13 (Gaskins) ¶¶ 28-30; Ex. 9 (Vandeven) ¶ 219.[40] Hudson, acting through a Vice President, Dan Maclean, hired Frank Hume (F.C. Hume & Co., Ltd.) to provide design services for Hudson at the Refinery relating to ponds and discharges to Skull Creek. *See* Ex. 13 (Gaskins) ¶ 29. Mr. Hume designed Aeration Pond 7. *Id.* Internal Hudson documents also clearly demonstrate that Aeration Pond 7 and its associated sumps were a Hudson (and not a Midland) project.[41]

Photographic evidence is also demonstrative of this point. As shown by Mr. Vandeven in his Affidavit, Aeration Pond 7 and its associated sumps were not present in a 1974 aerial photograph of the Site, and Aeration Pond 7 and its associated sumps were under construction in an October 1977 aerial photograph. *See* Ex. 9 (Vandeven) ¶ 219; *see also* Ex. 135 (Deposition of Al Williams (June 2, 1976) at 10:22-12:19 and Exhibit 1 thereto (reflecting a schematic of the Refinery as of June 2, 1976, and Aeration Pond 7 and its sumps not present). All of these facts demonstrate conclusively that the harm presented by Aeration Pond 7 and its associated sumps is "theoretically capable of apportionment," and also that neither Land O'Lakes nor Midland are "responsible parties" for such harm under CERCLA § 107(a).

---

[40] *See also* Ex. 133 (June 10, 1977 Memorandum from F.C. Hume & Co., Ltd. to W. Dan Maclean (Hudson) stating "[o]ne of the alternatives currently under consideration will place the aeration pond at the upper storm water basin instead of the contaminated storm water separation basin which is part of Hudson's Phase II program.")

[41] *See*, *e.g.*, Ex. 134 (Letter from Dan Maclean (Hudson Refining) to Dr. S.L. Burks dated October 3, 1977 regarding upcoming monitoring of individual pond biological activity monitoring and advice, and "consulting services regarding start-up of the aeration lagoon with respect to biological activity."

Having made its conclusive demonstration under the first prong of the *BNSF* divisibility analysis, there is an obvious and reasonable basis for apportionment by demonstrating the remediation costs necessitated by each polluter. In this case, there are no remediation costs necessitated by neither Land O'Lakes nor Midland as to Aeration Pond 7 and its associated sumps. All remediation costs associated with Aeration Pond 7 and its associated sumps were necessitated solely and completely by those who owned the Refinery after Midland's February 1, 1977 sale to Hudson.

b. Wastewater Pond 1

Like Aeration Pond 7, Wastewater Pond 1 is located on the North Refinery. *See* Ex. 3, Figure 2; Ex. 27; Ex. 11 (Brady) ¶ 145 (Photo PSC06306). Like Aeration Pond 7, the COCs (benzo(a)anthracene and benzo(a)pyrene) present in Wastewater Pond 1 sediment, according to EPA, represented "a probable source of contaminant migration" to surface water, uncontaminated pond sediments, and groundwater. *See* Ex. 3 at 16. The required ROD remedy for Wastewater Pond 1 was the same as for Aeration Pond 7—dewatering, and excavation, stabilization, and off-site disposal of sediments. *See* Ex. 3 at 70; Ex. 9 (Vandeven) ¶ 194. As part of its required work under the UAO, Land O'Lakes further investigated and prepared the RD, which covered Wastewater Pond 1. *See* Ex. 11 (Brady) ¶¶ 52-56. Ultimately, Land O'Lakes conducted the RA for Wastewater Pond 1 by removing 10,768 tons of material,[42] backfilling with clean borrow material, grading, and revegetating. *See* Ex. 11 (Brady) ¶¶ 144-52.

The harm associated with Wastewater Pond 1 is easily and conclusively divisible. Because Wastewater Pond 1 was completely cleaned out (of all surface water and sediments to clean, native material) after Midland's February 1, 1977 sale of the Refinery to Hudson, the harm

[42] The total weight of material includes fly ash (used as a stabilizer) and approximately 6 inches of underlying soil. *See* Ex. 22 (Remedial Action Report (Dec. 4, 2014); Ex. 11 (Brady) ¶¶ 145-46.

is "theoretically capable of apportionment" as neither Land O'Lakes nor Midland contributed in any way to the harm associated with Wastewater Pond 1 that is addressed in the ROD. For the same reasons, Land O'Lakes is not a responsible party for Wastewater Pond 1 under CERCLA § 107(a).

Hudson purchased and assumed operation of the Refinery as of February 1, 1977. *See, supra*, Section IV.B.; *see also* Exs. 31, 32. At no time after Midland sold the Refinery to Hudson did Midland or Land O'Lakes ever own or operate the Refinery. *See* Ex. 12 (Fuqua) ¶ 22. After Hudson purchased and assumed operation of the Refinery, Hudson initiated and completed a rework of Wastewater Pond 1. *See* Ex. 13 (Gaskins) ¶¶ 32, 33. This rework included dewatering and removal of sediment to clean, native soil. *See* Ex. 13 (Gaskins) ¶ 33; Ex. 20 (Wright) ¶ 69. Sediments removed from Wastewater Pond 1 by Hudson were land applied in Hudson's Land Treatment Unit on the Site. *See* Ex. 13 (Gaskins) ¶ 33; Ex. 27.

Internal Hudson documents also confirm this rework, and the removal of 428,270 cubic feet of material from Wastewater Pond 1 by Hudson after the Refinery sale in 1977.[43] All of these facts demonstrate conclusively that the harm presented by Wastewater Pond 1 is "theoretically capable of apportionment," and also that neither Land O'Lakes nor Midland are "responsible parties" for such harm under CERCLA § 107(a).

---

[43] *See, e.g.*, Ex. 136 (Hudson Memorandum Re: "Notes From Refinery Staff Meeting" dated February 23, 1978 ("We have had such volumes of water coming from the aeration pond which then goes through a ditch past #1 pond and into #2 pond, that it is washing the north dike of #1 pond out, and the excess soil is carrying down to #2 pond")); Ex. 35 (Hudson Minutes of the Refining Management Staff Meeting dated August 30, 1977 ("Al Williams–Start work on getting No. 1 Pond cleaned – Al will work with Mick on cleaning the No. 1 Pond."); Ex. 137 (Hudson Weekly Report on Refinery Maintenance Operations dated May 22, 1978 (referencing pumping water out of "#1 pond.")); Ex. 138 (Authorization For Expenditure dated July 17, 1979 (relating to Cleaning No. 1 Pond, repairing the east dike, and placing back in service); Ex. 139 (F.C. Hume & Co. Ltd. "Specifications for Cleaning No. 1 Basin" (August 1979, Rev. 0)); Ex. 140 (Hudson Notes from Refinery Staff Meeting dated September 27, 1979) ("#1 pond cleaning is producing a lot of water. Sam thinks we may have a leak between the aeration pond and #1 pond.")); Ex. 141 ("Supplement to Original AFE 141-C to Clean No. 1 Pond" dated December 4, 1979, ("Original Estimate called for 306,540 cubic feet of material to be removed at 16¢/ft^3 or total of $60,000.00. Actual material removed was 428,270 cubit [sic] or 53,270 cubic feet extra."); Ex. 142 (Hudson Minutes of the Refinery Management Staff Meeting dated July 30, 1981, ("Number 1 pond has washed and filled in. We need to sod the dikes to help keep erosion down")).

c. Coke Pond

The Coke Pond is located in the northern part of the South Refinery. *See* Ex. 3, Figure 2; Ex. 28. The Coke Pond served two functions: (1) a source of quench water for the Coker Unit; and (2) a catchment basin for petroleum coke fines,[44] which were washed from areas that produced, processed, and handled coke fines for loading and transportation. *See* Ex. 13 (Gaskins) ¶¶ 37, 39-41; Ex. 16 (Williams) ¶ 132, 135 Ex. 20 (Wright) ¶ 155. As described below, the ROD remedy did not address any harm caused or contributed to by Midland or Land O'Lakes.

Midland installed and started operating the Coker Unit in 1969. *See* Ex. 13 (Gaskins) ¶ 35; Ex. 16 (Williams) ¶ 114; Ex. 20 (Wright) ¶ 153. The Coker Unit was used to produce petroleum coke from the residues of crude oil after it was processed and separated into other products. *See* Ex. 16 (Williams), ¶ 114; Ex. 20 (Wright) ¶ 153. The Coker Unit ran on an 18-20 hour cycle and produced about 100 tons of petroleum coke per day. *See* Ex. 12 (Fuqua) ¶ 99; Ex. 16 (Williams) ¶ 121; Ex. 20 (Wright) ¶ 157. Every 18 hours, one of the Coker Unit's two coke drums was filled with the feedstock while the other was being quenched and drilled out. *See* Ex. 20 (Wright) ¶ 157. During and after the "drill out" process, petroleum coke was transferred by conveyor belt to a loading bin. *See* Ex. 16 (Williams) ¶ 122. The petroleum coke process, transportation, and loading area were periodically washed down. *See* Ex. 16 (Williams) ¶ 123. As part of the process, petroleum coke in the form of "coke fines" would fall from the conveyor belt to a concrete pad beneath the conveyor belt, whereupon they were washed into the Coke Pond. *See* Ex. 12 (Fuqua) ¶ 100; Ex. 13 (Gaskins) ¶ 37; Ex. 20 (Wright) ¶ 155. There was also a coke trap located near the Coker Unit's coke drums. *See* Ex. 20 (Wright) ¶ 158. Some

[44] "Coke fines" are smaller particles of coke generated by ore drilling out, handling and conveying of coke. *See* Exs. 13 (Gaskins) ¶¶ 37, 40, 41, 44, 46-50; Ex. 16 (Williams) ¶¶ 78, 137, 139.

coke fines would fall out in the trap. *See id.* These fines would be loaded onto the conveyor and sold. *See id.* Water used for dust suppression purposes in the coke processing, handling, and load out areas also ending up in the Coke Pond. Photographs provided at Exhibit 21 (at Joint Exs. 84–91, 95) depict the petroleum coke processing, handling, and load out facilities, areas, and process.

The source of the wash down water was the same as the quench water—the Coke Pond. The only inputs to the Coke Pond were coke fines and quench water. The Coke Pond did not discharge to any other location; in fact, the water in the Coke Pond was a closed loop and needed make up water (sourced from the City of Cushing) due to evaporative and steam losses. Cooling tower water for other Refinery processes and coke quench water were separate systems. Cooling tower water was a closed system, and was never used to quench coke or wash down coke fines as the cooling tower water was too expensive to create and maintain required treatment (acid, caustic) to prevent the buildup of scale and sludge. *See* Ex. 20 (Wright) ¶ 161. Any sheen on Coke Pond water would not be surprising, and would have been caused by quench water as it passed through the coking unit. *See* Ex. 20 (Wright) ¶ 160. At no time during the Midland years of operation was the Coke Pond a disposal unit or used to handle or dispose of waste material.

According to the ROD, COCs present in Coke Pond "sediment" (benzo(a)anthracene and benzo(a)pyrene) represented "a probable source of contaminant migration" to surface water, uncontaminated pond sediments, and groundwater. *See* Ex. 3 at 16. The required ROD remedy for the Coke Pond was dewatering, and excavation, stabilization, and off-site disposal of sediments. *See* Ex. 3 at 70. As part of its required work under the UAO, Land O'Lakes further investigated and prepared an RD for the Coke Pond. *See* Ex. 11 (Brady) ¶¶ 23, 53-56, 58, 105. Ultimately, Land O'Lakes conducted the RA for the Coke Pond by removing 5,596 cubic yards

of coke fine material, backfilling with clean borrow material, grading, and revegetating. *See* Ex. 11 (Brady) ¶¶ 172-86.

The harm associated with the Coke Pond is easily and conclusively divisible and was not caused by the disposal of hazardous substances during Midland ownership or operation of the Refinery. Petroleum coke fines were a valuable petroleum product to the Refinery. *See* Ex. 12 (Fuqua) ¶ 99; Ex. 13 (Gaskins) ¶¶ 44-46; Ex. 16 (Williams) ¶¶ 116, 117. Accordingly, the petroleum coke fines in the Coke Pond were periodically removed and sold as a product. *See* Ex. 12 (Fuqua) ¶ 100; Ex. 13 (Gaskins) ¶¶ 44-45 Ex. 16 (Williams) ¶ 123, 126-27; Ex. 20 (Wright) ¶¶ 70, 71, 155; Ex. 21 (Joint Exs. 120-23). Also, to maintain a sufficient volume of quench water in the Coke Pond, the accumulated coke fines had to be periodically removed. Ex. 20 (Wright) ¶ 70, 159. In fact, a "peninsula" was constructed into the Coke Pond so that a crane could be positioned to excavate coke fines. *See* Ex. 26 (Williams) ¶ 137. Former Refinery employee Mick Gaskins recalls being personally involved in cleaning out the Coke Pond on two occasions—once in 1976 and once in 1978. *See* Ex. 13 (Gaskins) ¶ 47. In his Affidavit, Mr. Gaskins also identifies documentation from Midland and Hudson regarding cleanouts and contemplated cleanouts of the Coke Pond in 1976, 1978, 1981, and 1982. *See* Ex. 13 (Gaskins) ¶ 50; *see also* Ex. 20 (Wright) ¶ 72; Ex. 21 (Joint Exs. 22, 23, 24, 44, 114, 143). Mr. Gaskins recalls that a crane and clamshell were used to excavate and remove coke fines down to a level below the coke fines/clean soil interface in the Coke Pond. *See* Ex. 13 (Gaskins) ¶ 47. The photograph, which provided in Exhibit 21 (as Joint Ex. 95), shows the Coke Pond and a yellow crane on the southeast bank of the Coke Pond. This photograph depicts and confirms the process described by Mr. Gaskins by which petroleum coke fines were removed (by the crane using a clamshell) and prepared for sale and transport as a product. *See* Ex. 13 (Gaskins) ¶ 47.

The testimony of Mr. Glen Wright, another former Refinery employee, mirrors that of Mr. Gaskins. According to Mr. Wright:

> After Hudson acquired the Refinery, I recall we drained the water out of the Coke Pond and dug out the coke fines that had accumulated in the Coke Pond with a dragline and clamshell, down to the bottom sediment or mud....

See Ex. 20 (Wright) ¶ 73.

> I recall that we dug out the sediment in the Coke Pond, to a depth of about a foot and a half, down to native dirt and clay. We hauled the sediment and mud from the clean out to the Land Treatment Unit on the North Refinery for land farming.

See Ex. 20 (Wright) ¶ 74. Former Refinery employee Al Williams confirms the recollections of Mr. Gaskins and Mr. Wright that the Coke Pond was cleaned out by Hudson in 1978. *See* Ex. 16 (Williams) ¶¶ 138-40.

Because the Coke Pond was completely cleaned out (of all surface water and sediments to clean, native material) after Midland's February 1, 1977 Refinery sale to Hudson (on multiple occasions), the harm is "theoretically capable of apportionment" as neither Land O'Lakes nor Midland contributed in any way to the harm associated with this pond that is addressed in the ROD. Hudson purchased and assumed operation of the Refinery as of February 1, 1977. *See, supra*, Section IV.B.; *see also* Exs. 31, 32. At no time after Midland sold the refinery to Hudson did Midland or Land O'Lakes ever own or operate the Refinery. *See* Ex. 12 (Fuqua) ¶ 22. After Hudson purchased and assumed operation of the Refinery, Hudson continued operation of the Coker Unit and Coke Pond. *See* Ex. 143. As part of these operations, Hudson initiated and completed a cleanout of the Coke Pond in 1978 and again in 1981. *See* Ex. 13 (Gaskins) ¶¶ 47, 50; Ex. 20 (Wright) ¶¶ 70, 72-74. Sediments removed from the Coke Pond by Hudson were sold

by Hudson to a cement manufacturer in Kansas, where they were used as fuel.[45] *See* Ex. 20 (Wright) ¶ 71. Sediments from the bottom of the Coke Pond remaining after removal of saleable coke fines were taken to the LTU for land-farming.

