

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

LAND O' LAKES, INC.)	
)	
Plaintiff,)	Case No. 5:15-cv-0683-R
)	
vs.)	JUDGE DAVID L. RUSSELL
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
)	

**MOTION FOR LEAVE TO FILE SURREPLY
TO NEW ARGUMENT RAISED IN DEFENDANT'S REPLY IN
SUPPORT OF ITS MOTION TO DISMISS**

Pursuant to LCvR7.1(i), Plaintiff Land O' Lakes, Inc. hereby moves for leave to file the attached surreply (*See* Ex. 1) to Defendant's Motion to Dismiss to address one new argument raised in Defendant's Reply in Support of Defendant United States' Motion to dismiss filed January 21, 2016 (Doc. 33).

The grounds for this motion are: (1) the Defendant's Reply raises a new argument related to the completion of Remedial Action for the site to which Plaintiff has had no opportunity to respond; and (2) the Surreply will aid the Court in understanding the facts pleaded, and in particular, the regulatory distinction between: (1) operation and maintenance of the groundwater monitoring system over decades to achieve specific remedial action objectives for groundwater; and (2) remedial action completion.

A proposed Order is attached, and will be submitted according to local rules.

Respectfully submitted,

/s/ Mark D. Coldiron

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Attorneys for Plaintiff Land O'Lakes, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2016, a true and accurate copy of the foregoing was served by electronic filing through PACER upon all counsel of record.

/s/ Mark D. Coldiron

MARK D. COLDIRON

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

_____)	
LAND O' LAKES, INC.)	
)	
Plaintiff,)	Case No. 5:15-cv-0683-R
)	
vs.)	JUDGE DAVID L. RUSSELL
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

ORDER

Upon consideration of Plaintiff's Motion for Leave to File Surreply to Defendant's Reply In Support of Its Motion to Dismiss, it is hereby

ORDERED that Plaintiff's Motion for Leave to File Surreply to Defendant's Reply In Support of Its Motion to Dismiss is GRANTED; and it is further

ORDERED that Plaintiff's Surreply be filed and served on or before _____, 2016.

IT IS SO ORDERED this ___ day of _____, 2016.

Dated: _____

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

LAND O’LAKES, INC.)	
)	
Plaintiff,)	Case No. 5:15-cv-0683-R
)	
vs.)	JUDGE DAVID L. RUSSELL
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
)	

**[PROPOSED] PLAINTIFF'S SURREPLY TO DEFENDANT'S
MOTION TO DISMISS**

INTRODUCTION

This Surreply responds to one new argument raised in the Reply in Support of Defendant United States' Motion to Dismiss (Doc. 33) ("the Reply") relating to the completion of the remedial action at the Site that is the subject of this action.

At pages 2 and 4, the Reply asserts, incorrectly, that paragraph 53 of the First Amended Complaint "admits" that the cleanup work at the Site is *not* complete because groundwater cleanup standards have not been met. This is an inappropriate attempt to introduce a factual dispute to support a claim that CERCLA Section 113(h) can be applied to bar this case. This position -- that Land O’Lakes must wait decades before the “cleanup work” is complete -- is both misleading and wrong.

The argument that the remedial action is not complete is misleading because it overlooks the regulatory distinction between: (1) operation and maintenance (“O&M”) of the groundwater monitoring system over decades to achieve specific remedial action

objectives for groundwater; and (2) remedial action completion. As pled by Land O'Lakes, and as explained below, there is no unfinished remedial action for the Site. The long-term groundwater monitoring system is part of the completed remedial action, and EPA agrees that O&M activity and achievement of performance standards occur after remedial action completion. Land O'Lakes is not challenging the completed remedy as the government maintains since it has been fully performed.

I. THE FIRST AMENDED COMPLAINT PLEADS REMEDIAL ACTION COMPLETION AND CANNOT BE CONTESTED FOR THIS MOTION

First, the Court must accept the facts in Land O'Lakes' First Amended Complaint as true for purposes of the Motion to Dismiss. The First Amended Complaint clearly and expressly pleaded that Land O'Lakes has completed the required remedial action at the Site. (*See* First Am. Compl. ¶¶ 4, 49, 52 and 53, ECF No 22 (Sept. 1, 2015).) Under the guise of characterizing paragraph 53 as an admission, the United States is attempting to contest pleaded facts, which is not allowed in resolving a motion to dismiss.

II. THE REMEDIAL ACTION IS COMPLETED: O&M TO ACHIEVE PERFORMANCE STANDARDS OCCURS AFTER REMEDIAL ACTION COMPLETION

Second, this Reply argument is misleading because it is contrary to the Unilateral Administrative Order ("UAO")¹ ordering the remedial action at the Site and EPA's guidance titled *Close Out Procedures for National Priorities List Sites*, OSWER 8320.2-22 May 2011,² both of which differentiate between O&M activities like groundwater

¹ Excerpts from EPA's UAO for Remedial Design and Remedial Action (Jan. 5, 2009) are attached hereto as Exhibit A.

² Excerpts from OSWER Directive 9320.2-22, *Close Out Procedures for National Priorities List Sites* (May 2011) are attached hereto as Exhibit B.

monitoring, which can continue after remedial action completion, and the construction and completion of a remedial action.

