

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

IN RE:)	
)	
Hudson Refinery)	Petition No. 15-01
Superfund Site)	CERCLA 106(b)
Cushing, Oklahoma,)	
)	
)	EPA Region 6 Docket No.
)	CERCLA-06-16-08
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))	
)	

MOTION OF RESPONDENT TO EXTEND TIME AND STAY PROCEEDINGS

I. Introduction and Background

The Respondent, the United States Environmental Protection Agency, Region 6 ("EPA" or the "Region"), by and through its Office of Regional Counsel, hereby moves the Environmental Appeals Board ("Board") to grant an extension of time to file responsive pleadings and stay proceedings regarding the Petition for Reimbursement of Funds ("Petition") filed on August 18, 2015, by Land O' Lakes, Inc. ("Petitioner"). The Petition was filed in connection with the CERCLA Section 106(a) Administrative Order No. CERCLA-06-16-08 ("Administrative Order") issued to the Petitioner by EPA Region 6. The Administrative Order was issued on January 6, 2009, and required the Petitioner to conduct a remedial action to address the release of hazardous substances into the environment, due to the disposal of oil refinery wastes at the Hudson Oil Refinery Superfund Site ("Site"). On September 15, 2015, the Respondent and the Petitioner filed an Agreed Motion to Stay Proceedings and an Extension of Time. On October 30, 2015, the Board issued an Order Granting in Part and Denying in Part Unopposed Motion for Stay. This Order granted a stay of the CERCLA 106(b) proceedings until January 27, 2016, and placed other deadlines in abeyance until that time as well.

Based upon the Board's Order, Federal Court filings and settlement efforts described below, the Respondent respectfully requests an Extension of Time to submit a response on the merits for the CERCLA 106(b) Petition and a Stay of the Petition proceedings until Federal District Court proceedings and settlement efforts have been exhausted.

II. Settlement Basis for the Extension of Time and Stay of Proceedings

The information provided herein supports the requested extension of time and stay of proceedings. On June 23, 2015, Land O' Lakes, Inc. ("Petitioner") filed a complaint, and a notice of intent to sue the United States both asserting and seeking to absolve itself of any liability for costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607. The complaint filed by the Petitioner in the District Court sought a declaratory judgment under 28 U.S.C. §§ 2201, 2202, and 42 U.S.C. § 9613(g)(2), and contends that the Petitioner is not liable for response costs incurred under CERCLA. *See Land O' Lakes v. United States*, No. 5:15-cv-0683-R (W. D. Okla. filed June 23, 2015). Recent events unfolding in the U.S. District Court for the Western District of Oklahoma ("District Court") include an October 22, 2015, Motion to Dismiss filed by the United States in response to the Petitioner's First Amended Complaint filed on September 1, 2015. The Petitioner filed a Response to the Motion to Dismiss on December 18, 2015, and the parties agreed to an extension of time requiring submission of the United States' Reply by January 22, 2016. On December 21, 2015, the Petitioner informed the District Court that it reached an agreement with the United States to take the deposition of Forrest Fuqua and requested leave of Court. The deposition is tentatively set for mid-February 2016.

The Respondent and the Petitioner have also been working closely with the Department of Justice to develop and agree on a possible settlement structure for this case. On December 16, 2015, counsel for the Petitioner, the Respondent, and the Department of Justice discussed a settlement structure. Some of the items discussed include: a) a global settlement of all issues (i.e., EAB reimbursement petition and EPA cost recovery claims, which have been referred to the Department of Justice); b) the use of a neutral mediator; c) timing of settlement efforts; d) venue of any mediation conducted; e) costs; and f) a tolling agreement. The parties agreed to continue discussion of the items identified above as part of an effort to resolve this matter amicably.

Based upon the above, including the September 15, 2015, Agreed Motion to Stay Proceedings and an Extension of Time, the Respondent and the Petitioner agreed that the CERCLA 106(b) Petition should be stayed in its entirety, including the Respondent's Response to the Petition, until either the District Court has entered a final judgment resolving the litigation, or a final settlement agreement is reached. The Respondent believes it is also appropriate for the Board to grant an appropriate extension of time for the filing a response on the merits regarding the Petition that is consistent with the stay of proceedings request. The extension of time and stay of proceedings will alleviate the duplication of effort regarding matters before both the Board and the District Court, and it will promote the advancement of the case through either federal court litigation or settlement of the disputed issues.

III. An Extension of the Stay is Appropriate because the United States District Court is a Better Venue for Determining Liability

On June 23, 2015, EPA demanded that the Petitioner reimburse EPA's Site response costs due to the Petitioner's liability for those response costs under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). EPA has referred the potential cost recovery case to the Department of Justice. The Petitioner's complaint (at pp. 20, 28-30) and first amended complaint (at pp. 5, 20-21, 23, 28-30) contends that it is not liable for CERCLA response costs. In the matter before the Board, the Petitioner claims that it is entitled to reimbursement under Section 106(b)(2)(C) of CERCLA, 42 U.S.C. § 9606(b)(2)(C), because they are not liable for response costs under Section 107(a) of CERCLA. *See Petition* at pp. 65-96. Thus, the same issue (i.e., liability for response costs under CERCLA between the same parties) that has been presented to the Board for consideration will be heard by the District Court. Assuming *arguendo*, if the Board were

