EXHIBIT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

(1) LAND O'LAKES, INC., Plaintiff, v. (1) UNITED STATES OF AMERICA, Defendant.	Case No. CIV-15-683-R

PLAINTIFF LAND O'LAKES, INC.'S FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

Page

I. Introduction 4

II. Parties 5

III. Jurisdiction and Venue 6

IV. Factual Basis for Plaintiff's Claims 8

A. The FCD Provided Protection from Liability to Land O'Lakes 9
B. The Closure Order Provided Protection from Liability to Land O' Lakes 12
C. The 1996-97 Salvage Operations by the Subsequent Owners Resulted in Releases at the Site 15
D. Despite Knowledge of this Court's FCD and Closure Order, EPA Issued its Formal Demands and UAO that Breached and Violated these Orders..……..16
E. The Conditions at the Site were "known by the United States and existing as of the date of the lodging of this Decree" 21
F. The Covenant Not to Sue in the FCD and the Release of Liability in the Closure Order Establish the Non-Liability of Land O'Lakes for CERCLA Claims 23
G. Res Judicata and Collateral Estoppel Bar the Government's Suits against Land O'Lakes Subsequent to the FCD and Closure Order.....25
H. The Anti-Duplication Provisions of RCRA and CERCLA Prohibit Any Liability of Land O'Lakes and Any Administrative End Run by EPA 27

V. Count I Plaintiff's Declaratory Judgment Claim against Defendant 28

VI. Count II Plaintiff's Citizen-Suit Claim under RCRA pursuant to 42 U.S.C. § 6972(a)(1)(A) against Defendant……..30

VII. Prayer for Relief 33

ATTACHED EXHIBITS

1. Court's Final Consent Decree of December 11, 1987, in U.S. District Court, Western District of Oklahoma, Civil Action No. 84-2027-A.

2. Court's Order for Closure of the Final Consent Decree of October 25, 1994, in U.S. District Court, Western District of Oklahoma, Civil Action No. 84-2027-A.

3. Government's Second Amended Complaint of August 15, 1985, in U.S. District Court, Western District of Oklahoma, Civil Action No. 84-2027-A.

4. Court's Partial Consent Decree of May 1, 1986, in U.S. District Court, Western District of Oklahoma, Civil Action No. 84-2027-A.

5. Supplemental Brief of the Hudson Liquidating Trust Regarding Hudson's Motion to Terminate Consent Decree (September 23, 1994) (without attachments).

6. United States' Supplemental Brief Regarding Hudson's Motion to Terminate Consent Decree (October 17, 1994) (without attachments).

7. Facsimile Letter of October 25, 1994, to the Honorable Wayne E. Alley from counsel for Hudson with a facsimile copy to Department of Justice counsel for the United States.

Plaintiff Land O'Lakes, Inc. ("Land O'Lakes" or "LOL") for its First Amended Complaint against Defendant United States of America, which has acted by and through the United States Environmental Protection Agency ("EPA"), (collectively, "Government"), states as follows:

I.
Introduction

1. Land O'Lakes is a member-owned agricultural cooperative that was originally formed in 1921. Among other business lines, it is a producer and marketer of dairy food products, and produces agricultural supplies.

2. Land O'Lakes is covered by and the beneficiary of the protections from environmental liability it received in this Court's Orders regarding the Hudson Oil Refinery, f/k/a Cushing Refinery and n/k/a the Hudson Refinery Superfund Site, in Cushing, Oklahoma ("Site").

3. This Court entered its 1987 Final Consent Decree ("FCD") (Attached as Exhibit 1) and 1994 Order for Closure of the Final Consent Decree ("Closure Order") (Attached as Exhibit 2) 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. This Court's FCD and Closure Order provided protections from liability to Land O'Lakes for the Site. These protections included a covenant not to sue in the FCD and a release from liability and termination of further obligations in the Closure Order.

4. Land O'Lakes brings this action for declaratory and citizen-suit relief[1] because the Government knowingly violated and breached this Court's FCD and Closure Order regarding the Site as these Orders pertain to the rights of Land O'Lakes. In disregard of the protections owing to Land O'Lakes under the FCD and Closure Order, EPA issued its 2009 Unilateral Administrative Order ("UAO"), purportedly under CERCLA,[2] to Land O'Lakes requiring actions at the Site, and threatened to sue Land O'Lakes for cost recovery for EPA's past response actions at the Site. Land O'Lakes has fully complied with the UAO.