This distinction between a completed remedial action and long-term O&M of systems installed to achieve performance standards such as groundwater cleanup standards makes regulatory sense because it may take decades after completion of remedial action construction to demonstrate that subsequent operation and maintenance activities achieve all required performance standards. (As explained by EPA's First Five-Year Review Report referenced below for this Site,³ it is estimated to take 30 years to achieve groundwater performance standards at the single non-complying well by monitored natural attenuation.)

The UAO differentiates between remedial action and O&M activities such as groundwater monitoring. Paragraph 51 of the UAO defines "Operations and Maintenance," "Remedial Action," and "Work" as follows:

f. "Operations and Maintenance" or "O&M" shall mean all activities required under the Operation and Maintenance Plan developed by the Respondent pursuant to Section IX.B. of this Order, and Section F. 7 of the Statement of Work, and approved by EPA.⁴

* * *

j. **"Remedial Action" or "RA" shall mean those activities, except for Operations and Maintenance,** to be undertaken by the Respondent to implement the final plans and specifications submitted by the Respondent pursuant to the Remedial Design Work Plan approved by EPA, including any additional activities required under Sections X, XI, XII, XIII and XIV of this Order.

³ Excerpts from EPA's First Five-Year Review Report are attached hereto as Exhibit C.

⁴ As pled by Land O'Lakes in paragraph 53 of the First Amended Complaint, groundwater monitoring at the Site is on-going pursuant to an EPA-approved O&M plan.

* * *

r. **"Work" shall mean all activities the Respondent is required to perform under this Order, including Remedial Design, Remedial Action, Operation and Maintenance,** and any activities required to be undertaken pursuant to Sections VII through XXIV, and XXVII of this Order.

(Exhibit A at 12-13 (emphasis added).)

The UAO also creates two separate processes for establishing completion of Work. One for completion of remedial action. A second for completion of all phases of the "Work," which specifically includes subsequent O&M activities and attainment of performance standards at a later date. Paragraph 75 of the UAO sets forth the process for determining remedial action completion and paragraph 76 sets forth the process for determining "that all phases of the Work have been fully performed, that the Performance Standards have been attained, and that all Operation and Maintenance activities have been completed." (Exhibit A at 19.)

EPA guidance for remedial action completion also makes clear that O&M activities may continue **after remedial action completion**. EPA's guidance titled *Close Out Procedures for National Priorities List Sites*, OSWER 8320.2-22 (May 2011), Exhibit 2-1 (entitled "Remedial Action Completion Examples"), provides that for groundwater restoration remedies that involve monitored natural attenuation, RA completion is achieved when "[t]he ROD is signed and any necessary RA is conducted (e.g., installation of sufficient monitoring well network to make the O&F [operational and functional] determination)." (Exhibit B at 2-3.) This guidance also provides the following for determining RA completion for groundwater restoration remedies:

The timing of the RA Report is generally unique for these remedies due to the duration of remediation, which may be substantially longer than for the other categories of remedies described above [e.g., excavation and off-site disposal of contaminated soil]. **For a restoration remedy, the RA Report is typically written when the remedy has been constructed and is operating as intended, but prior to achieving the remedial action objectives specified in the ROD....**

For groundwater and surface water restoration remedies, regions should consider the following factors prior to approval of the RA Report:

* * *

- ◆ Whether the monitoring well network is installed;
- ◆ Whether the remedy is operating as intended;

Previous guidance distinguished between interim and Final RA Reports, where Interim RA Reports were used to document RA completion for groundwater and surface water restoration actions (a Final RA Report would then be issued when cleanup levels were achieved). Current guidance eliminates this distinction, now referring to all reports simply as "RA Reports". Rather than producing a Final RA Report, monitoring data demonstrating that cleanup levels have been achieved maybe referenced in the Final Close Out Report.

(*Id.* at 2-5, 2-6 (emphasis added, citations omitted).) Finally, this guidance states: "If waste is left in place, O&M activities may continue after all response actions have been completed." (*Id.* at 4-2.)

The EPA's First Five-Year Review Report documents: (1) that a groundwater monitoring system is part of the completed remedy; (2) that EPA concluded in 2015 that there is no unfinished remedial action at the Site; and (3) that O&M for the groundwater monitoring system will continue until the remedial action objectives ("RAOs") are met (likely decades).

EPA signed the Record of Decision (ROD) for the Site on November 23, 2007. **The selected remedy included** excavation and off-site disposal of contaminated soil and sediments, **monitoring**

groundwater, and institutional controls. The Site achieved construction completion with the signing of the Preliminary Close Out Report on November 23, 2010.

The assessment of this five-year review [in 2015] found that the remedy was constructed in accordance with the requirements of the ROD, No follow up actions are required as a result of this five-year review.

(Exhibit 2 to Pl. Land O'Lakes, Inc.'s Resp. to Defs.' Mot. to Dismiss, page 5 of 5, [Doc. 28] (Dec. 18, 2015) (emphasis added).)

The assertion that the remedial action is incomplete because some groundwater contamination remains or that continued monitoring is required ignores the express language of the EPA's First Five-Year Review Report for the Site, dated February 2015, to the contrary:

Determinations

The remedy at the Hudson Refinery Superfund 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 the institutional controls to address the potential contamination remaining at greater than two feet in depth.

(*Id.* at page 4 of 5 (emphasis added).)

The EPA's First Five-Year Review Report explains the distinction between O&M of groundwater monitoring systems for remaining contaminants and the remedial action completion (including installation of monitoring wells) in its discussion of Remedy Implementation.