As demonstrated above, there are no remediation costs necessitated by either Land O'Lakes or Midland relating to the Coke Pond. All remediation costs associated with the Coke Pond were necessitated solely and completely by those who owned the Refinery after Midland sold it in 1977, and Land O'Lakes is not a responsible party for the Coke Pond under CERCLA § 107(a).

d. Ponds 6A, Treatment Pond 8, Pond 8A, Runoff Pond 9, and Unnamed Pond 1

EPA's ROD required multiple unimpacted ponds on the Site to be drained, berms leveled, and graded to ensure that rainwater runoff is allowed to drain properly from the Site. *See* Ex. 3 at § 19.2.3. Like Wastewater Ponds 4 through 6 (discussed above), Treatment Pond 8, Pond 8A, and Runoff Pond 9 did not have ROD COC exceedances. *See* Ex. 3, § 19.2.3; Ex. 9 (Vandeven) ¶ 226; Ex. 11 (Brady) ¶ 167. Rather, under the ROD and ESD, EPA required that these ponds be drained, graded, and remain in service to eliminate the potential flooding in adjacent areas. *See* Ex. 3, § 19.2.3; Ex. 9 (Vandeven) ¶¶ 224; Ex. 11 (Brady) ¶ 169. In carrying out the UAO, Land O'Lakes performed additional surface water sampling of these ponds, drained the ponds, removed the HDPE liner from Treatment Pond 8 and disposed it off-site, re-graded the ponds, removed the dike between Treatment Pond 8 and Runoff Pond 9 (thereby combining the two into a detention basin), installed engineered drainage structure in Runoff Pond 9 to replace the old outfall structure, and installed an engineered overflow structure. *See*

[45] Thus, these coke fines are also be subject to the petroleum exclusion under CERCLA.

Ex. 9 (Vandeven) ¶ 21, Ex. 11 (Brady) ¶¶ 53-5, 169, 170, Ex. 22, Remedial Action Report, (Dec. 4, 2014) at 30, 41, Appendix B.

As demonstrated by Figures 10 and 11 to the Affidavit of Mr. Vandeven, Treatment Pond 8, Pond 8A, and Runoff Pond 9 are within an area of the Refinery that Hudson substantially re-worked after Midland sold the Refinery in 1977. *See* Ex. 9 (Vandeven) ¶ 227, Figures 10, 11. This re-work included draining and reconfiguration. *See* Ex. 9 (Vandeven) ¶ 227. During Midland's operation of the Site, this area contained the East Holding Pond, which is visible in the December 1973 and February 1974 aerial photographs. *See* Ex. 9 (Vandeven) ¶ 47, Aerial Photographs 9, 10. Hudson reconfigured the East Holding Pond and the surrounding area into four ponds shown on Figure 1A to Mr. Vandeven's Affidavit: (1) the "North Oily Water Pond" ("NOWP"), located furthest to the northeast; (2) "Treatment Pond 8," located immediately southwest of the NOWP; (3) "Pond 8A," located immediately southwest of Treatment Pond 8; and (4) "Runoff Pond 9," located south of the other three ponds. *See* Ex. 9 (Vandeven) ¶ 47, Figure 1A. This reconfiguration is visible in October 1977, April 1979, and September 1980 aerial photographs. *See* Ex. 9 (Vandeven) ¶ 47, Aerial Photographs 11, 12, 13. This reconfiguration was part of an NPDES permit compliance construction schedule. *See* Ex. 9 (Vandeven) ¶ 47. A scope of work negotiated by Midland for an Environment Management Program required complete draining of ponds in this area. *See id.* As part of the Midland sale of the Refinery, Hudson assumed this scope of work. *See id.* An NPDES Compliance Monitoring Inspection dated after the sale noted that Hudson was in the process of carrying out stormwater upgrades to meet NPDES requirements. *See id.*

Beyond the work described above, the *Final Consent Decree* required excavation and backfilling or lining much the area within and near Treatment Pond 8. *See* Ex. 9 (Vandeven)

¶ 228. The approximate area of these *Final Consent Decree* activities is demonstrated by Figures 12A and 13A to Mr. Vandeven's Affidavit. *See* Ex. 9 (Vandeven) ¶ 228, Figures 12A, 13A. Moreover, comparing March 1985 and December 1989 aerial photographs shows that the ponds in this area were drained and part of the area was backfilled. *See* Ex. 9 (Vandeven) ¶ 228, Aerial Photographs 17, 18.

Unnamed Pond 1 was located to the southwest of Runoff Pond 9 and its location is shown in Figure 8A to Mr. Vandeven's Affidavit. *See* Ex. 9 (Vandeven) 227, Figure 8A. To comply with the ROD and UAO, Land O'Lakes conducted additional surface water sampling in this pond. *See* Ex. 11 (Brady) ¶ 53. Runoff Pond 9 is visible in 2008 and 2009 aerial photographs. *See* Ex. 9 (Vandeven) ¶ 230, Aerial Photographs 34, 35. Unnamed Pond 1 was remediated for the same reasons as Treatment Pond 8, Pond 8A, and Runoff Pond 9, and not due to chemical contamination/hazardous substances. *See* Ex. 9 (Vandeven) ¶ 233. The costs Land O'Lakes was compelled to incur do not constitute a response cost, nor a cost for which it is liable. *See* Ex. 9 (Vandeven) ¶ 233.

In the late 1970s, Hudson added another pond to the Site's wastewater treatment pond system labeled Wastewater Pond 6A. *See* Ex. 9 (Vandeven) ¶¶ 46, 213. Wastewater Pond 6A was located directly south of Wastewater Pond 6. As demonstrated by Mr. Vandeven in his Affidavit, Wastewater Pond 6A is not visible in aerial photographs dated February 1974 and October 1977, but is first visible in the April 1979 aerial photograph, where it appears to be under construction. *See* Ex. 9 (Vandeven) ¶¶ 46, 213, Aerial Photograph 10, 11, 12. Wastewater Pond 6A is also visible in the September 1980 aerial photograph. *See* Ex. 9 (Vandeven) ¶¶ 46, Aerial Photograph 13. The apparent purpose of Wastewater Pond 6A was to prevent erosion by slowing down the flow rate of water from Wastewater Pond 6 and to allow for additional settling

out of solids in order to improve effluent quality. *See* Ex. 9 (Vandeven) ¶ 46. Like other ponds described above, Wastewater 6A had no ROD exceedances of any COC. *See* Ex. 11 (Brady) ¶ 164. Notwithstanding the fact that Wastewater Pond 6A was built after Midland sold the Refinery and had no ROD COC exceedances, Land O'Lakes was still required to remediate Wastewater Pond 6A. *See* Ex. 11 (Brady) ¶ 167. Since Wastewater Pond 6A was constructed by Hudson after Midland sold the Refinery on February 1, 1977, the harm addressed by remediating Wastewater Pond 6A is divisible and Land O'Lakes is not responsible for costs it incurred to address it as required by the UAO and ROD under CERCLA § 107(a). Ex. 9 (Vandeven) ¶ 214.

e. North Refinery ACM Pile

"ACM was identified in a pile located near MW-6 in the North Refinery during the RI field activities." *See* Ex. 3, at 68, Figure 10. The ROD required this ACM (approximately 10 cubic yards) to be "excavated, containerized, and transported to a regulated off-site disposal facility." *See* Ex. 3 at 68. According to the ROD, ACM was a "principal threat waste." *See* Ex. 3 at 66.

After clearing and grubbing, additional suspected ACM was identified around the ACM pile identified by EPA in the ROD, both on and below the soil surface, therefore the lateral extent of the ACM area expanded. *See* Ex. 11 (Brady) ¶ 509. This suspect material was sampled and shown to be ACM. *See id.* The removal of the ACM required two separate soil excavations of six inches, to a total depth of one foot, and generated an approximate volume of 395 cubic yards of ACM and soil. *See id.* The additional material and weather conditions extended the scheduled 25 days into 46 days of ACM removal related activities. *See id.*

The ACM pile addressed in the ROD was identified at a minimum of 27 years after Midland sold the Refinery and permanently ended its era of operations. According to the

observations of the Benham/SAIC's Site Superintendent, Mr. David Brady, the location of the ACM pile:

> was far removed from any process areas, vessels, and piping that would be expected to have been associated with ACM. Based upon such distance, it would appear that the ACM covered by the ROD was dumped there after the end of refining operations.

See Ex. 11 (Brady) ¶ 509. This fact is not surprising given the well-documented ACM issues that hampered the sale of the Refinery from the Hudson bankruptcy estate to USR, the salvaging work conducted on the Site by Western and the Emergency Removal Action and Non-Time Critical Action Work performed by EPA, all as discussed above and addressed in the Affidavit of Mr. Vandeven. Former refinery employees' testimony is that the salvaging activities of Western significantly impacted the Site. For example, according to Forrest Fuqua, "removal of, or salvaging metals from, processing units and the cutting and salvaging of tanks would have resulted in spilling or spreading of hydrocarbon materials and asbestos insulation from the equipment and tanks." *See* Ex. 12 (Fuqua) ¶ 213. When Midland sold the Refinery to Hudson in 1977, there was no loose or friable asbestos. *See* Ex. 13 (Gaskins) ¶ 110; Ex. 16 (Williams) ¶ 79; Ex. 20 (Wright) ¶ 133. In the 1989 to 1991 time period—well after Midland sold the site in 1977—there was still no loose or friable asbestos at the Refinery. *See* Ex. 12 (Fuqua) ¶ 183.

In fact, neither the ROD nor EPA have provided any evidence that links Midland in any way to the ACM pile. Rather:

> Hudson and its successors mismanaged this material. The response costs incurred by Land O'Lakes to address ACM at the Site are divisible and are costs for which Land O'Lakes is not liable. ACM that was present at the Site at the time of the ROD and UAO did not originate due to Midland's operations. Midland sold the refinery 30 years prior to implementation of the ROD and housekeeping and maintenance activities cannot be traced to its conduct. Hudson's operation and ownership of the refinery, Western's careless salvage operations, and USEPA's removal actions are the likely origin of this material.

Ex. 9 (Vandeven) ¶ 349.

All of these facts demonstrate conclusively that the harm presented by the ACM pile is "theoretically capable of apportionment," and also that neither Land O'Lakes nor Midland are "responsible parties" for such harm under CERCLA § 107(a).

f. Areas Impacted by the Salvage Operations of Western, USR, and Quantum

As described in detail above, salvage operations were initiated by former Site owners USR and Quantum in approximately 1996. *See*, *supra*, Section IV.D.3 and 4; *see also* Ex. 9 (Vandeven) ¶¶ 13, 28, 149, 150. These salvage operations, conducted by Western on the Site nearly 20 years after Midland's 1977 sale of the Refinery to Hudson, were destructive, careless, and incomplete, resulting in direct releases during and after the salvage operations and introducing chemicals related to asbestos and petroleum products and wastes onto and into the Site soils. *See* Ex. 5 (Boehm) ¶¶ 26, 49, 71, 91, 94; Ex. 9 (Vandeven) ¶¶ 28, 116. Western's salvaging operations breached tanks, deposited petroleum, bottoms, and other materials on the ground, and left loose, torn asbestos. *See* Ex. 9 (Vandeven) ¶¶ 116, 151. A former refinery employee, Forrest Fuqua, describes that the "removal of, or salvaging metals from, processing units and the cutting and salvaging of tanks would have resulted in spilling or spreading of hydrocarbon materials and asbestos insulation from the equipment and tanks." *See* Ex. 12 (Fuqua) ¶ 213. Citizen complaints to ODEQ provide further proof of the destructive and careless activities of Western as it razed the tanks, piping, and process vessels on the Site. *See* Exs. 75-79. Quantum, ATSDR, EPA, and EPA contractors also made note of the damaging effects of Western's salvaging operations. *See*, *supra*, Section IV.E.

The UAO required Land O'Lakes to incur costs to investigate and remediate areas impacted by the salvage operations of Western, USR, and Quantum. *See* Ex. 9 (Vandeven)

¶¶ 28, 148. A comparison of aerial photographs from February 1995 (Aerial Photograph 23), to aerial photographs from October 1996 (Aerial Photograph 24) and September 1998 (Aerial Photograph 25) demonstrate the effects of these salvaging activities. *See* Ex. 9 (Vandeven) ¶ 151. Also, Attachment 8 to Mr. Vandeven's Affidavit contains photographs taken during EPA's removal activities, and clearly demonstrate the destructive and careless nature of Western's salvaging activities. *See* Ex. 9 (Vandeven) ¶ 249. Figures 14A and 14B to Mr. Vandeven's Affidavit demonstrate the areas of the Site impacted by Western's salvage operations. Those areas are then compared to areas of the Site that Land O'Lakes was required to remediate under the UAO in Figures 15A and 15B to his Affidavit. *See* Ex. 9 (Vandeven) ¶¶ 249, 258, 267, 276, 298, 315, 339, 349. Figures 20A and 20B to Mr. Vandeven's Affidavit also present a comparison of areas addressed under the UAO with the Site salvaging activities of Western.

These facts conclusively demonstrate that the harm presented in the areas impacted by the salvaging operations of Western, USR, and Quantum as depicted on Figures 14A, 14B, 15A, 15B, 20A, and 20B of Mr. Vandeven's Affidavit is "theoretically capable of apportionment," and also that neither Land O'Lakes nor Midland are "responsible parties" for such harm under CERCLA § 107(a).

g. Areas Impacted by EPA's Emergency Removal Action and Non-Time Critical Removal Action

EPA conducted two separate removal actions at the Site, each of which impacted areas of the Site where the UAO and ROD required remedial action. *See* Ex. 9 (Vandeven), ¶¶ 29, 30. Land O'Lakes was required under the UAO to incur costs to remediate these areas. These are costs which are divisible and for which Land O'Lakes is not responsible or liable under CERCLA § 107(a). As this discussion is considered, it is important to bear in mind a critical

fact—the ROD's soil remedy required excavation of COC exceedances from 0-2 feet BGL. *See* Ex. 3, § 19.2.2. As will be demonstrated, after all of the excavation, mixing, spilling, solidification, and grading that took place during the Emergency Removal Action and Non-Time Critical Removal Action – which occurred in virtually the very same areas where the UAO and ROD required excavation for soil COCs—it is clear that Midland could not have, and in fact did not, contribute to any ROD soil COC exceedances in these areas.

From September 1998 to December 1999, EPA conducted its Emergency Removal Action at the Site. *See, supra*, Section IV.E.I. During the Emergency Removal Action, EPA and its contractors severely impacted the Site, including: (1) placement of liquids, sludge, and tank bottoms on the ground; (2) spreading of contaminated soils and liquids; and (3) breaching of pipes and vessels that released petroleum liquids. *See* Ex. 9 (Vandeven), ¶¶ 29, 30, 188, 252, 261. None of the materials in tanks, vessels, or pipes is attributable to Midland. *See* Ex. 4 (Baugher), ¶¶ 10, 34-43. To handle the ultimate disposal of these materials, EPA constructed a second land treatment unit ("EPA LTU") and associated retention pond on the Site. *See* Ex. 9 (Vandeven), ¶ 49, Figures 1A, 15A; Ex. 27. During the Emergency Removal Action, EPA placed approximately 10,000 cubic yards of contaminated material in the EPA LTU, which included contaminated soil and soil mixed by EPA in staging areas with petroleum products and sludge recovered from tanks, vessels, separators, and sumps as well as drum wastes. *See* Ex. 9 (Vandeven) ¶ 49.

