

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

IN RE:

Hudson Refinery  
Superfund Site  
Cushing, Oklahoma,

Land O' Lakes, Inc.,

Petitioner

Petition for Reimbursement Under  
Section 106(b)(2) of the Comprehensive  
Environmental Response, Compensation,  
and Liability Act of 1980, as amended  
42 U.S.C § 9606(b)(2)

Petition No. 15-01  
CERCLA 106(b)

EPA Region 6 Docket No.  
CERCLA-06-16-08

**RESPONDENT'S NOTICE OF DISTRICT COURT FILINGS**

**I. Notice**

The Respondent, the United States Environmental Protection Agency, Region 6 ("EPA" or the "Region"), by and through its Office of Regional Counsel, hereby provides the Environmental Appeals Board ("Board") with notice of filings by the Respondent in *Land O' Lakes v. United States*, No. 5:15-cv-0683-R (Western Dist. Okla. filed June 23, 2015).

**II. Respondent's Filings**


In accordance with the Board's September 18, 2015, Order, the following document was filed on behalf of the United States in the Western District Court litigation:

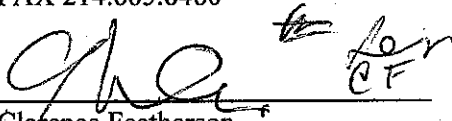
Attachment 1 – Opposition of Defendant United States to Land O' Lakes Motion for Leave to File Sur-Reply.

Dated this 4th day of February 2016.

Respectfully submitted:

By:

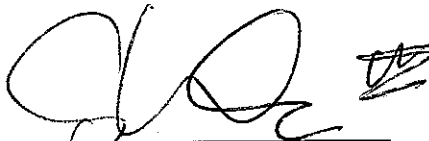
  
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th of February 2016, I served a true and correct copy of the above Notice by mailing a copy via electronic or first class United States Mail to:

Byron E. Starns, Esq.  
Stinson Leonard Street LLP  
150 South Fifth Street, Suite 2300  
Minneapolis, MN 55402

A handwritten signature in black ink, appearing to read "George Malone, III", with a horizontal line underneath it.

George Malone, III





113(h) does not apply once “cleanup activities have been completed,” as LOL contends is the case at the Site. Land O’Lakes’ Response to Motion to Dismiss (ECF 28) (“Response”), 7-11. In reply on this point, the United States countered that the “cleanup” has not been completed at the Site because—as Land O’Lakes itself alleges in its Complaint—groundwater remediation standards have not yet been met, and operation and maintenance, including groundwater monitoring, is ongoing at the Site. *See* United States’ Reply (ECF 33) at 2.

Land O’Lakes attempts to justify its attempt to file a sur-reply by pointing to a supposed “regulatory distinction” between completion of the remedial action and operation and maintenance of the groundwater monitoring system. Motion for Leave (ECF 34-1) at 1. The fact remains that, in its Response brief, Land O’Lakes argued that “cleanup activities” have been completed. “Cleanup,” however, is not a defined term under CERCLA, and Land O’Lakes never specified which activities it was referring to. *See* Response, at 9-11.<sup>1</sup> Land O’Lakes is not entitled to use an improper sur-reply to clarify the ambiguity that Land O’Lakes itself created in its Response.

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<sup>1</sup> The activities that, in common parlance, constitute a cleanup under CERCLA are broadly defined under the terms “remove” and “removal” under Sections 101(23) and (25), and “‘remedy’ or ‘remedial action’” under Section 101(24) and (25). *See* 42 U.S.C. § 9601(23), (24), and (25). The definition of “remedial action” includes “any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.” *Id.* at § 9601(24). Moreover, Section 121, which addresses “Cleanup Standards,” indicates that long-term operation and maintenance is included as a part of a “remedial action” at a site. *See* 42 U.S.C. § 9621(b).

Even if “cleanup” at the Site was complete, as Land O’Lakes argues in its proposed Sur-Reply, it does not affect EPA’s substantive argument in its Motion to Dismiss. That is so because enforcement activity remains ongoing and EPA has not pursued a cost recovery action

### CONCLUSION

Land O'Lakes has failed to demonstrate that the United States raised any issues in its Reply brief that Land O'Lakes lacked a previous opportunity to address. As a result, Land O'Lakes Motion for Leave to File a Sur-Reply should be denied.

FOR THE UNITED STATES

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/s/ John E. Sullivan

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under Section 107 of CERCLA. Thus, Land O'Lakes' claim remains barred under Section 113(h). See Motion to Dismiss at 3-4, 7-8, 11-15.

**CERTIFICATE OF SERVICE**

I hereby certify that true and accurate copies of the foregoing Reply in Support of Defendant's Motion to Dismiss were served by electronic filing through PACER upon all counsel of record on February 4, 2016.

/s/ John E. Sullivan  
John E. Sullivan