Monitoring well OW-B was identified in the RI [remedial investigation] as the one monitoring well with benzene above the cleanup level. Since ground water contamination was found to be discontinuous and

in isolated areas on the Site and because all ground water alternatives considered in the FS [feasibility study] estimated the same time, 30 years, to achieve RAO's [remedial action objectives] and cleanup levels, **monitoring was determined to be protective and also the most cost effective [remedy].**

(Exhibit C at 14 (emphasis added).)

The regulatory relationship between O&M of a completed groundwater remedy and the achievement of groundwater performance standards (RAOs) are explained in the Five-Year Review Report's discussion of "System Operations/Operations and Maintenance" as follows:

O&M [operations and maintenance] activities consist of the following:

- Ground water monitoring;
- Annual statistical evaluation of ground water monitoring results;
- Ensuring ground water cleanup levels, RAOs, and performance standards are met;
- Ensuring monitoring well integrity and access;

* * *

Benzene levels in ground water remain consistent. Ground water monitoring was reduced from quarterly to once per six months after the second Pre-final inspection. **Ground water monitoring will continue as part of Site long-term response and operation and maintenance until cleanup levels are met.** Ground water should be monitored to ensure that ground water contamination does not migrate beyond Site boundaries and to ensure that the areas with contamination are stable and/or decreasing. **Ground water monitoring should continue until the RAO for ground water is reached. The ROD estimated time to reach RAOs was 30 years.**

(Exhibit C at 19 (emphasis added).)

CONCLUSION

The above demonstrates that: (1) the completed remedial action for the Site included construction of a groundwater monitoring system which is operational and functional and being conducted as part of EPA-approved O&M (not remedial action), (2) that the groundwater monitoring system is being, and will be, operated for an anticipated 30 years to achieve groundwater performance standards, and (3) that EPA agrees that achievement of groundwater performance standards will occur after remedial action completion. Thus, Paragraph 53 of the First Amended Complaint is consistent with EPA's First Five-Year Review Report, its own guidance and its conclusion that the remedial action is completed. The Court's jurisdiction in this action is not based on or prevented from proceeding by EPA's claim that it has not yet determined to file its purported cost claim for the Site due to lack of remedy completion. This is simply wrong.

January 28, 2016

Respectfully submitted,

/s/ Mark D. Coldiron

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Attorneys for Plaintiff Land O'Lakes, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2016, the above and foregoing was filed with the Clerk of this Court and served upon all counsel of record by electronic filing through PACER.

/s/ Mark D. Coldiron

MARK D. COLDIRON

EXHIBIT A

FILED

08 JAN -6 AM 11:01

REGIONAL HEARING CLERK
EPA REGION VI

HUDSON OIL REFINERY SUPERFUND SITE
UNILATERAL ADMINISTRATIVE ORDER
FOR REMEDIAL DESIGN AND REMEDIAL ACTION

provisions, including but not limited to all attachments to this Order, all documents incorporated by reference into this Order, and all schedules and deadlines in this Order, attached to this Order, or incorporated by reference into this Order.

VI. DEFINITIONS

51. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or its implementing regulations. Whenever terms listed below are used in this Order or in the documents attached to this Order or incorporated by reference into this Order, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601 et seq.
- b. "Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the end of the next working day.
- c. "EPA" shall mean the United States Environmental Protection Agency.
- d. "ODEQ" shall mean the State of Oklahoma Department of Environmental Quality.
- e. "National Contingency Plan" or "NCP" shall mean the National Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, including any amendments thereto.
- f. "Operation and Maintenance" or "O&M" shall mean all activities required under the Operation and Maintenance Plan developed by the Respondent pursuant to Section IX.B. of this Order, and Section F. 7 of the Statement of Work, and approved by EPA.
- g. "Paragraph" shall mean a portion of this Order identified by an arabic numeral.
- h. "Performance Standards" shall mean those cleanup standards, standards of control, and other substantive requirements, criteria or limitations, identified in the Record of Decision and Statement of Work, that the Remedial Action and Work required by this Order must attain and maintain.
- i. "Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site, signed on November 23, 2007, by the Superfund Division Director, EPA Region 6, and all attachments thereto as set forth in Attachment 2 to this Order. The ROD is incorporated into this Order and is an enforceable part of this Order. The ROD was also forwarded to the Respondent on February 19, 2008.
- j. "Remedial Action" or "RA" shall mean those activities, except for Operation and Maintenance, to be undertaken by the Respondent to implement the final plans and specifications submitted by the Respondent pursuant to the Remedial Design Work Plan approved by EPA, including any additional activities required under Sections X, XI, XII, XIII, and XIV of this Order.

k. "Remedial Design" or "RD" shall mean those activities to be undertaken by the Respondent to develop the final plans and specifications for the Remedial Action pursuant to the Remedial Design Work Plan.

i. "Response Costs" shall mean all costs, including direct costs, indirect costs, and accrued interest incurred by the United States and the State to perform or support response actions at the Site. Response costs include but are not limited to the costs of overseeing the Work, such as the costs of reviewing or developing plans, reports and other items pursuant to this Order and costs associated with verifying the Work.

m. "Statement of Work" or "SOW" shall mean the statement of work for implementation of the Remedial Design, Remedial Action, and Operation and Maintenance at the Site, as set forth in Attachment 3 to this Order. The Statement of Work is incorporated into this Order and is an enforceable part of this Order.

n. "Section" shall mean a portion of this Order identified by a roman numeral and includes one or more paragraphs.

o. "Site" shall mean the Hudson Oil Refinery Superfund site, encompassing approximately 200 acres, located on the west side of the City of Cushing, in Payne County, Oklahoma, at the intersection of Highway 33 and N. Depot Street, as described in the Record of Decision.

p. "State" shall mean the State of Oklahoma.

q. "United States" shall mean the United States of America.

r. "Work" shall mean all activities the Respondent is required to perform under this Order, including Remedial Design, Remedial Action, Operation and Maintenance, and any activities required to be undertaken pursuant to Sections VII through XXIV, and XXVII of this Order.