5. Land O'Lakes seeks this Court's order of its non-liability to the Government with respect to the Site as a result of the protections granted to it under the FCD and the Closure Order. Land O'Lakes further seeks a determination that the Government violated the FCD and Closure Order when it issued its 2009 UAO and its formal demands to Land O'Lakes for payment of the Government's past costs for the Site.

II.
Parties

6. Plaintiff, Land O'Lakes, is a Minnesota cooperative corporation—a member-owned agricultural cooperative. It was originally formed in 1921 as a marketing cooperative association for dairy farmers in the upper Midwest. Land O'Lakes is widely

[1] Land O'Lakes brings this action at this time for the reasons stated in Paragraphs 49-53 below of this Complaint.

[2] Comprehensive Environmental Response and Liability Act ("CERCLA" or "Superfund," 42 U.S.C. § 9601, et seq.).

known as a producer of high quality dairy food products bearing its famous "Indian Maiden" logo.

7. Land O'Lakes has never directly owned or operated petroleum refineries. Land O'Lakes is the successor by merger to Midland Cooperatives, Inc. ("Midland"), which operated the refinery on the Site before it was sold to Hudson Oil Company/Hudson Refinery Company ("Hudson"). References in this Complaint to Midland include Land O'Lakes unless the context requires otherwise.

8. Defendant United States of America is the federal government and has acted by and through the EPA and includes the EPA, as well as other current and former agencies and instrumentalities of the United States government (collectively, "Government").

9. Land O'Lakes and the Government are "persons" under RCRA[3] and CERCLA. 42 U.S.C. § 6903(15); 42 U.S.C. § 9601(21).

10. Land O'Lakes has provided a copy of this First Amended Complaint to the Attorney General of the United States and to the Administrator of EPA in accordance with 42 U.S.C. § 9613(*l*).

III.
Jurisdiction and Venue

11. The FCD provides:

> A. This Court shall retain jurisdiction of this Final Consent Decree for purposes of ensuring compliance with its terms and conditions.

[3] Resource Conservation and Recovery Act ("RCRA," 42 U.S.C. § 6901, et seq.)

> B. Plaintiff and Defendants each retain the right to seek to enforce the terms of this Final Consent Decree and take any action authorized by federal or state law not inconsistent with the terms and conditions of this Final Consent Decree or otherwise.

Final Consent Decree, Section XX, A and B.

12. Land O'Lakes, as a protected person under the FCD and Closure Order, has standing to enforce these orders.

13. Consent decrees are subject to continuing supervision and enforcement by the Court. A court has an affirmative duty to protect the integrity of its decree, and this duty arises where the performance of one party threatens to frustrate the purpose of the decree. A party who has fully obtained the benefits of a consent decree cannot then be permitted to ignore such affirmative obligations as were imposed by the decree.

14. This Court has jurisdiction over this action pursuant to the FCD and the Closure Order, 28 U.S.C. § 1331, 42 U.S.C. § 9613(b), 42 U.S.C. § 6928, 42 U.S.C. § 6972 and 42 U.S.C. § 9620, because Plaintiff alleges claims and seeks relief under federal law and the claims require interpretation and resolution of the parties' duties and responsibilities under federal law.

15. Additionally, this Court has authority to issue a declaratory judgment concerning the rights and liabilities of the parties pursuant to 28 U.S.C. §§ 2201, 2202, 42 U.S.C. § 9613(g)(2) and Rule 57, *Fed.R.Civ.P*.

16. Furthermore, this Court has authority to grant citizen-suit relief concerning the rights and liabilities of the parties pursuant to 42 U.S.C. § 6972.

17. Venue properly lies in this Court pursuant to 28 U.S.C. § 1391(b), 42 U.S.C. § 9613(b) and 42 U.S.C. § 6972(a), because the Site is located within this judicial district, the alleged releases of hazardous substances and other contaminants occurred within this district and the violations and breaches occurred within this district. In addition, venue is proper because this Court entered the FCD and Closure Order.