As demonstrated by Mr. Vandeven in his Affidavit, EPA's Emergency Removal Action and Non-Time Critical Removal Action impacted areas of the Site that Land O'Lakes was required to remediate under the UAO. First, the Emergency Removal Action. These activities introduced petroleum and other chemicals into the soils. *See* Ex. 5 (Boehm), ¶¶ 29, 46-48, 94-

97, 102, 139. Figures 16A and 16B depict and describe areas of the North Refinery and South Refinery, respectively, that were affected by the EPA's Emergency Removal Action. *See* Ex. 9 (Vandeven), Figures 16A, 16B. Figures 17A and 17B to Mr. Vandeven's Affidavit correlate ROD areas of concern, with areas that were affected by EPA's Emergency Removal Action. *See* Ex. 9, Figures 17A, 17B. As demonstrated by Figures 16B and 17B, large swaths of SAOC-2, SAOC-3, SAOC-4, SAOC-5, EPA's designated "Coke Tar Area," and what later became the "Coke Pond Expansion" during Land O'Lakes' required action under the UAO were impacted by EPA's activities. *See* Ex. 9 (Vandeven), ¶ 299, Figures 16B, 17B. In particular, Emergency Removal Action activities including earthwork, staging of debris, and mixing of waste overlap with these areas. Photographs provided with Mr. Vandeven's Affidavit illustrate the nature and extent of the impacts caused by the EPA's Emergency Removal Action. *See* Ex. 9 (Vandeven), Attachment 8.

EPA next conducted its Non-Time Critical Removal Action at the Site from September 2002 to June 2003. *See*, *supra*, Section IV.E.3. During the Non-Time Critical Removal Action, EPA and its contractors again engaged in activities that further impacted the Site, including the removal of pumps that allowed liquids to drain, the breaching of pipes and vessels that resulted in the release of liquids, and the covering or removal of building foundations. *See* Ex. 9 (Vandeven) ¶ 30. As Mr. Vandeven demonstrates, large areas of significant earthwork and areas where concrete, waste, and hazardous wastes were staged further contaminated the very same areas that the UAO required Land O'Lakes remediate. *See* Ex. 9 (Vandeven), Figures 18B, 19A, and 19B. These activities introduced petroleum and other chemicals into the soils. *See* Ex. 5 (Boehm), ¶¶ 29, 46-48, 94-97, 102, 139. Remnants of these activities conducted on the surface of the Site soils were necessarily left behind in the soils as confirmed in subsequent Site

sampling. *See* Ex. 5 (Boehm), ¶ 47, 48. The Coke Pond, EPA's designated "Coke Tar Area," parts of SAOC-2, SAOC-3, SAOC-4, and what became the "Coke Pond Expansion," are within areas impacted by the EPA's Non-Time Critical Removal Action. *See* Ex. 9 (Vandeven) ¶¶ 190. Mr. Vandeven also includes photographic documentation from the Non-Time Critical Removal Action Report and a slide deck with photos from EPA's contractor that illustrates the areas impacted by EPA's Non-Time Critical Removal Action. *See* Ex. 9 (Vandeven), Attachments 9 and 10.

h. BNSF Railroad Right-of-Way and Electrical Vault

The UAO required that Land O'Lakes implement the ROD remedy on property owned by BNSF. Part of this required activity was implementing the ROD's soil remedy on former BNSF railroad right-of-way, and part of this required activity was the removal of what the ROD called the "electrical vault." *See* Ex. 3, § 15.1. According to the ROD, the "electrical vault" was required to eliminate and prevent human health, environmental and public safety hazards. *See* Ex. 3, ¶ 15.1; *see also* Ex. 3, Figure 10. Both the BNSF railroad right-of-way and the electrical vault were located on property owned by BNSF. *See* Ex. 144. At all times relevant to the operational history of the Site, the BNSF railroad right-of-way and the electrical vault were owned and operated by BNSF or its predecessors, and not Midland. *See* Ex. 22 (BNSF Notice of Remediation and Easement dated October 31, 2011); Ex. 144; *see also* Ex. 30 (excepting out BNSF railroad right-of-way). Thus, Midland is not a CERCLA § 107(a) responsible party for any UAO action required on the BNSF railroad right-of-way.

The electrical vault was a concrete structure in the BNSF railroad right-of-way on the North Refinery and appeared to be an electrical switch vault for the track signals and switches. *See* Ex. 9 (Vandeven) ¶ 358; Ex. 11 (Brady) ¶ 500. During the RI, a surface water sample was collected from inside the electrical vault. The analytical results for this surface water sample

contained no detectable levels of VOC, SVOC or PCB compounds, but several metals were detected. *See* Ex. 11 (Brady) ¶ 501. The ROD identified the electrical vault as an area to be remediated by removal and off-site disposal. *See* Ex. 11 (Brady) ¶ 503. Land O'Lakes removed and disposed of the electrical vault off-site. *See* Ex. 11 (Brady) ¶ 504.

As described in detail by Mr. Brady, SAOC-1 and SAOC-2 were dominated by the BNSF right-of-way, including finding former gravel rail bed materials. *See* Ex. 11 (Brady) ¶¶ 42, 43, 209, 219, 220, 223, 224, 228, 229, 231, 232, 235, 254. Mr. Vandeven presents a similar picture for both SAOC-1 and SAOC-2, including graphical presentations of the overlap of these areas with the BNSF railroad right-of-way. *See* Ex. 9 (Vandeven) ¶¶ 240, 247, Figure 9B. As described by Dr. Boehm, arsenic and lead in these areas are attributable to historic rail operations. *See* Ex. 5 (Boehm) ¶¶ 50, 54(c), 69, 70. In Mr. Baugher's extensive petroleum refining experience, there is no known source of arsenic in the petroleum refining process. *See* Ex. 4 (Baugher) ¶¶ 14, 26.

In 2009, Land O'Lakes identified this CERCLA liability and divisibility issue to EPA in its *Notice of Intent*, and specifically provided a technical report stating that the highest lead and arsenic exceedances are located in the BNSF railroad right-of-way and are upgradient from lower concentrations of lead and arsenic found elsewhere on the Site. *See* Ex. 24, ¶¶ 43, 133 (citing Benham's *Evaluation of Soil, Sediment, Surface Water and Groundwater Data Related to the Hudson Refinery Superfund Site Record of Decision, Cushing Oklahoma* (February 6, 2009); *see also* Section V.A, *supra*. In its *Notice of Intent*, Land O'Lakes even highlighted the fact that an EPA Field Investigation Team observed apparent spills and releases in the BNSF railroad right-of-way in 1982 and obtained samples showing elevated inorganic compounds. *See* Ex. 24,

¶ 43. EPA turned a deaf ear to the statements and evidence that Land O'Lakes presented before it was forced to embark under the UAO.

In sum, releases of contaminants in these areas are attributable to BNSF, not Midland, and Land O'Lakes is not a liable party under CERCLA § 107(a) for response costs associated with investigating and remediating these areas.

i. Areas Impacted by Petroleum Products Introduced by Hudson and Other Parties After Midland's Ownership Ended

The UAO required Land O'Lakes to clean up petroleum and petroleum products in soils, sediment, and piping that were introduced to the Refinery by Hudson and other parties after February 1977. Because these materials were introduced to the Refinery after February 1977, any releases of those products to areas of the Refinery were not occasioned by acts or omissions of Land O'Lakes or Midland, and are capable of being apportioned. Land O'Lakes is not a responsible person for these releases.

Mr. Baugher first analyzes whether any materials attributable to the operations of Midland could be found at the Site in the first instance. His analysis demonstrates that crude oil feedstocks, products, chemicals, additives, and by-products used or generated by Midland in operating the Refinery were quickly eliminated after Midland sold the Refinery to Hudson on February 1, 1977. *See* Ex. 4 (Baugher), ¶¶ 10, 34-43, Figure 6, Table 1. Materials remaining in process vessels, tanks, and piping at the Refinery at and after Hudson's 1982 Refinery shutdown were solely attributable to Hudson. *See* Ex. 4 (Baugher) ¶ 41. Thus, where those materials were the cause of RD/RA activities required of Land O'Lakes, all such related costs are divisible, and Land O'Lakes is not a responsible party.

IX. EPA'S ACTIONS WERE ARBITRARY, CAPRICIOUS, AND NOT IN ACCORDANCE WITH LAW

The United States Supreme Court explained the "arbitrary and capricious" standard as follows:

> The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made....In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment'.... Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Manufacturers Ass'n v. State Farm, 463 U.S. 29, 42 (1983) (internal citations omitted). The United States Supreme Court also has warned:

> Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.

Id. at 48, quoting *New York v. U.S.*, 342 U.S. 882 (1951).

A. The UAO and ROD Required Land O'Lakes to Excavate "Visual Contamination" Without Evidence of the Presence of Hazardous Substances as Required by CERCLA

CERCLA provides that the President (through his designee, EPA) has no authority to act unless there is a disposal of hazardous substances. 42 U.S.C. § 9607(a). The burden of proof is on EPA to show scientific data in the administrative record supporting the ROD and rationally connect that data to support its ultimate findings. *U.S. v. Nova Scotia Food*, 568 F.2d 240, 251-52 (2d Cir. 1977) (The burden is on the agency to articulate rationally why the facts support the

ultimate findings; it is arbitrary and capricious for the agency to base its ruling on "inadequate data" or data that "is known only to the agency."); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393, 402 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency;" held, the EPA's ruling is reversed because it is not supported in the administrative record supporting the ROD by scientific data.); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) (Court reversed the agency and stated that: "In addition to requiring a reasoned basis for agency action, the 'arbitrary or capricious' standard requires an agency's action be supported by facts in the record;" "[A]gency action will be set aside as arbitrary if it is unsupported by 'substantial evidence.'").

Moreover, the EPA in its own regulations acknowledges and accepts this burden. EPA requires that the ROD shall document "all facts, analyses of facts, and site-specific policy determinations." 40 C.F.R. § 300.430(f)(5)(i). This is necessary "to support the selection of a remedial action." *Id.*

In this case, the EPA has the burden to support its soil remedy to "excavate and haul off site" in the administrative record supporting the ROD. CERCLA provides that the offsite transport and disposal of materials is the "least favored alternative remedial action." 42 U.S.C. § 9621(b)(1). However, the administrative record supporting the ROD does not support its remedy with sampling and testing results that establish the presence or concentration of any hazardous substance in soil with "visual contamination" or the boundaries of the SAOCs to be excavated on the basis of the presence of "visual contamination."

More perplexing still was that the ROD allowed the excavation of chemical exceedances (determined by lab testing) in soil to terminate at two feet BGS, but required the excavation of

soils with "visual contamination" to unlimited depths without evidence of hazardous substances. In other words, EPA's ROD limited the depth of areas that had been characterized by chemical analysis, but required Land O'Lakes to excavate to unlimited depths when EPA had no characterization or data to show whether any hazardous substance existed in soils with "visual contamination."

The ROD soil remedy required Land O'Lakes to conduct excavation and removal of "visual contamination." *See* Ex. 3, § 19.2.2. Early in the UAO RD process, Land O'Lakes' consultant began inquiry on the ROD, its lack of data, and the requirement to excavate "visual contamination." During an April 21, 2009 "Scoping Meeting" held at the ODEQ in Oklahoma City, and as reflected in Benham/SAIC's "Minutes of Meeting," EPA and ODEQ representatives made the following points/statements, acknowledging that there was no technical data supporting the requirement to excavation "visual contamination":

> 4. Stankosky: For RI, the goal was not to sample and characterize visible waste, just trying to delineate non-visible impacts.
>
> 5. Brittain: DEQ policy is to remove visible waste. Trenching may be helpful because soil borings may miss areas of contamination.

See Ex. 22, Benham Minutes of Meeting (April 22, 2009), at 2. Again, during a June 12, 2009, meeting at ODEQ regarding the Remedial Design Work Plan and its development/finalization, EPA and ODEQ were questioned about "visual contamination":

> GR [Benham] – We used your analytical data to demonstrate that these ASOC's [sic] already met the commercial/industrial cleanup levels.
>
> LS [EPA] – Where we saw visible waste, we did not necessarily sample. We would like to see confirmation sampling.
>
> AB [ODEQ] – DEQ would as well.
>
> JL [Benham] – Stained soils do not necessarily exceed cleanup levels.

> LS [EPA] – I need more data to make a NFRAP (No Further Remediation Action Planned).
>
> JL [Benham] – There are boundaries for soil cleanup. You need confirmation which I understand but at the same time, we should be able to count on your data from the RI/FS. Also, there is a difference between stained soil and visible waste, such as coal tar, etc. Stained soil may not bust any of the cleanup levels that have been established.
>
> AB [ODEQ] – The more impacted soil we can take care of the better. I want to research the ROD before responding definitively on removal.
>
> * * *
>
> LS [EPA] – We need to make a decision on what is the cutoff for "visible [sic] contamination."

See Ex. 22, Benham Minutes of Meeting (June 22, 2009) at 5. Thus, EPA's representative again acknowledged that no sampling data existed to support the ROD's requirements for "visual contamination" and further acknowledged that it was necessary to establish a standard for "visual contamination." The EPA's decision on the soil remedy for "visual contamination," and its implementation in the field, is arbitrary and capricious because EPA had inadequate scientific data and analysis to support its decision.

"Visual contamination" ultimately became the principal remedial driver for the required RA soil activities at the Site. *See* Ex. 11 (Brady), ¶¶ 157-162, 178, 186-202, 211-243, 246-249, 259-262, 263-272, 288-290, 292-340, 344-361, 375, 391, 394-401, 409-415, 418-433, 435-440, 446-459, 462-481, 492-498. However, the ROD did not define "visual contamination," but instead necessarily left its definition to EPA's field personnel and contractors to make arbitrary and unsupported decisions in the field as to what constituted "visual contamination." Neither the ROD nor EPA had any supporting, objective data as to what constituted "visual contamination," and decisions made by EPA field personnel and contractors were arbitrary, capricious, and unsupportable. *See* Ex. 7 (Hathaway) ¶ 26.

From the beginning, Land O'Lakes consistently raised concerns and objections to EPA regarding the ROD's lack of any objective standards for in-field or analytical determination of the identification of "visual contamination" at the Site, as well as the absence of any objective chemical data to support its identification as a hazardous substance requiring removal under CERCLA *See, e.g.,* Ex. 22, Minutes of June 12, 2009, RD Work Plan meeting (June 22, 2009); Ex 22, EPA December 24, 2009 Comments and Request for Modification of Intermediate RD, bullet #2 re: Visual Contamination and Visible Waste (announcing the definition would include non-visual characteristics),[46] Ex. 22, Notification of Anticipated Delay in Completing Pre-Final Remedial Design (Jan. 8, 2010),[47] Ex. 22, January 20, 2010 EPA Meeting Minutes, as revised by EPA) (Feb. 16, 2010, resubmitted on April 5, 2010).[48]

The initial concern was that lack of specificity regarding "visual contamination" made completion of remedial design and certainty of a construction schedule [49] problematic. Specifically, Land O'Lakes told EPA that certainty regarding what constituted "visual

---

[46] "Visual contamination would include those soils/clays that are visibly stained, possessing a hydrocarbon odor, and containing volatiles as may be measured with an organic vapor analyzer."

[47] "EPA's attempted definition of 'visible contamination' also cannot be tied to COCs in the ROD. LOL disagrees, on both procedural and substantive grounds, with EPA's attempt to impose a definition of 'visible contamination' as a remediation driver. There is no basis in the record for such a substantial change to the remediation. Setting aside whether 'visual contamination' is even properly addressed through CERCLA, to comply with the NCP, EPA must attempt a ROD amendment to implement the EPA comments regarding "visible contamination." Any attempt to impose such a change through mandated modifications to the design is arbitrary, capricious, and not consistent with the NCP."

[48] "EPA discussed the option of sampling "visual contamination" in the case of uncertainty or disagreement in the field. The sampling option would be for the constituents of what is commonly referred to as the 'Skinner List'- constituents of Concern for Petroleum Processes. EPA indicated that known areas of visual contamination had to be addressed [in the RD]."