VII. NOTICE OF INTENT TO COMPLY

52. 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. The absence of a response by EPA to the notice required by this paragraph shall not be deemed to be acceptance of the Respondent's assertions.

VIII. PARTIES BOUND

53. This Order shall apply to and be binding upon the Respondent identified in paragraphs 11 and 12, their directors, officers, employees, agents, successors, and assigns. The Respondent is jointly and severally responsible for carrying out all activities required by this Order. No change in the ownership, corporate status, or other control of the Respondent shall alter any of the Respondent's responsibilities under this Order.

73. Notwithstanding any action by EPA, the Respondent remains fully responsible for achievement of the Performance Standards in the Record of Decision, Statement of Work, RA Work Plan and the O&M Work Plan. Nothing in this Order, or in EPA's approval of the Statement of Work, or in the Remedial Design or Remedial Action Work Plans, or approval of any other submission, shall be deemed to constitute a warranty or representation of any kind by EPA that full performance of the Remedial Design or Remedial Action will achieve the Performance Standards set forth in the ROD, the Statement of Work, RA Work Plan and the O&M Work Plan. The Respondent's compliance with such approved documents does not foreclose EPA from seeking additional work to achieve the applicable performance standards.

74. The Respondent shall, prior to any off-site shipment of hazardous substances from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving state and to EPA's RPM of such shipment of hazardous substances. However, the notification of shipments shall not apply to any off-site shipments when the total volume of all shipments from the Site to the State will not exceed ten (10) cubic yards.

a. The notification shall be in writing, and shall include the following information, where available: (1) the name and location of the facility to which the hazardous substances are to be shipped; (2) the type and quantity of the hazardous substances to be shipped; (3) the expected schedule for the shipment of the hazardous substances; and (4) the method of transportation. The Respondent shall notify the receiving state of major changes in the shipment plan, such as a decision to ship the hazardous substances to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be determined by the Respondent following the award of the contract for Remedial Action construction. The Respondent shall provide all relevant information, including information under the categories noted in paragraph 74.a above, on the off-site shipments as soon as practicable after the award of the contract and before the hazardous substances are actually shipped.

75. Within thirty (30) days after the Respondent concludes that the Remedial Action has been fully performed, the Respondent shall so 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, after completion of the pre-certification inspection and receipt and review of the written report, EPA determines that the Remedial Action or any portion thereof has not been completed in accordance with this Order, EPA shall notify the Respondent in writing of the activities that must be undertaken to complete the Remedial Action and shall set forth in the notice a schedule for performance of such activities. The Respondent shall perform all activities described in the notice in accordance with the specifications and schedules established therein. 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. EPA's notification shall be based on present knowledge and the Respondent's certification to EPA, and shall not limit EPA's right to perform periodic reviews pursuant to section 121(c) of CERCLA, 42 U.S.C. § 9621(c), or to take or require any action that in the judgment of EPA is appropriate at the Site, in accordance with 42 U.S.C. §§ 9604, 9606, or 9607.

76. Within thirty (30) days after the Respondent concludes that all phases of the Work have been fully performed, that the Performance Standards have been attained, and that all Operation and Maintenance activities have been completed, the Respondent shall submit to EPA a written report by a registered professional engineer certifying that the Work has been completed in full satisfaction of the requirements of this Order. EPA shall require such additional activities as may be necessary to complete the Work or EPA may, based upon present knowledge and the Respondent's certification to EPA, issue written notification to the Respondent that the Work has been completed, as appropriate, in accordance with the procedures set forth in Paragraph 75 for the Respondent's certification of completion of the Remedial Action. EPA's notification shall not limit EPA's right to perform periodic reviews pursuant to section 121(c) of CERCLA, 42 U.S.C. § 9621(c), or to take or require any action that in the judgment of EPA is appropriate at the Site, in accordance with 42 U.S.C. §§ 9604, 9606, or 9607.

X. FAILURE TO ATTAIN PERFORMANCE STANDARDS

77. In the event that EPA determines that additional response activities are necessary to meet applicable Performance Standards, EPA may notify the Respondent that additional response actions are necessary.

78. Unless otherwise stated by EPA, within thirty (30) days of receipt of notice from EPA that additional response activities are necessary to meet any applicable Performance Standards, the Respondent shall submit for approval by EPA a work plan for the additional response activities. The plan shall conform to the applicable requirements of sections IX, XVI, and XVII of this Order. Upon EPA's approval of the plan pursuant to Section XIV, the Respondent shall implement the plan for additional response activities in accordance with the provisions and schedule contained therein.

