

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

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In re:)	
Land O'Lakes, Inc. (Hudson Oil Refinery Superfund Site))	CERCLA § 106(b) Petition No. 15-01
)	
Docket No. 06-16-08)	
)	

JOINT STATUS REPORT

Pursuant to the Environmental Appeals Board's ("Board") April 6, 2017 Third Order Continuing the Stay of Proceedings and Requiring Additional Status Reports in this matter, the parties, by and through their counsel, respectfully provide this status report.

I. THE STATUS OF DOJ'S COST RECOVERY ACTION (THE "COST RECOVERY CASE")

On February 22, 2016, the United States filed an action in the United States District Court for the Western District of Oklahoma, entitled *United States of America v. Land O'Lakes, Inc., and Cushing, Oklahoma Brownfields, LLC*, Case No. CIV-16-0170-R (Judge David L. Russell). Paragraph 2 of the Complaint states that it is a civil cost recovery action brought under CERCLA.

Since the last Joint Status Report, the Court in the Cost Recovery Case has modified the schedule governing the litigation. Specifically, on September 12, 2017, the Court issued its Order Granting Joint Motion to Enter First Amended Case Management Scheduling Order, which extended the deadline for the close of fact discovery from October 31, 2017 to April 30, 2018 and adjusted subsequent deadlines to run through June 14, 2019. A copy of the September 12, 2017 Order is attached as Exhibit 1. A copy of the Joint Motion to Enter First Amended Case Management Scheduling Order is attached as Exhibit 2.

II. THE STATUS OF SETTLEMENT NEGOTIATIONS

Since the last status report to the Board, counsel for the parties have had no additional discussions about the potential structure and scope of settlement discussions.

III. ANY OTHER RELEVANT INFORMATION

The following represents Land O'Lakes' position regarding its intent to seek leave to amend its CERCLA 106(b) petition. As explained in the previous five status reports to the Board, Land O'Lakes intends to file a motion for leave to file a First Amended Petition. Land O' Lakes is evaluating its planned motion for leave to file a First Amended Petition in light of the Court's February 22, 2017 Order striking and dismissing its affirmative defenses and counterclaims alleging that certain Bankruptcy Court Orders bar the issuance of the UAO, and any claims by the EPA related to or arising out of the issuance of the UAO, but also in light of documents and things produced by the United States in the Cost Recovery Case, but perhaps previously withheld from Land O'Lakes under FOIA.

The following represents EPA's Position on this matter. The CERCLA 106(b) proceeding was stayed in its entirety by the Board's Second Order Extending the Stay and Proceedings on March 15, 2016, and Third Order Continuing Stay of Proceedings on April 6, 2017. The Region believes there is no basis for the EAB to take an unusual step of ordering a substantial filing during the stay. Despite the above, the Region reserves the right to contest any such motion filed by Land O'Lakes, and any actions taken to enlarge or amend the original CERCLA 106(b) petition claims and arguments. In addition, EPA Region 6 reserves the right to contest all matters in this action including any factual and legal arguments that concern satisfaction of CERCLA 106(b) prerequisites (e.g., timeliness of advancing claims and supporting evidence) consistent with the EAB's February 3, 2016, Stay Order. Land O' Lakes previously requested and was granted access by EPA Region 6 counsel to the EPA Region 6 document depository in 2008 and 2010. On those occasions, Land O' Lakes requested and

received copies of a more limited set of documents than those requested after the 2017 document inspection at the EPA Region 6 depository.

Land O' Lakes' position is that EPA has waived and forfeited any challenges to CERCLA 106(b) prerequisites in this matter, and that the EAB order of February 3, 2016 reserved determination of: (1) whether Land O' Lakes established the prerequisites for its Section 106 claim; and (2) whether EPA had waived any challenges to the prerequisites.

With regard to the status of Land O' Lakes' pending FOIA Appeal Number HQ-APP-00098-10, the previous status report is updated as follows: The United States believes and states it: 1) has produced all of the documents initially withheld under 5 U.S.C. §§ 552(b) (4) and (6); and 2) has produced, or withheld as privileged/protected, all of the documents initially withheld under 5 U.S.C. §§ 552(b) (5) and (7). The United States provided Land O'Lakes with privilege logs on May 5, 2017 (55 Entries) and on September 7, 2017 (249 Entries) in accordance with the Cost Recovery Case discovery order. Land O' Lakes has not completed its review of the document productions and privilege logs of the United States to identify the previously withheld FOIA documents that were either produced or listed on the United States' privilege logs. Land O' Lakes reserves all rights with regard to the completeness of the production and any privilege claims. Land O' Lakes' FOIA appeal is currently assigned to an attorney in the Office of General Counsel, and Land O' Lakes intends to continue to pursue that appeal.

Although to date the parties have been diligent in discovery and produced a combined total of 1.5 million pages of documents, the document production phase of discovery is not completed. The United States anticipates completing its document productions and privilege logs in September 2017, with only productions of straggling documents later. Land O' Lakes anticipates making additional rolling document productions and producing additional privilege logs in the months of September and October 2017. With regard to depositions, the parties are discussing the scheduling of six fact

witness depositions (three (3) former refinery employees and three (3) contractors for Land O' Lakes) identified by the United States.

Respectfully submitted,

/s/ George Malone

Clarence Featherson
Office of Enforcement and
Compliance Assurance
U.S. EPA (2272A)
1200 Pennsylvania Avenue NW
Washington, DC 20460
Telephone: (202) 564-4234
Telefax: (202) 501-0269
E-mail: featherson.clarence@epa.gov

Lee R. Tyner
Office of General Counsel
U.S. EPA (2366A)
1200 Pennsylvania Avenue NW
Washington, DC 20460
Telephone: (202) 564-5524
Telefax: (202) 564-3711
E-mail: tyner.lee@epa.gov

George Malone, III
Assistant Regional Counsel
U.S. EPA, Region 6 (6RC-S)
1445 Ross Avenue, Suite 1200
Dallas, TX 75202
Telephone: (214) 665-8030
Telefax: (214) 665-6460
E-mail: Malone.george@epa.gov

/s/ Stephen L. Jantzen

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

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@stinson.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 27, 2017, service of the Joint Status Report was made by electronic mail and U.S. Mail upon 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

Clarence Featherson
Office of Enforcement and
Compliance Assurance
U.S. EPA (2272A)
1200 Pennsylvania Avenue NW
Washington, DC 20460
Telephone: (202) 564-4234
Telefax: (202) 501-0269

George Malone, III
Assistant Regional Counsel
U.S. EPA, Region 6 (6RC-S)
1445 Ross Avenue, Suite 1200
Dallas, TX 75202
Telephone: (214) 665-8030
Telefax: (214) 665-6460

Lee R. Tyner
Office of General Counsel
U.S. EPA (2366A)
1200 Pennsylvania Avenue NW
Washington, DC 20460
Telephone: (202) 564-5524
Telefax: (202) 564-3711

Stephen L. Jantzen
Stephen L. Jantzen