[49] In meetings and correspondence with EPA before and after the UAO was issued, Land O' Lakes and its environmental contractors had agreed to attempt an accelerated schedule for the RD/RA with a goal of completion by September 15, 2010. In meeting with Region 6 officials in August, 2009, after the UAO was issued, and in response to EPA's August 7, 2009 Notice of Deficiency regarding its RD Work Plan, Land O'Lakes confirmed its promise to EPA to perform an expedited cleanup of the Site with a nine month construction schedule beginning in January 2010, and complete the cleanup by the end of EPA's 2010 Fiscal Year on September 30. The history of these scheduling communications is described in Land O'Lakes Draft Remedial Action Report dated August 7, 2014 at section 1.4.5, pp. 14-18.

contamination" was needed to complete a final remedial design and the inability to complete the remedial design threatened Land O'Lakes ability to meet the EPA's required deadline for completion of the RA Work of September, 2010. This concern was set forth in Land O'Lakes January 8, 2010 Notification of Anticipated Delay for Pre-Final Remedial Design:

> The final design schedule cannot be met because the EPA Comments will make it impossible, within the 30-day period permitted by the UAO, to determine initial excavation boundaries, final construction quantities of excavated and borrow material, final grading plans for the Wastewater Pond berms and surface water control system, and field protocol for addressing "visual contamination." The EPA Comments present two principal obstacles for the completion of the Pre-Final Design. First, the EPA Comments essentially require another remedial investigation for the Site and impose cleanup standards and criteria which are not contained in the Record of Decision ("ROD") and are inconsistent with the NCP. By necessity, this new remedial investigation/characterization work must be designed, approved, and implemented before the Pre-Final Design can be completed and submitted to EPA and ODEQ for review and approval. Second, EPA's Comments introduce, for the first time, a definition of "visible contamination" (which was not defined or described in the ROD), which is inconsistent with the ROD, and which was not utilized in preparing the Intermediate Design. The introduction of these two fundamental changes in the design elements will require suspension of further design work on substantial portions of the Pre-Final Design until the issues are resolved and new data from the additional investigation/characterization now apparently being required by EPA and ODEQ is collected.

EPA's Comments and Required Design Modifications Are Arbitrary and Not Consistent with the NCP

> It is clear in the record that the boundaries of the SAOCs set forth in the ROD are not based upon Remedial Investigation ("RI") data or cleanup criteria that tie to the Contaminants of Concern ("COCs") in the ROD. Indeed, some of the SAOCs, as drawn in the ROD, do not have a single exceedance of any COC action level specified in the ROD. *See generally* Preliminary Remedial Design Report (November 3, 2009) § 2.3. Indeed, how the SAOC boundaries were established in the ROD is entirely unclear and unsupported in the record. Instead, the record reflects that the SAOC boundaries were not based upon the presence of COCs

> above cleanup standards as determined by RI data. *See* Field Sampling Plan (July 6, 2009), at 17; Minutes of June 12, 2009 RD Work Plan Meeting (June 22, 2009). Rather, LOL learned during a June 12, 2009 meeting with EPA and ODEQ that the SAOC boundaries were based upon observations of "visible contamination" at undocumented locations by persons unknown. *See* Field Sampling Plan (July 6, 2009), at 17; Minutes of June 12, 2009 RD Work Plan Meeting (June 22, 2009). Thus, the determination of the boundaries of the SAOCs in the ROD is arbitrary, capricious, unsupported, and inconsistent with the NCP.
>
> "Visible contamination" is not covered by CERCLA, is not a COC under the ROD, and no cleanup criteria were set in the ROD for "visible contamination." *See* ROD § 15.1, at 40, *see also* ROD Table 14. The ROD also fails to define the term "visible contamination." Indeed, the term "visible contamination" is mentioned only a single time in the entire ROD text at page 69.[50] Further, because there is no meaningful correlation between the COCs at the Site and "visible contamination," EPA's attempted definition of "visible contamination" also cannot be tied to COCs in the ROD. LOL disagrees, on both procedural and substantive grounds, with EPA's attempt to impose a definition of "visible contamination" as a remediation driver. There is no basis in the record for such a substantial change to the remediation. Setting aside whether "visual contamination" is even properly addressed through CERCLA, to comply with the NCP, EPA must attempt a ROD amendment to implement the EPA Comments regarding "visible contamination." Any attempt to impose such a change through mandated modifications to the design is arbitrary, capricious, and not consistent with the NCP.

Ex. 22, Notification of Anticipated Delay for Pre-Final Design (Jan. 8, 2010) at 2-3.

The January 8, 2010 Notification of Anticipated Delay led to a January 20, 2010 meeting at Region 6 headquarters, to discuss the issues raised by EPA's comments and required modifications to the Pre-Final RD plans and Draft Post-Excavation Sampling Plan served on Land O'Lakes on Christmas Eve and New Year's Eve, 2009. The major issues discussed included the definition of visual contamination and the imposition of a new sampling protocol

[50] In fact, the ROD uses the term "visual." For present purposes only, the terms "visual" and "visible" are used interchangeably.

requiring additional sampling to complete the RD, referred to as the "VSP." *See* Ex. 22, Minutes of the January 20, 2010 EPA meeting.

Land O'Lakes February 2, 2010 responses to EPA's comments on the Intermediate Remedial Design dated December 24 and 31, 2008, summarized the disagreement as follows:

> LOL and EPA disagree as to what constitutes "visual contamination" according to the ROD. LOL and EPA agree that the term "visual contamination" includes "coke like materials, asphalt-like, or tarry materials." LOL does not agree that the term "visual contamination" includes "soils/clays that are visibly stained, possessing a hydrocarbon odor, and containing volatiles as may be measured with an organic vapor analyzer (OVA).
>
> * * *
>
> The term "visual contamination" is not defined or linked to meeting RAOs for the Site. Given this lack of specificity, LOL attempted to provide in the Intermediate RD, a reasonable definition of the term to establish objectively verifiable criteria for demonstrating that this aspect of the RD is met. In an effort to provide a criteria linking what is clearly "visual" with what is clearly "contamination," Benham proposed the definition of "visible waste" in the Intermediate Remedial Design Report as including "coke-like materials, asphalt-like or tarry materials, and free-phase hydrocarbons contained within waste and/or soil void space at concentrations sufficiently high to result in drainage from the pore space." As proposed, soil within the SAOCs that was found to meet one or more of these criteria would be excavated and disposed of off-site regardless of the levels of lead, arsenic or B(a)P (the COCs for soil) that it contained.
>
> The Benham definition clarified that material not visually verifiable as being "contamination," such as "stained soil," or not related to "visual" observations, such as materials described by "odor" or OVA readings, is excluded from the definition. This exclusion is supported by the fact that the metric for evaluating excavation and disposal decisions for soils is a comparison of analytical sample results with cleanup levels for the COCs as described in Table 14 of the ROD.
>
> Notwithstanding LOL's objections to EPA's actions in this matter, EPA has directed LOL to use an inappropriate definition of "visible contamination" during the RD/RA and take specific

> actions in regard to same. LOL's response to EPA's directive is provided below.
>
> At the January 20, 2010 meeting EPA proposed, and LOL agrees, that any further dispute in the field, regarding identification of visual contamination that cannot be resolved in the field, may be resolved by analysis of the material in question for the Skinner List. The results of the analysis will be compared to appropriate human health benchmark values as presented in the RI or the soil remedial goals from the ROD. Materials which are found to be below these benchmark values will not be considered to be visual contamination and will require no further action.
>
> Further, at the January 20, 2010 meeting, EPA directed that any visual contamination in potholes and borings regardless of depth must be addressed. Testing of this material using the Skinner List noted above may be used to determine no further action.

Ex. 22, Land O'Lakes February 2, 2010 responses to EPA's comments on the Intermediate Remedial Design (Dec. 24 and 31, 2008).

The disagreement between Land O'Lakes and EPA over the definition of visual contamination remained unresolved and arose again during the remedial and investigative activities required by EPA in area AA-1 and the NESTF area, and with preparation of the draft RA Report. At this point, the concern shifted to the words used to describe EPA's in-field determinations of materials constituting "visual contamination." Ultimately, EPA compelled Land O'Lakes to delete language based on contemporaneous field notations and memories of its in-field personnel regarding how the determinations "visual contamination" were made and required language that Land O'Lakes agreed with EPA on the designation of "visual contamination." And Land O'Lakes preserved its objection and reserved all rights regarding the definition of and requirement to excavate visual contamination.

RESERVATION OF RIGHTS AND OBJECTIONS

> LOL sets forth below its initial responses to EPA's comments and required revisions dated September 18, 2014. LOL's position is

that EPA's compelled response time and compelled content requirements are unreasonable and deprive LOL of due process. For example, with regard to the compelled process, a majority of EPA's September 18, 2014, comments were new and presented to LOL for the first time on September 18, 2014. Indeed, substantial portions of EPA's September 18, 2014 comments were made on versions of submissions and/or elements of submissions submitted to EPA on March 19, 2014, but EPA did not provide comments on these elements to LOL in EPA's first round of comments on June 27, 2014. The compelled 10-day response time for addressing these new comments and required revisions was unreasonably short. In addition, there are numerous instances where LOL disagrees with positions taken by EPA, EPA's statements of fact, and the language and factual content LOL was compelled by EPA to include in LOL's revised submissions. LOL incorporates and restates its August 7, 2014 response to EPA's June 27, 2014 comment letter in this response, and, to the extent EPA claims such June 27, 2014 comments were not addressed, LOL disagrees. LOL reserves all rights, including, without limitation, its right to submit more definitive responses to, and to challenge the accuracy of, EPA's comments, facts, required "corrections" and revisions to the Reports.

Ex. 22, Land O'Lakes' Response to EPA's Notice of Deficiency, Final Data Evaluation Report (Rev. 4) (Sept. 29, 2014) at 2.

RAR Comment 11 – Section 1.4.2, page 12, SAOC-7 heading – Correct the last paragraph under this heading to read,

"EPA personnel stated to LOL that, based upon their visual observations of the pothole excavations in SAOC-7, it is their position that the hydrocarbon impacted soils observed in Potholes #16 and #17 constitute visual contamination. Based upon discussions between EPA and Benham, LOL agreed to include the hydrocarbon impacted materials observed in Pothole #16 and #17 within the soils that were addressed in the RD."

This revision more closely matches the language from the Preliminary Design from which in was taken.

RAR Response 11 – As required by EPA, the modifications have been made. LOL objects to these required modifications on several grounds. LOL did not "agree to" the inclusion of hydrocarbon impacted soils as "visual contamination" to be addressed in the RD. EPA required that inclusion over LOL's objections. LOL

> expressly denies that hydrocarbon impacted soils are properly considered "visual contamination" under the ROD, constitute a principal threat waste, or are properly subject to CERCLA.

Id. at 7.

Under EPA's threat of civil penalties, Land O'Lakes, while still preserving its objections, had to comply with EPA's directive and incorporate the following EPA language into the Remedial Design documents: "if LOL disagrees with a visual contamination determination made by EPA, LOL may choose to either excavate and dispose of the subject materials off-Site, or alternatively, collect a representative sample of the subject material and submit same to a laboratory for analysis of the "Skinner List" parameters...." *See* Ex. 22, Letter of March 1, 2010 at 1-2, Letter of March 11, 2010 at 7. The "Skinner List' challenge process for EPA designation of "visual contamination" was not a feasible solution to the disagreement, as a practical matter. The process was imposed seven (7) months before EPA-imposed RA completion deadline. It could not have been invoked without compromising that deadline because of the construction delay to stand-down while samples were collected and analyzed.[51]

EPA cannot shirk its fundamental obligation to document data in the administrative record supporting the ROD. Any attempt by EPA to shift this obligation to a responsible party such as Land O'Lakes is directly contrary to the law. 40 C.F.R. § 300.430(f)(5)(i); *U.S. v. Nova Scotia Food*, 568 F.2d 240, 251-52 (2d Cir. 1977); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393, 402 (D.C. Cir. 1973). Visual observation of what appears to be contamination is inadequate

[51] The standard sample analysis turnaround time was two weeks at $100.00 per sample; at $700.00 per sample, the turnaround time was approximately three (3) days. Mr. Brady's Affidavit (Exhibit 11) describes over 30 instances where EPA's "visual contamination" designations required excavations or expansions of existing excavations. Thus, the "Skinner List" testing of EPA-designated "visual contamination" in soils would have potentially added 15-30 weeks to the RA construction schedule along with substantial additional costs of construction delay and lab analysis.

without tests for the contamination. *Fay v. Dominion Transmission*, 2012 U.S. Dist. Lexis 102671, *12 (M.D. Penn. July 24, 2012); *U.S. v. Vertac Chemical*, 671 F. Supp. 595, 606 (E.D. Ark. 1987).

Even if EPA were permitted to shift its obligation under the law, which Land O'Lakes denies, EPA's attempt in this case was unworkable, infeasible and exorbitantly expensive. EPA will argue that Land O'Lakes had the choice to test the "visual contamination." However, this sham "choice" was no choice at all. Land O'Lakes had contractors with excavation equipment and trucks present during dozens of excavations. While excavators and trucks were in a position to dig and haul soil off-site, it would have made no sense for Land O'Lakes to tell them "Stop and wait" or "Go home" while it takes samples, sends them to the lab, has the lab test to the Skinner List (which is unnecessarily broader than the COCs at issue) and receives results back in two weeks. This could have never been done and still meet EPA's imposed completion deadline.

Without holding up the work of the excavators and trucks, Land O'Lakes' forensic environmental chemistry expert arranged to have several samples taken and analyzed (including the alleged coke tar). These results confirmed that EPA's ROD was not supported by scientific data and analysis. *See* Ex. 5 (Boehm) ¶¶ 110, 54(g), 54(h).

EPA's ROD, and its implementation, are arbitrary and capricious because: (1) EPA failed to conduct adequate sampling and testing of soil to determine the presence and concentration of any hazardous substance; (2) EPA failed to adequately characterize the soil; (3) the administrative record supporting the ROD did not contain adequate facts to support its selection of the soil remedy; and (4) EPA engaged in speculative analysis.

Land O'Lakes also had the "visual contamination" issue analyzed by experts including a former EPA (Region 6) engineer (William Hathaway), an environmental engineer (Jay

Vandeven), and an environmental chemist (Dr. Paul Boehm). The former EPA (Region 6) engineer made the following findings:

> Visual Contamination (VC) in soil, which was required to be removed by the ROD and UAO, was exclusively determined by visual inspection (eyesight) of the EPA Regional Project Manager ("RPM") and this subjective, standardless process served as the most costly remedy component throughout the UAO required Site clean-up. If EPA had not been driven by the Stakeholders and ODEQ's alleged policy pressure (*see* paragraphs 33 & 49-52 below) major expense could have been avoided. In the end, sub-surface visual contamination in soil accounted for more than 50 % of the subsurface materials and soil removed from the Site under the ROD and UAO. These EPA required actions and associated costs were arbitrary, capricious, contrary to law, and totally unnecessary. This requirement was not deployed from the regulatory standpoint of protecting public health and the environment under CERCLA.

See Ex. 7 (Hathaway) ¶ 26. In addition, Mr. Vandeven made the following findings:

> Land O'Lakes was required to conduct response actions based on USEPA's in-field observation of "visual contamination," which was never defined by the USEPA and was made without any chemical characterization. This requirement was taken without reasonable grounds, was contrary to prior decisions at the Site, was inconsistent with the NCP, and ignored the exclusion of petroleum from CERCLA. Land O'Lakes is not responsible or liable for the costs incurred to implement remedial actions that were based on USEPA's observation of "visual contamination."

See Ex. 9 (Vandeven) ¶ 33. Moreover, Dr. Saba found that:

> Before lodging of the FCD [*Final Consent Decree*], investigations under the PCD [*Partial Consent Decree*] discovered and reported the presence of visually contaminated or stained soils, both on the ground surface and Refinery subsurface.
>
> ****
>
> The reported evidence above shows that EPA was aware of the presence of surficial and sub-surficial visual contamination throughout the Site, prior to the FCD lodging date of October 13, 1987.