XI. EPA PERIODIC REVIEW

79. Under section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and any applicable regulations, EPA may review the Site to assure that the Work performed pursuant to this Order adequately protects human health and the environment. Until such time as EPA certifies completion of the Work, the Respondent shall conduct the requisite studies, investigations, or other response actions as determined necessary by EPA in order to permit EPA to conduct the review under section 121(c) of CERCLA. As a result of any review performed under this paragraph, the Respondent may be required to perform additional work or to modify work previously performed.

EXHIBIT B

OSWER Directive 9320.2-22
May 2011

Close Out Procedures for National Priorities List Sites



**Office of Superfund Remediation and Technology Innovation
U.S. Environmental Protection Agency**

and groundwater contamination in parallel. In these situations, each remedial technology may have a unique goal. It is recommended that the RPM consult with HQ to ensure that the appropriate RA completion criteria are being considered.

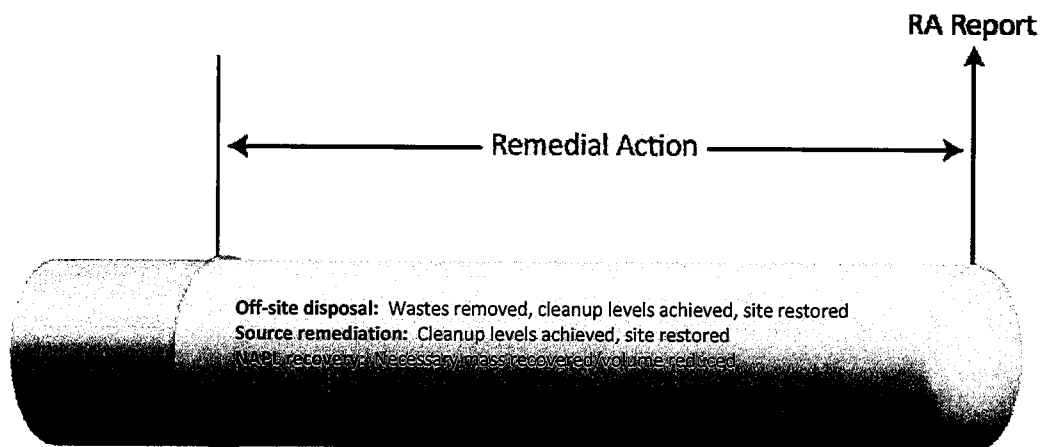
Exhibit 2-1
Remedial Action Completion Examples

Remedial Action Completion Examples	
Source Remediation Actions	
Source remediation (e.g., soil vapor extraction, in situ treatment of source material)	Cleanup levels have been achieved for the treated wastes and site has been restored.
Excavation and off-site disposal of contamination	All wastes that need to be addressed as part of the RA have been excavated, removed from the site to an approved location, cleanup levels have been achieved, and site has been restored.
NAPL remediation (destruction or recovery) with the goal of reducing the volume of source material, not restoring groundwater	Necessary contaminant mass removed or volume reduced.
Source and Groundwater Containment Actions	
Containment remedies (e.g., source control, landfill cap, groundwater containment in conjunction with a technical impracticability waiver)	Construction of the designed remedy is complete and data indicate that effective containment has been achieved (operational and functional, or O&F).
Extraction and treatment of groundwater to prevent plume migration	Construction of the treatment plant and monitoring system are complete, and data indicate that effective containment has been achieved (O&F).
Groundwater and Surface Water Restoration Actions	
Groundwater and surface water restoration remedies that involve ex situ treatment	Construction of the treatment plant and monitoring system are complete, and the remedy is operating as intended (O&F).
Groundwater restoration remedies that involve in situ treatment	Construction of the remedy and monitoring system are complete, injections of the appropriate reagent are underway, and the remedy is operating as intended (O&F).
Groundwater and surface water restoration remedies that involve monitored natural attenuation	The ROD is signed and any necessary RA is conducted (e.g., installation of sufficient monitoring well network to make the O&F determination).
Institutional Control Actions	
Implementation of an IC remedy	Institutional controls specified in the decision document are implemented.

2.2.1 RA Completion for Source Remediation Actions

For purposes of this guidance, source material is defined as material that includes or contains hazardous substances, pollutants, or contaminants that act as a reservoir for migration of contamination to groundwater, to surface water, to air, or acts as a source for direct exposure.³ Source remediation generally refers to actions taken to reduce or eliminate the toxicity, mobility, or volume of contaminated source material, either through on-site treatment to appropriate cleanup levels or by physically removing it from the site. Examples include soil vapor extraction, in situ thermal treatment, and dredging of contaminated sediments. Exhibit 2-2 graphically depicts source remediation actions.

**Exhibit 2-2
Source Remediation Actions Pipeline**



For excavation and other active source remediation remedies, regions should consider the following factors prior to approval of the RA Report:

- ◆ Whether all construction activities are complete, including site restoration and demobilization;
- ◆ Whether all remedial action objectives and associated cleanup levels specified in the applicable ROD have been achieved;
- ◆ Whether a successful contract final inspection or equivalent has been conducted (see 2.4); and
- ◆ Whether the RA Report contains the information described in Exhibit 2-5.