to decide that the Petitioner is liable for response costs and/or penalties at the Site, it's probable the Petitioner would seek trial de novo on the issue of liability in District Court. Consequently, EPA would be compelled to re-litigate liability the Petitioner's liability in the District Court. *In re Titan Tire Corporation & Dico, Inc.*, CERCLA 106(b) Pet. No. 10-01, at pp. 2 and 4 (EAB Dec. 10, 2010). In addition to judicial economy, the District Court because of its more expansive discovery provided for under the Federal Rules of Civil Procedure, is the more appropriate venue for determining Petitioner's liability for CERCLA response costs. The District Court, with more expansive evidence proceedings under the Federal Rules of Evidence, is also the better venue to address the admissibility of opinions presented by the Petitioner's witnesses offered as experts, the qualifications of such witnesses offered, and the subject matter of the testimony offered. *See Petition at Exhibits 4, 5, 6, 7, 8, and 9; and Petitioner's Motion to Substitute an Expert Witness and Submit an Affidavit*. It is also the only venue to determine the assessment of penalties under Section 106 due to non-compliance with the CERCLA Section 106(a) Administrative Order, No. CERCLA-06-16-08, issued to the Petitioner. As such, it is appropriate for the Board to both extend the current stay of this CERCLA 106(b) proceeding in its entirety, and continue to hold other previously ordered deadlines in abeyance (including the filing of a response on the merits) until the outcome of the federal District Court litigation has been concluded via settlement, or final judicial judgment. It is also appropriate for the Board to refrain from ruling on matters concerning the Petitioner's potential liability for noncompliance. Ruling on such matters may complicate the District Court's consideration of EPA's non-waiver of its right to seek, and secure penalties for non-compliance with the CERCLA 106(a) Order issued to the Petitioner at the Site.

IV. Absent an Extension of the Stay, this Petition Proceeding Will Result in an Unnecessary Expenditure of Resources.

The District Court case is currently considering CERCLA liability, an issue also squarely before the Board. This unnecessary duplication of effort may be avoided by the Board's granting an extension of the stay for this proceeding until either the District Court makes a finding on the Petitioner's CERCLA liability for response costs or the case is settled. The resources expended to hear the competing claims of liability in more than one forum will only result in an unnecessary and unproductive duplication of effort and squandering of resources, absent a stay extension by the Board. The Board lacks authority under CERCLA Section 113(b) to grant EPA Region 6's CERCLA Section 107(a) liability and cost recovery claim. *In re Titan Tire Corporation & Dico, Inc.*, CERCLA 106(b) Pet. No. 10-01, at pp. 2 and 4 (EAB Dec. 10, 2010). The Board also lacks the authority to grant EPA's response costs under CERCLA Section 107 (a) for the response costs identified in the Petitioner's complaint (at pp. 20, 29), and first amended complaint (at pp. 5, 20-21, 23, 28-30) before the District Court. Thus, even if the Board agrees with the EPA Region 6 that the Petitioner is liable, the United States would be forced to litigate the same liability claim in District Court to recover CERCLA 107(a) costs. *In re Titan Tire Corporation & Dico, Inc.*, CERCLA 106(b) Pet. No. 10-01, at pp. 2 and 4 (EAB Dec. 10, 2010).

The facts in this case conclusively establish that the relevant CERCLA liability issues are subject to adjudication by the same parties in the same time-frame, but in different forums. As such, EPA Region 6 contends that principles of judicial economy favor extending the stay of this case in its entirety (i.e., including responses on the merits). *In re Titan Tire Corporation & Dico, Inc.*, CERCLA 106(b) Pet. No. 10-01, at p. 3 (EAB Dec. 10, 2010). EPA respectfully believes it is appropriate for the Board to allow the District Court case proceed. Such an approach is contemplated by EAB Guidelines. *In re Titan Tire Corporation & Dico, Inc.*, CERCLA 106(b) Pet. No. 10-01, at p. 5 (EAB Dec. 10, 2010). Accordingly, EPA respectfully requests that the Board extend the stay for the CERCLA 106(b) Petition until a final

judgment concerning Petitioner's liability has either been issued by the District Court, or settled by the parties.

V. Conclusion and Proposal for an EAB Order

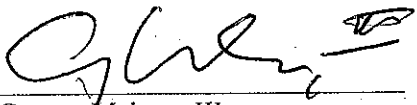
For the reasons stated above, the Respondent respectfully requests that the Board grant the Respondent's motion to extend time and stay proceedings (i.e., including any response to the Petition on the merits of the case) until the District Court case has been resolved either through litigation, or a final settlement agreement. The Respondent also proposes that any Order issued by the EAB include neither a date-specific deadline for the Respondent's submission of a Response on the Merits to the CERCLA 106(b) Petition, nor any ruling that may limit the Respondent's ability to assert non-compliance with the CERCLA 106(a) Order in District Court.

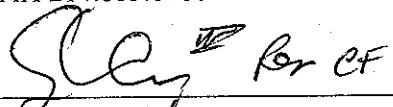
On December 16, 2015, and January 14, 2016, legal counsel for the Respondent conferred with legal counsel for the Petitioner. The Petitioner and the Respondent agree to the description of the status of settlement negotiations and the status of the district court case as presented in the January 2016 Joint Status Report.

Dated this 15th day of January 2016.

Respectfully submitted:

By:


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CERTIFICATE OF SERVICE

I hereby certify that on the 15th of January 2016, I served a true and correct copy of the above Motion to Extend Time by mailing a copy via first class United States Mail to:

Byron E. Starns, Esq.
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A handwritten signature in black ink, appearing to read "George Malone, III", written over a horizontal line.

George Malone, III