See Ex. 8 (Saba) ¶¶ 25, 48.

The actual implementation of the underlined "visual contamination" standard in the field is described by Mr. David Brady. *See* Ex. 11 (Brady) ¶¶ 61-67. First, there was no meaningful correlation between organic vapor meter ("OVM") readings and the presence of EPA-designated "visual contamination." *See* Ex. 11 (Brady) ¶ 63. Because the ROD did not establish any objective criteria for EPA-designated "visual contamination," implementation of the soil remedy was based upon the subjective judgment of EPA personnel and EPA contractors, which varied and was inconsistent. *See* Ex. 11 (Brady) ¶¶ 65-67. An excavation that was designated by EPA as clear of "visual contamination" was at times later determined by EPA to have "visual contamination." *See* Ex. 11 (Brady) ¶ 65. Material that was declared by EPA to be "visual contamination" in one excavation would not be designated as "visual contamination" in another excavation, despite being nearly identical in appearance. *See* Ex. 11 (Brady) ¶ 66. Photos discussed by Mr. Brady demonstrate these inconsistencies. *See* Ex. 11 (Brady) ¶ 66.

EPA's required NESTF investigation also demonstrates and supports Land O'Lakes' position. The NESTF investigation focused on the area proximal to Hudson's former Tanks 96 and 97, which were crude oil storage tanks. *See* Ex. 11 (Brady) ¶¶ 511-17, Attachment L. As described by Mr. Brady, during the NESTF field sampling, EPA designated "visual contamination" in a boring and directed it be sampled and analyzed. *See* Ex. 11 (Brady) ¶ 515. This sample was analyzed at EPA's direction for a much broader suite of constituents than required by the ROD. *See* Ex. 11 (Brady) ¶ 513. Like all samples taken during the NESTF investigation, this EPA-designated "visual contamination" sample was below all ROD COC cleanup levels, Region 6 screening levels, and consequently no further investigation or remediation was required in this area by EPA. *See* Ex. 11 (Brady) ¶¶ 516-17.

In conclusion, EPA's soil remedy in the ROD based on "visual contamination" was arbitrary, capricious, and not in accordance with law.

B. EPA's UAO and ROD are Arbitrary and Capricious, and Not in Accordance with Law, by Requiring Remediation at Areas Not Impacted by Hazardous Substances

CERCLA and the NCP limit the scope of EPA recoverable costs to hazardous substances. 42 U.S.C. §§ 9607(a), 9601(14) and 9605(a)(3). In order for EPA to charge a cost to a PRP under the NCP, the response cost must be tied to the actual cleanup of hazardous substance releases and be cost-effective. 40 C.F.R. §§ 300.430(f)(1)(ii)(D) and 300.415(b)(1); *Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005) (The response cost must be closely tied to the actual cleanup of hazardous substance releases; there must be a nexus between the alleged response cost and an actual effort to respond to environmental contamination; plaintiffs' costs are not recoverable); *Pentair Thermal Management, LLC v. Rowe Industries, Inc.*, 2013 U.S. Dist. Lexis 47390, *40 (N.D. Cal. Mar. 31, 2013) (Building demolition costs are not recoverable; under the NCP, the remedy must be cost-effective and the response cost must be tied to the actual cleanup of hazardous substance releases; there must be a nexus between the alleged response cost and an actual effort to respond to environmental contamination); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 670 (5th Cir. 1989) ("To justifiably incur response costs, one necessarily must have acted to contain a release threatening the public health or the environment."); *Sealy Connecticut, Inc. v. Litton Industries, Inc.*, 93 F. Supp. 2d 177, 189 (D. Conn. 2000) (Plaintiff cannot recover costs incurred in the demolition of the buildings and costs associated with obtaining town approval, hazardous material investigation, asbestos removal and fees paid to outside consultants related to the demolition); *Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc.*, 904 F. Supp. 644, (N.D. Ohio 1995) (The demolition of buildings was not required in order to implement the remedial activities relating to soil and groundwater

contamination; the cost of the demolition of buildings is not recoverable); *G.J. Leasing Co. v. Union Electric Co.*, 54 F.3d 379, 386 (7th Cir. 1995) (Response costs must be tied to the actual cleanup of hazardous substance releases; costs to remove asbestos are not recoverable).

In this case, through the UAO, EPA ordered Land O'Lakes to remediate and incur response costs in numerous areas of the Site that were not tied to the actual cleanup of hazardous substance releases. Examples of these areas include the Wastewater Ponds 4, 5, 6, and 6A (WWP-4 through WWP-6A), Treatment Pond 8, Pond 8A, and Runoff Pond 9, Unnamed Pond 1, the Investigation/Closure of Water Supply Wells 1 and 2 (WSW-1 and WSW-2), Re-vegetation, and scrap metal and pipe removal.

Land O'Lakes also had these areas analyzed by its experts. Mr. Vandeven made the following findings:

> Land O'Lakes was also compelled to incur costs in many areas of the Site where hazardous substances did not exist. Land O'Lakes is therefore not responsible or liable for the costs incurred in responding to these materials or these areas of the Site.
>
> ****
>
> **Wastewater Ponds 4, 5, 6, and 6A (WWP-4 through WWP-6A)**
>
> WWP-4 through WWP-6A were not remediated due to chemical contamination/hazardous substances. The costs Land O'Lakes was compelled to incur do not constitute a response cost, nor a cost for which it is responsible or liable.
>
> For all the reasons stated above, Land O'Lakes is not responsible or liable for response costs of $386,436.61 incurred implementing USEPA's selected remedy for WWP-4 through WWP-6A.
>
> **Treatment Pond 8, Pond 8A, and Runoff Pond 9**
>
> Treatment Pond 8, Pond 8A, and Runoff Pond 9 were not remediated due to chemical contamination/hazardous substances. The costs Land O'Lakes was compelled to incur do not constitute a response cost, nor a cost for which it is responsible or liable.

For all the reasons stated above, Land O'Lakes is not responsible or liable for response costs of $340,405.30 incurred implementing USEPA's selected remedy for Treatment Pond 8, Pond 8A, and Runoff Pond 9.

Unnamed Pond 1

Unnamed Pond 1 was located to the southwest of Runoff Pond 9 and its location is shown in Figure 8A. This pond is visible in the aerial photographs from 2008 and April 2009.

This pond was not remediated due to chemical contamination/hazardous substances. The costs Land O'Lakes was compelled to incur do not constitute a response cost, nor a cost for which it is liable. For this reason, Land O'Lakes is not responsible or liable for response costs of $36,322.60 incurred implementing USEPA's selected remedy for Unnamed Pond 1.

Water Supply Wells 1 and 2 (WSW-1 and WSW-2) Investigation/Closure

WSW-1 and WSW-2 were not remediated due to chemical contamination/hazardous substances. The costs Land O'Lakes was compelled to incur do not constitute a response cost, nor a cost for which it is liable.

For all the reasons stated above, Land O'Lakes is not responsible or liable for response costs of $372,013.64 incurred investigating and closing WSW-1 and WSW-2.

Vegetation

These activities were not taken to address chemical contamination/hazardous substances. The costs Land O'Lakes was compelled to incur do not constitute a response cost, nor a cost for which it is liable. For this reason, Land O'Lakes is not responsible or liable for response costs of $668,634.25 incurred maintaining vegetation at the Site while implementing USEPA's selected remedy.

Scrap Metal and Pipe Removal

Scrap metal that was present at the Site at the time of the ROD and UAO did not originate due to Midland's operations. Midland sold the refinery 30 years prior to implementation of the ROD and housekeeping and maintenance activities cannot be traced to its conduct. Hudson's operation and ownership of the refinery,

> Western's careless salvage operations, and USEPA's removal actions are the likely origin of this material. Land O'Lakes is therefore not responsible or liable for response costs of $471,121.38 incurred implementing USEPA's selected remedy for scrap metal and pipe removal.

See Ex. 9 (Vandeven) ¶¶ 24, 212, 214, 225, 229, 230, 328, 330, 339. Further, Mr. Vandeven made the following findings:

> **Wastewater Ponds 1 and 2**
>
> Hudson fully cleaned out WWP-1 in 1979, excavating approximately ten feet of sediment and placing it in the Land Treatment Unit it had constructed. During this cleanout, Hudson also installed aeration devices in WWP-1 ("Pond Cleanout Folder," 1979). Therefore, sediment that was removed from WWP-1 during the remedial action originated after Midland's sale to Hudson and Land O'Lakes should not be responsible or liable for the costs incurred to excavate, transport and dispose of this material.
>
> The limitations of the sampling approach used for WWP-1 and WWP-2 in the RI and the misuse of the data are similar to those I discussed for the Coke Pond. The RI Work Plan provides the following scope for sampling in WWP-1 and WWP-2:
>
> *"One surface water and one sediment sample will be collected from the aeration pond (pond 7) and each of the six wastewater biotreatment ponds (ponds 1 through 6) to determine the extent of impact to pond sediment and surface water, if any."*
>
> (Burns & McDonnell, 2004a).
>
> A single sample CANNOT be used to determine the extent of impact or contamination – but that is exactly what ODEQ and USEPA did for WWP-1 and WWP-2 And, further, they relied on that single sample as the basis for a more than $500,000 remedy in each Pond.
>
> USEPA identified the sediments in WWP-1 and WWP-2 as principal threat waste. As I discussed in paragraphs 142-146 of my Affidavit, there was no basis for this designation and USEPA's use of principal threat waste as a basis for requiring remedial action for these sediments is inconsistent with the NCP and contrary to its own guidance.

> I note again here that WWP-2 was used as the sole basis for the Site scoring greater than 28.5 on the HRS. USEPA characterized WWP-2 as a "sensitive environment," apparently ignoring the fact that it had been part of the refinery's waste treatment system for twenty years. As discussed in Paragraph 117 of my Affidavit, this "sensitive environment" designation was never discussed or considered in the remedial process. Neither the ODEQ nor USEPA identified ARARs that would need to be attained for such a designation, such as wetland-related ARARs under Section 404 of the Clean Water Act. The manner in which USEPA addressed WWP-2, both in the scoring and listing process and during the remedial process, dramatically represents the arbitrary nature of it actions and decisions.

Ex. 9 (Vandeven) ¶¶ 196-200.

In addition, Mr. Vandeven found:

> **Wastewater Pond 3 (WWP-3)**
>
> The ROD required the pond to be drained, berms leveled, and graded. Under the ESD, USEPA reduced the backfilling requirement for remediated ponds to a minimum of two feet of soil cover. While carrying out the UAO, USEPA identified "material" in isolated ends of Wastewater Pond 3. Land O'Lakes was required to remove this sediment along with six inches of underlying soils and backfill the excavated areas.
>
> USEPA's requirement to remediate part of WWP-3 due to visual contamination was made without any basis and did not give adequate consideration to the data. I discussed in paragraphs 162-171 of my Affidavit the arbitrary nature of USEPA's use of visual contamination as a basis for remediation. Chemical analysis of ROD COCs in 119 samples representing visual contamination across the Site showed that all but one of the samples are either petroleum-related or do not contain COCs exceeding ROD cleanup levels. This single sample exceeded the cleanup level for arsenic and was located on the South Refinery in an area that was not addressed under the UAO. Further discussion of the analytical results for samples representing visual contamination can be found in the Affidavit of Dr. Paul Boehm. Keith Baugher in his Affidavit notes that refineries do not use arsenic and that there was no operational source of arsenic at the Hudson refinery. The remainder of WWP-3 was not remediated due to chemical contamination/hazardous substances.

See Ex. 9 (Vandeven) ¶¶ 203, 205, 206.

Land O'Lakes has no responsibility for the response costs incurred in these areas, and EPA's UAO is arbitrary, capricious, and not in accordance with law because it ordered remediation of areas not impacted by hazardous substances.

C. EPA's UAO and ROD are Arbitrary and Capricious, and Not in Accordance with Law, by EPA's Selection of the Remedy in Disregard of the Land Use Restriction in the Court's *Final Consent Decree*

The Court's *Final Consent Decree*, in Case No. CIV-84-2027-A, specifically considered and addressed the operational history of the Site in defining the restriction on future land use, stating:

> The grantee therefore agrees to limit the future uses of and activities upon said property. Accordingly, it is expressly agreed and convenanted that no property transferred by this instrument shall be used for residential or agricultural purposes. The property may be used for industrial or commercial purposes where: 1) access is limited to business invitees; and 2) the general public is not invited for retail, entertainment, recreational, or educational activities.

Ex. 54 at 4; Ex. 9 (Vandeven) ¶¶ 143-47. The *Final Consent Decree* goes on to state that:

> This land use restriction provided herein may be altered or terminated upon **mutual agreement between the parties hereto or their successors.**

Ex. 54 at 4-5 (emphasis added); Ex. 9 (Vandeven) ¶¶ 143-47. No such mutual agreement ever occurred.

Despite this very clear and restrictive "land use restriction," EPA based its evaluation of alternatives in the ROD on the City of Cushing's desire to develop the Site into "high-intensity retail" and a "housing subdivision," as described in some detail in the City's "Letter of Intent for Redevelopment of the Hudson Refinery Superfund Site." Ex. 3, § 16.1.3 and Appendix A; Ex. 9 (Vandeven) ¶¶ 143-47.

The ROD's discussion of Alternative 2—Clay Cap (North and South Refinery) is a clear and compelling example of the impact of this decision. Ex. 9 (Vandeven) ¶¶ 143-47. According to the ROD, "This alternative includes capping contaminated soil in place with a vegetative soil cap to prevent direct contact with soil that has concentration about the cleanup levels." Ex. 3, § 16.1.3. The ROD concludes:

> This alternative will achieve applicable RAOs and meet the cleanup levels....

Ex. 3, § 16.1.3. But EPA states in the ROD that:

> This alternative will not be compatible with the long range future land use described in the City of Cushing's letter of intent.

Ex. 3, § 16.1.3; Ex. 9 (Vandeven) ¶¶ 143-47.

This Clay Cap Alternative would have been fully protective of human health and the environment, attained all ARARs, and required a fraction of the costs that Land O'Lakes was required to incur. Ex. 9 (Vandeven) ¶¶ 143-47. However, the ROD concluded that:

> **This alternative will not be compatible with the long range future land use described in the City of Cushing's letter of intent.**

Id. (emphasis added).

Under the NCP, community acceptance is a modifying criteria to be considered when evaluating alternatives. That is, EPA should seek the community's input of the selected remedy. However, what occurred during the remedy selection process at the Hudson Refinery was the EPA gave the City's goal of retail and residential land use primary consideration—effectively making it a threshold criteria. Such a process is fully inconsistent with the *Final Consent Decree*, the NCP and EPA's own land use guidance. 40 C.F.R. Part 300-430(f); Ex. 9 (Vandeven) ¶¶ 143-47.

In conclusion, EPA's ROD and UAO are arbitrary, capricious and contrary to the law. EPA disregarded the land use restriction in the Court's *Final Consent Decree*. If the EPA complied with this land use restriction, any of the ROD's containment-based remedies, such as the Alternative 2-Clay Cap (EPA estimated the Present Worth Cost at $1,795,403), would have been suitable. Ex. 3, § 16.1.3. A containment-based remedy would have been consistent with the land treatment of wastes conducted by Hudson and EPA during their prior work on the Site and would have been a fraction of the cost of the EPA's ROD remedy and would have eliminated the "excavate and haul off-Site" remedy selected by EPA. Ex. 9 (Vandeven) ¶¶ 143-47.