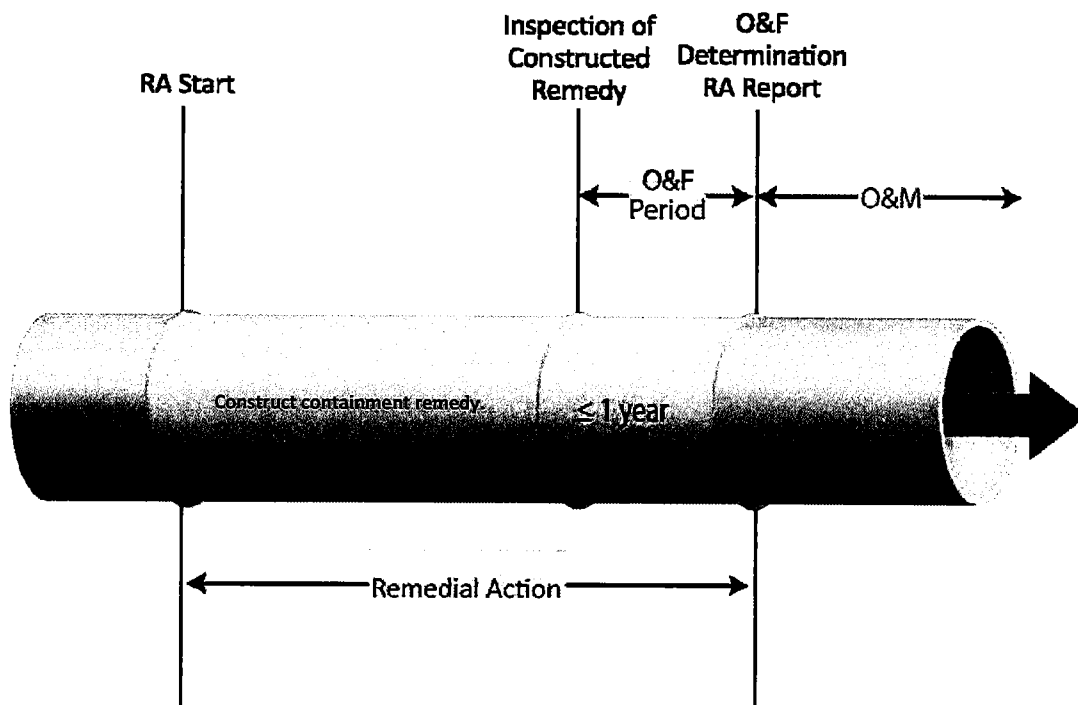
2.2.2 RA Completion for Source and Groundwater Containment Actions

Containment remedies may include, but are not limited to, permanent source control, a landfill cap, or physical measures to control the migration of a contaminated groundwater plume or surface water. Exhibit 2-3 graphically depicts source and groundwater containment actions. For containment remedies, regions should consider the following factors prior to approval of the RA Report:

³ See also *A Guide to Principal Threat and Low Level Threat Wastes* (OSWER 9380.3-06FS; November 1991).

- ◆ Whether all construction activities are complete, including site restoration and demobilization;
- ◆ Whether all remedial action objectives in the applicable ROD have been achieved;
- ◆ Whether there is data to indicate that containment has been achieved, and the operational & functional (O&F) determination has been made (see 2.3.1);
- ◆ Whether a successful contract final inspection or equivalent has been conducted (see 2.4); and
- ◆ Whether the RA Report contains the information described in Exhibit 2-5.

Exhibit 2-3
Source and Groundwater Containment Actions Pipeline



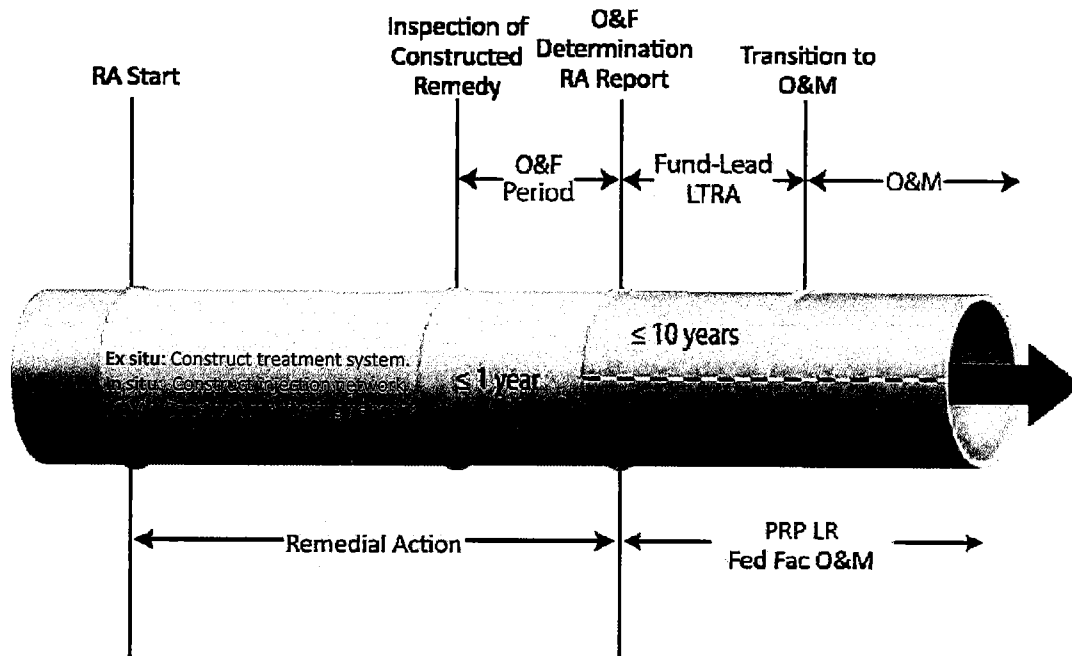
2.2.3 RA Completion for Groundwater and Surface Water Restoration Remedies