D. EPA Violated CERCLA Because it Failed to Consider All Relevant Factors in Selecting and Implementing the Remedy

An agency is arbitrary and capricious when it fails to consider all relevant factors. *Hanly v. Mitchell*, 460 F.2d 640, 648 (2d Cir. 1972), *cert. denied*, 409 U.S. 990 (1972) (It is arbitrary and capricious for an agency not to take into account all relevant factors in making its determination); *People of the State of Illinois v. U.S.*, 666 F.2d 1066 (7th Cir. 1981) (ICC finding was arbitrary and capricious because it ignored certain evidence and issues); *Nat'l Black Media Coal. v. FCC*, 791 F.2d 1016 (2d Cir. 1986) (FCC action arbitrary and capricious when FCC did not take all relevant factors into account); *Simmons v. Block*, 782 F.2d 1545 (11th Cir. 1986) (FHA's action arbitrary and capricious when agency failed to comply with its own regulations).

As discussed in this *Petition*, EPA failed to consider, or articulate a satisfactory explanation, for its remedial action selected in the ROD and implemented in the UAO against Land O'Lakes with respect to the following relevant factors:

1. EPA ignored Land O'Lakes' statutory and constitutional rights of notice and an opportunity to comment doing the Site remedy selection process.

2. EPA ignored the release and liability protections provided to Land O'Lakes in the *Final Consent Decree* and *Closure Order*.

3. EPA ignored CERCLA's petroleum exclusion.

4. EPA ignored the data documentation requirements in order to show the presence of a hazardous substances under CERCLA, both in the "visual contamination" areas and other areas where it ordered remediation without such data.

5. EPA ignored the September 1995 findings of Weston—EPA's contractor—which scored the Site at 0.03, significantly less than the 28.5 required for NPL eligibility.

6. EPA ignored its own EPA Superfund office, which issued a "No Further Response Action Planned" designation for the Site in October 1995.

7. EPA ignored Western's contamination of the Site in 1996-1997, which contamination occurred 20 years after Midland conveyed the Site to Hudson on February 1, 1977, and ordered remediation by Land O'Lakes in the UAO.

8. EPA ignored the criteria for NPL eligibility by using "wetlands" (which are part of the North Refinery Wastewater Pond system) as a surface water pathway to artificially elevate the score above the 28.5 threshold, but then subsequently ordered the removal of such wetlands during the UAO remedial action.

9. After three cleanups of the Site (by Hudson under the *Final Consent Decree*, by EPA during the Emergency Removal Action, and by EPA during the Non-Time Critical Removal Action) and completion of its Remedial Investigation, EPA ignored ATSDR's 2006 finding of "no apparent public health hazard," and ordered a fourth cleanup by Land O'Lakes in the UAO.

10. EPA disregarded the land use restriction in the Court's Final Consent Decree.

Land O'Lakes also had the "relevant factors" issue analyzed by experts including a former EPA (Region 6) engineer (William Hathaway) and an environmental engineer (Jay Vandeven). Mr. Hathaway made the following findings:

> The 1999 Hazardous Ranking System ("HRS") re-scoring of the Site by EPA in order to have the Site listed on the National Priorities List ("NPL") was effectuated by using wetlands (part of the pond system) as a surface water pathway to artificially elevate the score above the 28.5 threshold, but then subsequently ordering the removal of such wetlands (ponds) during the UAO remedial action ("RA")). The purpose of EPA Region 6 re-opening the NPL listing was clearly to find some way to get the Site on the NPL so that EPA would have access to CERCLA funds to address conditions that were created and/or remained after Midland's time period of ownership and operation of the Refinery. These Site conditions included ACM, impacted soils, decaying refinery vessels, tanks and equipment and above ground pipes and structures. Incidental to the Site conditions was meeting the stated desires of the City of Cushing to return the Site back to raw developable land.
>
> EPA has conducted CERCLA clean-up activities at the Site from 1998 to present with total disregard for the land use prohibitions in the FCD. EPA not only disregarded the residential use restriction, they funded, facilitated and participated in the City of Cushing's continuing push for utilizing a portion of the Site for residential purposes, thus facilitating what amounted to a cleanup beyond the regulatory norm of a risk-based clean-up for protecting public health and the environment.
>
> The City of Cushing, the community, and the Oklahoma Department of Environmental Quality's ("ODEQ") (collectively "Stakeholders") involvement at the Site began to increase shortly after EPA's 1999 Non-time Critical Removal Action ("NTCRA") decision. This Stakeholder pressure was in part what caused EPA to make arbitrary decisions regarding its lawful scope of authority under CERCLA for the Site, which continued through the UAO.
>
> ****
>
> EPA was required by the National Contingency Plan ("NCP") and by its own guidance (OSWER 9200.1-23) to directly notify Land O'Lakes of the public hearing and comment period for the Record of Decision ("ROD") remedy selection. However, EPA did not give Land O'Lakes any such required notice. Failure of EPA to give actual, direct notice to an out-of-state PRP effectively denied Land O'Lakes an opportunity to have input prior to ROD issuance

> (see OSWER 9200.1-23, Section 5.6). Without comments and questions from a PRP, NPL listing would allow EPA a pathway to take the Site beyond what was necessary or authorized under CERCLA, if desired, even though almost all, if not all, of the remaining Site environmental conditions were subject to the petroleum exclusion of CERCLA, not impacted by CERCLA hazardous substances, or were not above relevant standards. (Vandeven 2015; Boehm 2015)
>
> ****
>
> The UAO was in effect nothing more than EPA's final effort to complete a process that began with the NTCRA—the removal of all remnants of the former refinery, independent of whether conditions posed a threat to human health or the environment. Exclusive of the wastewater ponds, all chemicals of concern were found to either be subject to CERCLA's petroleum exclusion, below standards, or sourced from post-Midland operations and activities, including those of EPA, railroads, and other third parties (Boehm 2015). Further, no principle threat wastes existed at the Site (Boehm 2015 and Vandeven 2015). The wastewater ponds are divisible as discussed by Mr. Vandeven (2015). As a result, the UAO directives at this Site were arbitrary and capricious and contrary to law.

See Ex. 7 (Hathaway) ¶¶ 21, 22, 23, 25, 27. In addition, Mr. Vandeven found the following:

> USEPA's decisions and actions at a number of crucial points in the application of the Superfund process at the Site were contrary to its own guidance, inconsistent with other decisions and the NCP, and did not take into account the full circumstances of the Site. This led to a remedy selection process and implementation that was arbitrary, capricious, and contrary to law, and the costs for which Land O'Lakes should not be responsible or liable.
>
> Both U.S. Refining – owner of the Site between 1989 and 1996 – and Quantum – owner of the Site between 1996 and 2001 – hired Western to conduct salvage operations. U.S. Refining also hired Western to conduct environmental cleanup activities. Western's salvage operations were incomplete and, by several accounts, careless, resulting in releases and contamination in many areas of the Site. Western breached above ground storage tanks, allowing material to release, and left behind asbestos containing material (ACM) torn and hanging from facility components. The remnants of Western's activities were a proximate cause for the need of the Emergency Removal Action and USEPA's involvement at the Site. Land O'Lakes was required under the UAO to incur costs to

remediate areas impacted by Western's activities. These are costs which are divisible and for which Land O'Lakes is not responsible or liable.

The USEPA conducted an Emergency Removal Action at the Site from September 1998 to December 1999. USEPA and its contractors engaged in activities that severely impacted the Site, including the placement of liquids, sludges, and tank bottoms on the ground; spreading of contaminated soils and liquids; and breaching of pipes and vessels that released petroleum liquids. Land O'Lakes was required under the UAO to incur costs to remediate these areas. These are costs which are divisible and for which Land O'Lakes is not responsible or liable.

The USEPA conducted a NTCR [Non-Time Critical Removal] at the Site from September 2002 to June 2003. USEPA and its contractors engaged in activities that further impacted the Site, including the removal of pumps that allowed liquids to drain, the breaching of pipes and vessels that resulted in the release of liquids, and the covering or removal of building foundations. Land O'Lakes was required under the UAO to incur costs to remediate these areas. These are costs which are divisible and for which Land O'Lakes is not responsible or liable.

The selection of many of the remedy elements contained in the ROD and ordered in the UAO were based on a risk assessment performed by USEPA, the Oklahoma Department of Environmental Quality (ODEQ), and Burns & McDonnell that contained significant and numerous errors, represented a misapplication of USEPA's guidance and directives, and was inconsistent with the NCP.

The USEPA's characterization of sediment in the wastewater ponds, coke fines in the Coke Pond, and "coke tar" at the Site as "principal threat waste" and the response actions taken based on this characterization were inconsistent with the NCP and contrary to USEPA guidance and directives. It is apparent that USEPA used this characterization as a means to sidestep the petroleum exclusion and to use an undefined "visual contamination" approach to justify remedial action of CERCLA-excluded substances. Land O'Lakes is not responsible or liable for the costs incurred to implement remedial action decisions that were based on USEPA's principal threat waste designation.

Land O'Lakes was required to conduct response actions based on USEPA's in-field observation of "visual contamination," which was never defined by the USEPA and was made without any chemical characterization. This requirement was taken without reasonable grounds, was contrary to prior decisions at the Site, was

> inconsistent with the NCP, and ignored the exclusion of petroleum from CERCLA. Land O'Lakes is not responsible or liable for the costs incurred to implement remedial actions that were based on USEPA's observation of "visual contamination."
>
> ****
>
> I have reviewed the USEPA's responses at the Site, from the initial investigations in the mid-1980s through the ROD, and found a number of significant examples of arbitrary and internally contradictory decisions, actions that are inconsistent with the NCP, and conclusions that belie subsequent actions. Additionally, throughout the period of USEPA's involvement at the Site, there is a marked theme of the agency violating one of the most basic tenets of the Superfund program and environmental response actions in general – the full consideration of all previously collected and available data, information, and findings at each step in the decision-making process. This shortcoming in USEPA's approach is particularly acute and relevant in relation to the data, information, and conclusions that were developed and reached during the PCD and FCD. Taken in total, these facts demonstrate that the Site should not have been listed on the NPL, that the response actions were not appropriate given the full circumstances and record of the Site, and that Land O'Lakes is not responsible or liable for the costs incurred to implement USEPA's selected remedy as provided in the UAO and ROD.

See Ex. 9 (Vandeven) ¶¶ 27, 28, 29, 30, 31, 32, 109.

In conclusion, EPA's ROD and UAO were arbitrary, capricious and contrary to the law. EPA failed to consider all of the relevant factors.

X. EPA VIOLATED LAND O'LAKES' CONSTITUTIONAL AND STATUTORY NOTICE, COMMENT, AND PARTICIPATION RIGHTS

CERCLA requires EPA to provide meaningful opportunity for public participation in the development of a remedy. This includes notice and opportunity to comment. In this regard, 42 U.S.C. § 9613(k)(2)(B) requires as follows concerning the rights of participation in the development of the administrative record for a remedial action under CERCLA:

> The President shall provide for the participation of interested persons, **including potentially responsible parties**, in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial

> review of remedial actions will be based. The procedures developed under this subparagraph shall include, **at a minimum**, each of the following:
>
> (i) **Notice to potentially affected persons** and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered.
>
> (ii) **A reasonable opportunity to comment and provide information** regarding the plan.
>
> (iii) An opportunity for a public meeting in the affected area, in accordance with section 9617(a)(2) of this title (relating to public participation).
>
> (iv) **A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.**
>
> (v) A statement of the basis and purpose of the selected action.

42 U.S.C. § 9613(k)(2)(B) (emphasis added).

A PRP that is not provided notice and a reasonable opportunity to provide comment and criticism of a proposed remedial action before the signing of a decision document (such as the ROD in this matter), is effectively denied a fair opportunity to comment and criticize the remedy before it is final, on the one hand, and, on the other hand, is also denied the opportunity to create a full administrative record for purposes of post-enforcement judicial review.

Land O'Lakes very first involvement with the Site came in 1999, when it received a CERCLA 104(e) Request for Information dated March 22, 1999. *See* Ex. 18 (Wilson) ¶ 5, and Ex. A thereto. By letter dated May 26, 1999, Land O'Lakes responded to EPA's CERCLA 104(e) Request and provided the few responsive documents in its possession. *See* Ex. 18 (Wilson) ¶ 12, and Ex. B thereto. While EPA's CERCLA 104(e) request referred to the Site as a "Superfund Site," EPA failed to notify Land O'Lakes that the Site had not been proposed for listing, or actually listed on, the National Priorities List ("NPL"). *See* Ex. 18 (Wilson) ¶ 6.

The next notification received by Land O'Lakes from EPA was dated August 2, 2000 and stated: "[y]ou should also know that the EPA has placed the Hudson Site on the National Priorities List (NPL) of Superfund sites...." *See* Ex. 18 (Wilson) at ¶ 7. Land O'Lakes subsequently learned that the Site was proposed to be listed as a Superfund site on the NPL on April 23, 1999, and that it was actually placed on the NPL on July 22, 1999. *See* Ex. 18 (Wilson) ¶ 8. Thus, Land O'Lakes did not learn of the placement of the Site on the NPL until after the NPL listing process was completed, and was not notified by EPA that Land O'Lakes had rights to participate in and comment upon the site scoring and listing process. *See* Ex. 18 (Wilson) ¶ 9. Land O'Lakes never received any notice from EPA prior to the placement of the Site on the NPL at that time. *See id.*

Since Land O'Lakes never owned or operated the Refinery, Land O'Lakes had very limited information about the Site. *See* Ex. 18 (Wilson) ¶ 12. While Midland merged into Land O'Lakes in early 1982, this merger was more than five years after Midland sold the refinery to Hudson. *See id*; *see also* Ex. 33. Land O'Lakes never employed anyone who worked at the Refinery, and had no institutional knowledge or memory about Midland's ownership and operation of the Refinery. *See* Ex. 18 (Wilson) ¶ 12.

The next communication received by Land O'Lakes from EPA relating to the Site was an August 3, 2000 letter served upon Land O'Lakes' registered service agent in Texas. *See* Ex. 18 (Wilson) ¶ 13, and Exs. C and D thereto. This letter stated that EPA would be conducting a Non-Time Critical Removal Action at the Site, offered Land O'Lakes the opportunity to conduct such removal, but then stated that "EPA has not yet, however, made a determination as to whether Land O'Lakes is liable within the meaning of Section 107 of CERCLA...." *See* Ex. 18 (Wilson) ¶ 13, and Ex. D thereto. When EPA, in November 2000, provided telephonic notice of

a forthcoming Special Notice Letter to conduct a Remedial Investigation/Feasibility Study ("RI/FS"), Land O'Lakes made multiple requests (including a FOIA request) for documents and information needed to evaluate the situation. *See* Ex. 18 (Wilson) ¶¶ 14, 15.

EPA transmitted the Special Notice Letter for RI/FS dated January 18, 2001, which included a demand for payment of **$8,902,414.97** in costs incurred by EPA to that point. *See* Ex. 18 (Wilson) ¶ 16, and Ex. F thereto. By letter dated March 26, 2001, Land O'Lakes responded to the Special Notice letter, and the factual allegations in the accompanying draft Administrative Order on Consent, with an expert report challenging the interpretations of historical, black and white, aerial photographs by EPA's consultant Lockheed that alleged that releases had occurred during the period 1949-1974. Land O'Lakes declined to pay EPA's past response costs and to undertake or fund the RI/FS. *See* Ex. (Wilson) 18, ¶ 17. As a matter of good faith and corporate policy, however, Land O'Lakes informed EPA that it wished to cooperate and work toward an amicable resolution of any allegations of legal liability and therefore would consider any other information in EPA's possession. *See* Ex. 19 (Wolski) ¶ 8. Specifically, Land O'Lakes wrote: "[a]ccordingly, if EPA has other information that it believes indicates that Land O'Lakes has responsibility under CERCLA for the disposal of hazardous substances at the Site, the company will consider that information." *See* Ex. 18 (Wilson) ¶ 17, and Ex. H thereto; Ex. 19 (Wolski) ¶ 8. For more than seven years, Land O'Lakes heard nothing in response to its 2001 Response to the Special Notice Letter or the expert report Land O'Lakes submitted to EPA. Until February 18, 2008, Land O'Lakes received no information from EPA about Site activities, process, the RI/FS, or the remedy selection. *See* Ex. 18 (Wilson) ¶¶ 18, 19; *see also* Ex. 19 (Wolski) ¶ 9.

EPA did not include Land O'Lakes' 2001 expert report in the ROD administrative record. *See* Ex. 3, Administrative Record Index. In addition, EPA did not respond to this expert report as required by 42 U.S.C. § 9613(k)(B)(iv). EPA also conducted a Non-Time Critical Removal Action at the Site at the cost of approximately $9 million. EPA did not send a special notice letter to Land O'Lakes seeking comment on EPA's Non-Time Critical Removal Action. The failure to issue a special notice letter prior to the Non-Time Critical Removal Action violated the NCP. *See* 40 C.F.R. § 300.415(a)(2).

The next communication received by Land O'Lakes from EPA following the January 18, 2001 Special Notice Letter (other than EPA's responses to Land O'Lakes' 2001 FOIA requests) was another Special Notice Letter dated February 19, 2008, demanding that Land O'Lakes: (a) perform the remedy previously selected by the ROD, and estimated by EPA to cost over $9 million; and (b) pay over $20 million in costs incurred by EPA for past response activities at the Site. *See* Ex. 18 (Wilson) ¶ 19, Ex. I. Land O'Lakes was never given notice by EPA of the RI/FS process, the remedy selection process, or of any opportunity to submit comments. *See* Ex. 19 (Wolski) ¶ 11. In fact, Land O'Lakes had to request a copy of the RI/FS from EPA to first learn of the nature of the remedy that EPA selected. *See id.* at ¶ 12. Land O'Lakes received the RI/FS Report by letter dated April 8, 2008. *See* Ex. 18 (Wilson) ¶ 20, and Ex. J thereto. Land O'Lakes responded to EPA's February 19, 2008 Special Notice Letter, noting that EPA had denied Land O'Lakes' participation rights and opportunities:

> On January 18, 2001, Land O'Lakes received from EPA a Special Notice Letter for Remedial Investigation/Feasibility Study. This marked the first time that Land O'Lakes ever had reason to inquire into Midland's operation of the refinery. Land O'Lakes responded to EPA on March 26, 2001, and in the intervening seven years, has not heard anything from EPA. Land O'Lakes has not received any information from EPA about Site activities, process, the RI/FS or remedy selection.

Ex. 18 (Wilson) ¶ 21; *see also* Ex. K thereto. In fact, Land O'Lakes later learned that EPA, in the course of its field work at the Site, discovered numerous Refinery records of Midland and Hudson and had moved many of those records to EPA Region 6 offices. *See* Ex. 19 (Wolksi) ¶ 14. At Land O'Lakes' request, by correspondence dated April 29, 2008, EPA provided Land O'Lakes with those documents, which EPA considered as primary support for its position against Midland under CERCLA. *See* Ex. 19 (Wolski) ¶ 15, and Ex. C and D thereto.

As demonstrated above, Land O'Lakes received no direct, actual notice of EPA's Site activities, the RI/FS process, or the ROD process, or its public participation rights to any of these, from EPA. EPA failed to provide Land O'Lakes with notice adequate to "provide for the participation of . . . [LOL as] [a] potentially responsible [party] . . . in the development of the administrative record on which the President will base the selection of remedial actions and on which judicial review of remedial actions will be based" and therefore the issuance of the UAO violates 42 U.S.C. § 9613(k)(2)(B)(i). EPA further failed to provide Land O'Lakes with a "reasonable opportunity to comment and provide information regarding the plan [for the remedy]," and therefore the issuance of the UAO also violates 42 U.S.C. § 9613(k)(2)(B)(ii). This failure also violated the NCP and EPA's own guidance. *See* Ex. 7 (Hathaway) ¶ 25. Additionally, EPA failed to respond to expert comments and criticism provided by Land O'Lakes by letter dated March 26, 2001, and failed to include Land O'Lakes' expert comments in the administrative record. Therefore, the issuance of the UAO also violates 42 U.S.C. § 9613(k)(2)(B)(iv).

As demonstrated in Land O'Lakes' *Notice of Intent*, including the responses to the Findings of Fact in the UAO, Land O'Lakes' defenses, Land O'Lakes' offer of proof, and the exhibits, and expert evidence attached to this *Petition*, Land O'Lakes, if given a reasonable

opportunity, could have provided significant information not provided elsewhere in the ROD's administrative record. According to the Affidavit of Mr. Vandeven, had Land O'Lakes been given proper notice, it is likely that the Site never would have been listed on the NPL in the first instance because Land O'Lakes would have submitted comments and information in response to such notice. *See* Ex. 9 (Vandeven), ¶ 122. Land O'Lakes could not submit this information during the public comment period because of EPA's failure to provide Land O'Lakes fair notice of its activities and the nature of the plan for remedial action at the Site. Land O'Lakes' information, submitted as part of the *Notice of Intent* and throughout the UAO process, substantially supported the need to alter significantly the remedial action selected by the ROD. Land O'Lakes was the sole PRP identified by EPA for the Site, and its absence of participation resulted from the EPA's failure to give adequate notice.

The ROD's administrative record does not reflect all of the factors EPA should have taken into consideration before reaching a final decision because Land O'Lakes was not given an adequate opportunity to present those factors to EPA. *United States v. Rohm & Haas Co.,* 669 F. Supp. 672, 683 (D.N.J 1987). EPA compounded its violation of Land O'Lakes' public participation and due process rights when it denied Land O'Lakes' *Petition for Remand* to supplement the ROD's administrative record. *See* Ex. 102.

The NCP gives the EPA the discretion to add material to the administrative record after the decision document has been signed "limited to the issues for which the lead agency has requested additional comment" (40 C.F.R. § 300.825(b)), but provides only the following limited criteria for acceptance of material submitted by a PRP after the ROD is signed:

> **§ 300.825. Record requirements after the decision document is signed.**
>
> (a) The lead agency may add documents to the administrative record file after the decision document selecting the response action has been signed if . . . :
>
> * * *
>
> (c) The lead agency is required to consider comments submitted by interested persons after the close of the public comment period only to the extent that the comments contain significant information not contained elsewhere in the administrative record file which could not have been submitted during the public comment period and which substantially support the need to significantly alter the response action . . . .

40 C.F.R. § 300.825(a) and (c).

As required by the UAO, Land O'Lakes submitted its *Notice of Intent* to comply with the UAO on or about February 9, 2009. Included in Land O'Lakes' *Notice of Intent* was a *Petition for Remand* to supplement the ROD's administrative record, which identified EPA's failure to comply with CERCLA's public participation requirements. In its *Petition for Remand*, Land O'Lakes requested that the ROD docket be remanded for further development of the administrative record for the RD and RA selected for the Site, under a schedule providing Land O'Lakes with a reasonable opportunity to obtain and to examine the data and Site information and provide comments and criticisms on the proposed remedy.

By correspondence dated March 18, 2009, EPA summarily denied Land O'Lakes' Petition for Remand. *See* Ex. 102. EPA's reasoning for the denial was that Land O'Lakes "did not participate in any public participation opportunities provided by EPA." EPA's reasoning was circular and ignored its failure to provide Land O'Lakes with notice of such public participation opportunities. *See* Ex. 102.

In addition to the statutory violations by EPA, for all of the reasons stated above, EPA also violated Land O'Lakes' due process rights under the Fifth and Fourteenth Amendments of the United States Constitution. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-20 (1950) (Held, publication notice, rather than direct notice, violated due process; an elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-800 (1983) (Held, publication notice, rather than direct notice, violated due process; notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition if its name and address are reasonably ascertainable); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (Held, inadequate notice violates due process; a fundamental requirement of due process is the opportunity to be heard. It is an opportunity which must be granted at a meaningful time and in a meaningful manner.) *United States of America v. Erpenbeck,* 682 F.3d 472, 476-481 (6th Cir. 2012) (Held, publication notice, rather than direct notice, violates due process; when the government knows or reasonably should know whom to notify, the government must attempt to provide direct notice of the proceeding); *Hamdi v. Rumsfield*, 542 U.S. 507, 533 (2004) (Held, inadequate notice by the Department of Defense violated due process rights); *U.S. v. Hardage*, 663 F. Supp. 1280, 1289-90 (W.D. Okla. 1987) (EPA violated a PRP's statutory and due process rights in the remedy selection process by failing to provide the procedural safeguards under CERCLA); *National Organization for Women v. Social Security Administration*, 736 F.2d 727, 738-41 (D.C. Cir. 1984) (Office of Federal Contract Compliance Programs violated plaintiff's statutory and due process rights by failing to provide adequate notice and opportunity to be heard).

In the *Hamdi* case, the Supreme Court stated:

> For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.' These essential constitutional promises may not be eroded.

Hamdi, 542 U.S. at 533 (citations omitted).

When EPA issues a UAO to a PRP such as Land O'Lakes, the PRP is barred from obtaining pre-enforcement judicial review of the UAO by CERCLA § 9613(h). 42 U.S.C. § 9613(h); *General Electric Co. v. U.S. Envtl. Protection Agency*, 610 F.3d 110, 115 (D.C. Cir. 2010) ("*General Electric*"). General Electric challenged the constitutionality of the UAO regime on due process grounds. *General Electric*, 610 F.3d at 113. General Electric argued that the UAO regime imposes a classic and unconstitutional Hobson's choice: because refusing to comply risks severe punishment of $37,500 per day in fines plus treble damages, UAO recipients only real option is to comply before having an opportunity to be heard on the legality and rationality of the UAO. *General Electric*, 610 F.3d at 116; *Ex parte Young*, 209 U.S. 123 (1908) (Judicial review is constitutionally inadequate if it can be obtained only by running the risk of significant civil or criminal liability, and if judicial review cannot otherwise be had while complying); *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012) (held the landowners could bring a civil action under the Administrative Procedure Act to challenge EPA's administrative compliance order despite EPA's denial of a hearing).

In *General Electric,* the Court did ultimately uphold the constitutionality of the UAO regime based in large part on "the extensive procedures CERCLA requires EPA to follow before issuing a UAO, including notice and comment...." *General Electric*, 610 F.3d at 128. The

Court specifically relied on the procedural safeguards under CERCLA that require EPA to provide for the participation of the PRPs in the development of the administrative record. *General Electric*, 610 F.3d at 114. The Court stated: "Specifically, EPA must provide notice to potentially affected persons and the public, a reasonable opportunity to comment and provide information regarding the remedial plan...." *Id.* However, EPA failed to provide these safeguards to Land O'Lakes regarding the Site. Thus, EPA violated Land O'Lakes' due process rights.

XI. CONCLUSION

The intent of Congress when it included § 106(b)(2) in CERCLA was to provide relief in cases just like this one. On its face, CERCLA § 106(b)(2) allows petitioners to recover the reasonable costs incurred in responding to an EPA UAO and other required actions where the petitioners were not liable under CERCLA or where the orders were arbitrary and capricious. Both circumstances exist in this case with regard to Land O'Lakes. Reimbursement should be granted.

Moreover, the UAO in this case, which ordered implementation of the ROD, and/or the CERCLA UAO regime violated CERCLA and Land O'Lakes' constitutional due process rights because: (1) EPA issued the ROD without compliance with the notice, comment and participation requirements for Land O'Lakes, an alleged PRP; and (2) EPA failed to provide a pre-deprivation hearing before a neutral decision-maker. Land O'Lakes should be awarded its reasonable costs, damages and attorney fees for these violations of CERCLA and constitutional due process and an opportunity to supplement the administrative record.

WHEREFORE, upon the basis of Land O'Lakes having complied with the UAO and other EPA required actions and completed the work required thereunder, and upon the above arguments, Land O'Lakes requests the following relief:

1. That Land O'Lakes shall have the right to supplement the record relating to Land O'Lakes' *Petition* based upon:

a. The pending FOIA requests for information relevant to this *Petition* that EPA has failed and refused to completely answer and/or wrongly withheld information; and

b. Initiation and completion of discovery in the Case No. CIV-15-683-R litigation now pending in the United States District Court for the Western District of Oklahoma, which will generate information, documents, testimony, and evidence relevant to Land O'Lakes' *Petition.*

c. Land O'Lakes' *Motion for Additional Time to Retain Substitute Expert Witness and File Supplemental Expert Witness Affidavit, and Suggestions in Support* filed of even date herewith.

2. The entry of an Order:

a. Finding Land O'Lakes not liable under CERCLA for any of the actions required by the UAO and EPA thereunder;

b. Finding that EPA's issuance of the UAO to Land O'Lakes and EPA's actions under the UAO were arbitrary, capricious, and not in accordance with law;

c. Finding that the UAO in this case, which ordered implementation of the ROD, and/or the CERCLA UAO regime violate CERCLA and constitutional due process and requiring EPA, the United States Treasury, or other appropriate United States governmental entity to pay Petitioners' reasonable costs, damages and attorney fees for such violations;

d. Finding that any and all obligations of Land O'Lakes under the UAO are terminated;

e. Requiring EPA, the United States Treasury, or other appropriate United States governmental entity, pursuant to 42 U.S.C. § 9606(b)(2), to reimburse Land O'Lakes for the following:

i. All reasonable costs incurred by Land O'Lakes in connection with the actions required by the UAO and EPA's other required actions thereunder;

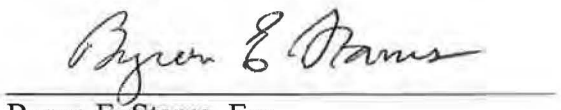
ii. Attorneys' fees, expert fees, and all such costs in connection with the UAO and pursuing this *Petition*, as they never would have been incurred were it not for the EPA's allegations requiring compliance with the UAO and EPA's other required actions; and

iii. Interest on all such amounts in accordance with § 9606(b)(2).

3. Land O'Lakes requests an evidentiary hearing and oral argument.

4. Such other and further relief as the Board is empowered to grant under the facts and circumstances presented above.

Respectfully submitted,



Byron E. Starns, Esq.
Stinson Leonard Street LLP
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Telephone: (612) 335-1516
Telefax: (612) 335-1657
E-mail: byron.starns@stinsonleonard.com

Mark E. Johnson, Esq.
Stinson Leonard Street LLP
1201 Walnut Street, Suite 2900
Kansas City, MO 64106-2150
Telephone: (816) 691-2724
Telefax: (816) 412-1208
E-mail: mark.johnson@stinsonleonard.com

Mark D. Coldiron, Esq.
Stephen L. Jantzen, Esq.
Ryan Whaley Coldiron Jantzen
Peters & Webber PLLC
119 North Robinson, Suite 900
Oklahoma City, OK 73102
Telephone: (405) 239-6040
Telefax: (405) 239-6766
E-mail: mcoldiron@ryanwhaley.com
E-mail: sjantzen@ryanwhaley.com

CERTIFICATE OF SERVICE

Pursuant to Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions, Environmental Appeals Board (February 23, 2012), and agreement with Ms. Eurika Durr, Clerk of the Environmental Appeals Board, the undersigned hereby certifies that one paper original and one paper copy set of the *Petition* and Exhibits 1 through 150, have been hand-delivered to the EAB on this 18th day of August, 2015, to the following:

Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
WJC East, Room 3332
Washington, D.C. 20460-0006

In addition, on this same date, the *Petition*, without the voluminous Exhibits, was filed electronically with the EAB's electronic filing system.