For purposes of this guidance, a restoration remedy is a remedial action with the objective of returning all or part of a surface water body or groundwater aquifer to the beneficial use specified in the ROD.⁴ For groundwater currently or potentially used for drinking water purposes, these levels may be Maximum Contaminant Levels (MCLs) or non-zero Maximum Contaminant Level Goals (MCLGs) established under the Safe Drinking Water Act. The timing of the RA Report is generally unique for these remedies due to the duration of remediation, which may be substantially longer than for the other categories of remedies described above. For a restoration remedy, the RA Report is typically written when the

⁴ See also *Transfer of Long Term Response Action (LTRA) Projects to States* (OSWER 9355.0-81FS-A; July 2003)

remedy has been constructed and is operating as intended, but prior to achieving the remedial action objectives specified in the ROD. Exhibit 2-4 graphically depicts groundwater and surface water restoration actions.

**Exhibit 2-4
Groundwater and Surface Water Restoration Actions Pipeline**



For groundwater and surface water restoration remedies, regions should consider the following factors prior to approval of the RA Report:

- ◆ Whether the construction of the treatment system is complete;
- ◆ For in situ restoration remedies, whether delivery of the appropriate reagent (e.g., oxidant or surfactants) is underway;
- ◆ Whether the monitoring well network is installed;
- ◆ Whether the remedy is operating as intended (O&F, see 2.3.1);
- ◆ Whether a successful contract final inspection or equivalent has been conducted (see 2.4); and
- ◆ Whether the RA Report contains the information described in Exhibit 2-5.

Previous guidance distinguished between Interim and Final RA Reports, where Interim RA Reports were used to document RA completion for groundwater and surface water restoration actions (a Final RA Report would then be issued when cleanup levels were achieved). Current guidance eliminates this distinction, now referring to all reports simply as "RA Reports". Rather than producing a Final RA Report, monitoring data demonstrating that cleanup levels have been achieved may be referenced in the Final Close Out Report (see Chapter 4).

When reviewing the remedial decision documents and associated response actions, it is important to assess whether they adequately address all contamination and exposure pathways identified during the RI/FS or any subsequent site characterization. The remedial action objectives and cleanup levels selected in these documents are typically reviewed in light of CERCLA, the NCP, and current EPA policy and guidance. These reviews should provide assurance that the remedial action objectives (RAOs) and associated cleanup levels selected for the response actions identify clear expectations and objectives and are consistent with ARARs, as appropriate.

4.2.2 All Response Actions have been Completed and Appropriately Documented in the Site File

CERCLA and Section 300.5 of the NCP both define response as removal or remedial action, including enforcement related activities. As defined by the NCP, response actions may include a combination of engineering and/or institutional controls selected to address risks posed at the site. If waste is left in place, O&M activities may continue after all response actions have been completed. See 4.2.4 for additional definitions and information related to operation and maintenance activities.

In order to determine that all response actions have been completed, it is encouraged that the regions have defensible and reportable data to verify that the cleanup levels associated with the response action have been achieved. This data, along with other remedial and removal action activities, are typically included in a report signifying completion of these activities. The data and report should be part of the post-decision document file or general site file kept at the region.

For removal actions, the completion of these activities is typically documented in Pollution Reports (POLREPs). The content of these reports can be found in the *Guidance for Preparing POLREPs/SITREPS* (EPA 540/F-94/018).

For remedial actions, the completions of these actions are typically documented in RA Reports. Chapter 3 provides details on the recommended content of these reports for different types of remedial action.

It is recommended that the content of these reports be summarized in the Final Close Out Report. In addition to the compilation of the reports described in this section, the FCOR typically summarizes all activities associated with restoration of groundwater or surface water, including a summary of monitoring data and an analysis that demonstrates that cleanup levels have been achieved.

Recommended contents for this report are summarized in Exhibit 4-3.

EXHIBIT C

**FIVE-YEAR REVIEW REPORT FOR
HUDSON REFINERY SUPERFUND SITE
PAYNE COUNTY, OKLAHOMA**



Prepared by

**Oklahoma Department of Environmental Quality
Oklahoma City, Oklahoma**

and

**U.S. Environmental Protection Agency
Region 6
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Land O'Lakes and EPA worked to secure site access from the private landowners that owned Site property at the time the UAO was signed. The final Site access agreement was negotiated and effective on August 28, 2009.

The City of Cushing enacted an ordinance that prohibited access to the fenced areas of the Site until cleanup has been completed. The City of Cushing enacted the ordinance after the sale of Site property at a sheriff's tax auction. The ordinance prohibited Site access with the exception of EPA, ODEQ, and federal/state remediation contractors. The ordinance provided an additional layer of protection until Site cleanup and future engineered controls were implemented on the Site. Land O'Lakes worked with the city to add to the ordinance that Land O'Lakes, its contractors, representatives would be allowed access to the Site for remediation. At the time the UAO was signed the Site was zoned for industrial use.