In addition, on this same date, one copy set of the *Petition* and Exhibits 1 through 150, were sent by Federal Express to the following:

George Malone
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Suite 1200
Dallas, TX 75202

Byron E. Starns

Attorney for Petitioner

INDEX TO EXHIBITS TO PETITION

Exhibit No.	Date	Description
1	1/6/2009	EPA's CERCLA 106 Unilateral Administrative Order - titled *Administrative Order for Remedial Design and Remedial Action* (UAO), pursuant to 106(a) CERCLA
2	1/6/2009	EPA's Statement of Work for Remedial Design and Remedial Action at the Hudson Refinery Superfund Site, Cushing, Oklahoma (SOW)
3	11/23/2007	EPA's Record of Decision (ROD)
4	Unsigned	Declaration of D. Keith Baugher
5	8/7/2015	Affidavit of Paul Boehm, Ph.D.
6	8/7/2015	Affidavit of Raymond F. Dovell
7	8/7/2015	Affidavit of William Hathaway
8	8/7/2015	Affidavit of Tarek Saba, Ph.D.
9	8/17/2015	Affidavit of Jay Vandeven
10		Joint Expert Witness Reference Documents
11	8/12/2015	Affidavit of David S. Brady
12	8/5/2015	Affidavit of Forrest S. Fuqua
13	7//29/2015	Affidavit of Mick Gaskins
14	8/7/2015	Affidavit of Jack Lawmaster
15	7/29/2015	Affidavit of Eldon Penn
16	7/29/2015	Affidavit of Louis Al Williams
17	3/25/2015	Affidavit of Mary Mills Wilson (Process to Select Cleanup Contractor and Project Coordinator)
18	3/25/2015	Affidavit of Mary Mills Wilson (History of EPA Communications and Failure to Provide Land O'Lakes Actual Notice of Participation Rights Prior to Selection of Remedy)
19	3/6/2015	Affidavit of Carolyn V. Wolski

Exhibit No.	Date	Description
20	7/30/2015	Affidavit of Glen Wright
21		Joint Fact Witness Exhibits
22		Administrative Record for the UAO as maintained by Land O'Lakes
23	8/13/2015	Affidavit of Melissa Keplinger with attached DVD of 1991 Video of Hudson Refinery Superfund Site
24	2/9/2009	Notice of Intent to Comply, Response to Unilateral Administrative Order, Statement of Sufficient Cause and Other Defenses, Offer of Proof and Petition for Remand to Supplement the Administrative Record; and Appendix
25	6/23/2015	Complaint - LOL v USEPA, WD of OK, CIV-15-863-L
26	2/1/2010	Figure 1 titled Site Location and Topographic Features – Figure 1 to Supplemental Field Investigation Report of same date
27		General Figure - North Refinery
28		General Figure - South Refinery
29	9/11/1985	Brief in Support of Defendant's Motion to Dismiss and/or For Summary Judgment - Case No. 84-2027-A
30		Midland Acquisition Documents - 1943 Transfer to Midland
31	2/1/1977	Limited Warranty Deed from Midland Cooperatives, Inc. to Hudson Refining Company, Inc.
32	2/1/1977	Bill of Sale from Midland Cooperatives, Inc. to Hudson Refining Company, Inc.
33	1/21/1982	Certificate of Merger between LOL and Midland Cooperatives
34	4/26/1977	Minutes of the Refinery Management Staff Meeting
35	8/30/1977	Minutes of the Refining Management Staff Meeting
36	1/27/1978	Minutes of the Refinery Management Staff Meeting
37	6/29/1978	Minutes of the Refinery Management Staff Meeting
38	9/22/1978	Minutes of the Refinery Management Staff Meeting

Exhibit No.	Date	Description
39	12/1/1978	Minutes of the Refinery Management Staff Meeting
40	2/1/1979	Minutes of the Refinery Management Staff Meeting
41	7/26/1979	Minutes of the Refinery Management Staff Meeting
42	1/31/1980	Minutes of the Refinery Management Staff Meeting
43	5/28/1980	Minutes of the Refinery Management Staff Meeting
44	8/27/1980	Minutes of the Refinery Management Staff Meeting
45	12/4/1980	Minutes of the Refinery Management Staff Meeting
46	1/29/1981	Minutes of the Refinery Management Staff Meeting
47	6/25/1981	Minutes of the Refining Management Staff Meeting
48		Hudson Refinery Proposal 1988
49	1/3/1984	Hudson Reorganization Bankruptcy Petition - KS
50	7/16/1990	Unsecured Creditors' Committee's Third Amended Disclosure Statement to Plan of Reorganization - KS Bankruptcy Court
51	8/8/1984	Complaint - *US v Hudson*, CIV-84-2027
52	5/1/1986	Partial Consent Decree - *US v Hudson*, CIV-84-2027, including attached Addendum Work Plan
53	6/23/1987	USEPA Memorandum from Greta Clendenen to Robert Deese stating that after review of files in accordance with CERCLA and NCP, Hudson Oil Refining does not appear to warrant an immediate removal action
54	12/11/1987	Final Consent Decree - *US v Hudson*, CIV-84-2027, including Addendum A Work Plan
55	10/1/1994	Technico Report - Final Soil and Groundwater Testing for the Hudson Oil Refinery
56	10/25/1994	Order for Closure of the Final Consent Decree - 84-2027
57	2/16/1989	Agreement for Sale and Purchase of Assets between Walter M. Kellogg, Trustee in Bankruptcy for Hudson Refining Company, and US Refining and Marketing, Inc.

Exhibit No.	Date	Description
58	3/17/1989	Order Approving Trustee's Application to Sell Refinery in Cushing Oklahoma Free and Clear of Liens and Encumbrances
59	3/7/1989	Objection to Trustee's Application to Sell Refinery Until and Unless Contract is Modified, Case Nos. 84-20002 thru 84-20009
60	8/30/1989	Warranty Deed - Hudson Refining and US Refining
61	8/31/1989	Order Approving Trustee's Sale of Cushing Refinery to US Refining, LP -Case Nos. 84-20002 thru 84-20009
62	10/11/1993	Declaration of Earl Westmoreland
63		Hudson Oil Storage Terminal and Refinery Proposal, Proposal for the purchase and rehabilitation of the Hudson Refinery and Terminal located in Cushing, Oklahoma. Business Plan presented by Robert S. Widner, US Refining & Marketing Company
64	12/20/1990	Verified Complaint, Court of Chancery of the State of Delaware, New Castle County
65	7/10/1989	Memorandum from Spud Westmoreland to Distribution regarding Storage Terminal Estimated Start-up Costs
66	2/15/1995	Objections to Claims filed in California Bankruptcy matter
67	7/30/1990	Memorandum from E.F. Westmoreland to Roy C. Adams regarding May-July Crude Oil Receipts and Deliveries
68	7/19/1993	Memorandum from Bryon Heineman to Ronald Crossland regarding Hudson Refining 3008(h) Corrective Action Oversight Inspection Report
69	10/20/1993	Declaration of Walter C. Kellogg
70	9/28/1995	Letter from Roy F. Weston, Inc. to USEPA with September, 1998 PREscore Package Report to the EPA regarding the Hudson Site
71	10/4/1995	No Further Remedial Action Planned (NFRAP) - USEPA Report
72	1/10/1996	EPA Letter to ODEQ transmitting Superfund Site Strategy Recommendation
73	7/1/1996	Declaration of Alfred Spolar, Jr.

Exhibit No.	Date	Description
74	9/11/1996	Order Authorizing Debtor to Enter Into Agreement Outside the Ordinary Course of Business
75	3/27/1996	Citizen Complaint to ODEQ
76	4/26/1996	Citizen Complaint to ODEQ
77	6/5/1996	Citizen Complaint to ODEQ
78	6/24/1996	Citizen Complaint to ODEQ
79	6/25/1996	Citizen Complaint to ODEQ
80	10/1/1996	Special Warranty Deed from US Refining/Hudson RAM to Quantum Realty; and 1998-09-01 Bill of Sale from Quantum to Balboa
81	10/7/1996	Agreement for Salvage/Environmental Cleanup Cushing Refinery Project between Quantum Realty Company, LLC and Western Environmental of Oklahoma LLC
82	2/2/1998	POLREPs, POLREP Nos. 1 (Response), 03, 04, 05, 06, 07, 08, 09.
83	2/3/1998	Petition styled Western Environmental v Quantum Realty, Case No. CJ-98-62, Payne County
84	3/19/1998	Answer by Quantum Realty to Petition of Western Environmental in Case No. CJ-98-62
85	9/11/1998	USEPA Unilateral Order for Access and Noninterference to Quantum Realty Company, L.C., CERCLA Docket No. 6-13-98
86	3/5/1999	Quantum 104(e) Response to EPA
87	1/18/2001	EPA Special Notice Letter for Remedial Investigation / Feasibility Study (RI/FS) to Land O'Lakes - Demand Letter to LOL
88	3/26/2001	LOL Response to Special Notice Letter, with attached Coons' Report Regarding Photograph
89		Exemplar County Treasurer's Deeds

Exhibit No.	Date	Description
90	6/22/2006	Public Health Assessment for the Hudson Refinery NPL Site by the ATSDR (Agency for Toxic Substances and Disease Registry)
91	11/19/2010	**USEPA's Explanation of Significant Differences** for Hudson with transmittal Email from Benham to USEPA and ODEQ
92	2/19/2008	EPA Special Notice Letter of Potential Liability and Draft Consent Decree to Land O'Lakes - Demand Letter to LOL with Special Notice Letter
93	5/28/2008	LOL Response to Second Special Notice Letter
94	1/9/2009	LOL FOIA Request to USEPA related to RCRA Issues
95	1/9/2009	LOL FOIA Request to USEPA Related to NPDES & Stormwater Issues at the Hudson Refinery Superfund Site
96	1/9/2009	LOL FOIA Request to USEPA generally related to Potentially Responsible Parties (PRPs)
97	10/28/2011	EPA FOIA Response
98	3/8/2010	EPA Final FOIA Response asserting exemptions and attaching Document List
99	4/6/2010	LOL letter to USEPA - Administrative Appeal of EPA's Response to FOIA Request; with attachments, which include the 01-09-2009 FOIA request; and 03-08-2010 EPA Response; and Index of Withheld Documents showing Categories of Identified Deficiencies for EPA's Denial Log
100	9/30/2011	EPA FOIA Appeal Response
101		Access Agreements to LOL from Landowners: Bryant, Haven Ministries, Roe, Clemons, Anderson, Martinez, Lozier; City of Cushing, OK Brownfields, BNSF and Cubbage
102	3/18/2009	USEPA, Charles Faultry, Correspondence to LOL, Byron Starns, in response to NOI, Response to UAO, Statement of Sufficient Cause and Other Defenses, Offer of Proof and Petition for Remand to Supplement the Administrative Record, and denying LOL petition for remand to supplement the ROD's administrative record
103	7/23/2008	Letter from Peter S. Janzen to Samuel Coleman in response to EPA demand for Remedy Specified in ROD

Exhibit No.	Date	Description
104	1/7/2011	LOL Response to EPA regarding Explanation of Significant Differences dated November 19, 2010
105	11/23/2010	Preliminary Close Out Report - PCOR - for the Hudson Refinery Superfund Site
106	11/19/2013	EnviroClean Letter to USEPA Transmitting Third Revised Operation and Maintenance Plan, including the Second Revised Surface Water and Groundwater Monitoring Plan and the Site Security Plan, also providing notice that the Remedial Action is complete and requesting a pre-certification inspection.
107	1/14/2014	Second Pre-Final - Final Inspection Report for Site Inspection for December 19, 2013 Inspection, with attached Pre-Final Inspection Sign-in Sheet and EPA Pre-Final Final Inspection Record Write-up
108	6/27/2014	USEPA Letter to LOL - comments on the draft Data Evaluation Report Rev. 3 and draft Remedial Action Report, disapproving both submissions.
109	6/30/2014	Email from Byron Starns to Laura Stankosky Requesting Extension of Time to Re-Submit the Remedial Action Report and Data Evaluation Report
110	7/2/2014	Email from Laura Stankosky to Byron Starns granting Extension to August 8, 2014 for submission of revised Remedial Action Report and revised Data Evaluation Report
111	8/7/2014	Letter from Byron Starns to Laura Stankosky responding to comments regarding the draft Remedial Action Report and Draft Data Evaluation Report, and transmitting revised RAR and DER.
112	8/27/2014	LOL Letter to USEPA with attached Addendum to Terracon IQAT Report dated 08-19-2014
113	9/4/2014	USEPA, Stankosky, letter to LOL, Knudson with Terracon, Acknowledging Receipt of IQAT dated March 19, 2014.
114	9/18/2014	USEPA Notice of Deficiency Letter from Stankosky to LOL, Byron Starns, regarding the Revised Draft Data Evaluation Report, and the Revised Draft Remedial Action Report
115	9/29/2014	Letter from Byron Starns to Laura Stankosky responding to EPA correspondence of September 18, 2014, and submitting revised RAR and DER

Exhibit No.	Date	Description
116	11/18/2014	Email transmittal and Letter from USEPA to LOL, Starns, stating EPA approval with modifications of the September 29, 2014 RAR and DER.
117	12/4/2014	LOL Response to EPA regarding November 18, 2014 Comments, and transmitting letter for DER and RA Reports
118	6/19/2015	EPA Letter to LOL stating RAR approvable and no additional modifications required
119	6/25/2015	LOL Letter to EPA, John C. Meyer, in response to EPA's June 19, 2015 correspondence
120	6/23/2015	EPA Letter with Demand for Reimbursement of Costs Expended
121	6/25/2015	LOL Letter to EPA requesting itemization of costs
122	7/2/2015	EPA Email Response with Cost Itemization
123	7/15/2015	EPA Letter stating July 2, 2015 is date of LOL receipt of EPA Accounting Report
124	7/22/2015	Email chain regarding wire transfer for EPA oversight costs
125	7/22/2015	Letter from LOL, Starns, to USEPA, Shade and Malone, in response to EPA's June 23, 2015 Demand for Reimbursement
126	8/15/1985	Second Amended Complaint - *US v Hudson*, CIV-84-2027
127	5/1/1990	Internal EPA Memo
128	2/22/1995	Hudson Refining Activity Log
129		Projected Operational Lifetime of Facility
130	3/8/2010	Letter from Stephen L. Jantzen to Stankosky and Malone - notice of sampling activity
131	3/17/2010	Email from Malone to Stephen L. Jantzen regarding forensic sampling
132	7/30/1975	Williams Bros. Waste Control, Inc. Environmental Management Program, WBWC 3133
133	6/10/1977	Memorandum from F. C. Hume & Co. to W. Dan Maclean regarding AFE #115 - EPA Compliance Program - Phase 3 Status Report - Request for Action

Exhibit No.	Date	Description
134	10/3/1977	Letter from Dan Maclean, Hudson Refinery, to Dr. S. L. Burks, with attached 09-08-1977 Memo from Gaskins to Fuqua regarding permitting requirements for land farming operations
135	6/2/1976	Deposition of Louis Al Williams, pages 10-12 and Exhibit 1 only
136	2/23/1978	Notes from Refinery Staff Meeting
137	5/22/1978	Weekly Report on Refinery Maintenance Operations
138	7/17/1979	AFE relating to Cleaning No. 1 Pond
139	8/1/1979	August 1979, Rev. 0, F. C. Hume & Co. Ltd. *Specifications for Cleaning No. 1 Basin*
140	9/27/1979	Notes from Refinery Staff Meeting
141	12/4/1979	AFE relating to Cleaning No. 1 Pond
142	7/30/1981	Minutes of the Refining Management Staff Meeting
143	6/30/1978	Memorandum of Shipping for petroleum coke
144	8/28/2009	License for Environmental Access between BNSF Railway Company and Land O'Lakes, Inc.
145	4/21/2010	Stillwater News Press Article "Hudson Refinery Wastewater Worries Cushing Area Residents"
146	8/7/1978	Weekly Report on Refinery Maintenance Operations
147	9/11/1978	Weekly Report on Refinery Maintenance Operations
148	9/18/1978	Weekly Report on Refinery Maintenance Operations
149	10/30/1978	Weekly Report on Refinery Maintenance Operations
150	11/6/1978	Weekly Report on Refinery Maintenance Operations