The LOL contractor, Benham, prepared a final RD Work Plan and associated documents which was approved by EPA September 4, 2009. The RD Work Plan included a plan for environmental sampling to better define the areas of soil, sediment, surface water, and ground water contamination at the Site identified in the ROD. This additional sampling and analysis was designated as the Supplemental Field Investigation (SFI). The field work for SFI was conducted by Benham in September and October 2009. Pothole sampling was also conducted in October 2009 to better define soil areas with visual contamination.

Monitoring well OW-B was identified in the RI as the one monitoring well with benzene above the cleanup level. Since ground water contamination was found to be discontinuous and in isolated areas on the Site and because all ground water alternatives considered in the FS estimated the same time, 30 years, to achieve RAOs and cleanup levels, monitoring was determined to be protective and also the most cost effective. Monitoring well OW-D was identified in the RI as the one monitoring well with LNAPL and the accumulated LNAPL was removed using tubing and a peristaltic pump during SFI sampling. Ground water monitoring was scheduled to be conducted on a quarterly basis during the RD and RA construction activities. LNAPL in monitoring well, OW-D, had not returned as of the date of approval of the RD; continued quarterly monitoring was planned for this well at the same sampling schedule as other Site wells during RA construction work.

The LOL contractor, Benham, prepared the RD required under the UAO and UAO Attachment 3, SOW; it was approved by EPA on April 9, 2010. The selected remedy required excavation of contaminated soil, sediment, coke tar, scrap metal, ACM and disposal at an appropriate landfill(s), treatment of surface water, and removal of LNAPL. The RD provided a detailed description of LOL's implementation of the selected remedy of excavation of contaminated soil, sediment, coke tar, scrap metal, ACM waste pile, disposal of these materials at an appropriate landfill(s), and coordination with ODEQ to place deed restrictions on remediated Site property.

The RD described the intended use of berm material in between the North Refinery wastewater ponds as a backfill borrow source. The ROD required excavated areas to be backfilled with clean soil, graded for adequate drainage, and the surface of the soil seeded to establish a vegetative cover. Use of the on-site berm material meant that backfill borrow material would not have to be purchased from an off-site source. This resulted in a cost savings. The RD included sampling required to show that the berm material was suitable for use as a backfill borrow source.

The RD waste pond grading plan included differences from the ROD for the North Refinery ponds. Wastewater Pond 6 did not have contaminated sediment; the RD indicated it would be modified and left open to provide storm water retention for flow from the former wastewater pond area to minimize downstream flooding. RD plans called for Treatment Pond 8 and Runoff Pond 9 to be modified and combined for storm water retention for flow channeled from the South Refinery to minimize downstream flooding. Storm water retention would hold excess storm water and release it more slowly into Skull Creek after rain events. Also by not backfilling Wastewater Pond 6, Treatment Pond 8, and Runoff Pond more berm material remained available for soil excavation backfill.

- Site ownership has changed which affects filing of institutional controls required by the ROD.

C. System Operations/Operation and Maintenance

Operation and maintenance (O&M) activities are described in the *Third Revised Operations and Maintenance Plan* which was revised February 1, 2014. Site O&M activities are conducted by Land O'Lakes.

O&M activities consist of the following:

- Ground water monitoring;
- Annual statistical evaluation of ground water monitoring results;
- Ensuring ground water cleanup levels, ROAs, and performance standards are met;
- Ensuring monitoring well integrity and access;
- Plugging and abandonment of Site wells no longer in use in accordance with OWRB requirements;
- Updating institutional controls as necessary;
- Maintaining land use restrictions;
- Maintaining ground water use restrictions
- Maintaining engineering controls such as erosion control; and
- Addressing additional hazardous substances, pollutants, or contaminants that may be subsequently identified.

Ground water monitoring includes analysis of benzene, toluene, ethylbenzene, and xylenes (BTEX) and also analysis of general chemistry parameters (conductivity, temperature, pH, and dissolved oxygen). Depth to ground water and LNAPL thickness are evaluated and reported. Ground water monitoring was reduced from monitoring once per quarter (January, April, July, and October) to once per six months (April and October) at the time of the second pre-final inspection at LOL's request.

Benzene levels in ground water remain consistent. Ground water monitoring was reduced from quarterly to once per six months after the second Pre-final inspection. Ground water monitoring will continue as part of Site long-term response and operation and maintenance until cleanup levels are met. Ground water should be monitored to ensure that ground water contamination does not migrate beyond Site boundaries and to ensure that the areas with contamination are stable and/or decreasing. Ground water monitoring should continue until the RAO for ground water is reached. The ROD estimated time to reach RAOs was 30 years. Section VI.D. below describes the review of ground water data performed for this five-year review.

See Attachment 2 for a figure that shows ground water monitoring wells that are sampled at a frequency of once every six months. This figure in Attachment 2 is included with the deed notices for the Site.

O&M also includes evaluating ground water monitoring trends annually to determine if ground water contaminant levels are substantially increasing, moving offsite, or identified in wells that had not previously shown ground water contamination above ROD cleanup levels.

O&M costs estimate numbers came from the September 29, 2014 revised draft Remedial Action Report's Table 2 titled "Remedial Design/Remedial Action Costs". This table indicated LOL's O&M costs, to date, at approximately \$53,000.

V. Progress Since the Last Five-Year Review

This is the first five-year review for the Hudson Refinery Superfund Site.