IV.
Factual Basis for Plaintiff's Claims

18. The Site consists of approximately 200 acres in Cushing, Oklahoma. The Site is a former oil refinery that was operated by several owners from on or before 1915 until ceasing operation in 1982.

19. When Hudson shut down the refinery on or about December 1982, it expected the stoppage to be temporary and left some crude oil and refined products in refinery pipes, equipment, a coke pond and tanks with contents in place. At the time of shut down, the crude oil, refined products and feed materials left by Hudson were solely derived from past Hudson operations. Hudson's shut down on or about December 1982 ceased all refinery operations, and despite expectations, such operations never resumed.

20. From 1943 until 1977, Midland Cooperatives, Inc. ("Midland"), the predecessor of Land O'Lakes, owned and operated the Cushing Refinery.

21. On February 1, 1977, Midland sold the Cushing Refinery to Hudson which caused Midland to be Hudson's immediate predecessor in interest of the Cushing

Refinery. Hudson operated the Cushing Refinery for approximately six years or until December 31, 1982.

22. 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 on this date. As further described herein, under the FCD and Closure Order, the immediate predecessor to Hudson was granted certain rights, protections and benefits under these orders.

23. On January 3, 1984, Hudson filed for reorganization under Chapter 11 of the Bankruptcy Code (D. Kansas, No. 84-20003).

A. The FCD Provided Protection from Liability to Land O'Lakes

24. On or about August 8, 1984, the United States, at the request of EPA, filed its initial Complaint in this Court against Hudson regarding the Cushing Refinery in Civil Action No. 84-2027-A. In its initial Complaint, the Government alleged violations of federal hazardous waste management requirements and sought injunctive relief for cleanup of the refinery and civil penalties against Hudson pursuant to RCRA, the federal hazardous waste management act.

25. The Government amended its initial Complaint against Hudson on two occasions, resting ultimately on its Second Amended Complaint filed on or about August 15, 1985 (Attached as Exhibit 3).

26. During the course of the litigation, the Government and Hudson partially resolved the Government's allegations with the entry of a Partial Consent Decree

(Attached as Exhibit 4), which was entered by this Court on May 1, 1986. The Partial Consent Decree required Hudson to undertake extensive "Site Investigation" activities as more particularly spelled out in the "Addendum: Work Plan" attached thereto. The items in the Addendum included:

a. An inspection of all tanks and API separators, justification supporting any 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.

b. Removal of accumulated sludge from operating API separators in excess of 40% of volumetric capacity.

c. 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.

d. A Site-wide groundwater investigation.

e. A Site-wide soil sampling and characterization investigation.

27. Ultimately, the Government and Hudson fully resolved the Government's allegations with the Government's lodging of the FCD on or about October 13, 1987, and the Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, entered the FCD on or about December 11, 1987. Among other things, the FCD required Hudson to perform Site-wide corrective action as described in the 41-page "Addendum A Work Plan" to the FCD for the Site conditions which had been identified and known by EPA to exist at the Cushing Refinery. The main Site-wide clean-up items in the Addendum included:

a. Selected tank cleanout.

b. Soil excavation.

c. Biotreatment of visually contaminated soils.

d. Removal of North Oily Water Pond sludges and contaminated soils.

e. Groundwater remediation using a pump and treat system.

f. Removal and disposal off-Site of all RCRA waste.

28. The FCD set forth a covenant not to sue as follows:

> B. Except as provided below, **the United States hereby covenants not to sue Defendants [Hudson companies]** 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.**

Paragraph B of Section XVI EFFECT OF SETTLEMENT, Final Consent Decree (Dec. 11, 1987) (emphasis added).

29. The Government's Second Amended Complaint under its Third Claim for Relief, Paragraph 29, notes that "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." Paragraph 30 states that "such substances…are hazardous wastes…." Paragraph 31 states that "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." All four "contaminants of concern" ("COCs") in the EPA's 2007 Record of Decision ("ROD") for the Site that EPA subsequently directed Land O'Lakes to remediate under its 2009 UAO

are included in this Second Amended Complaint list of chemicals. EPA knew when it issued its 2009 UAO that these four COCs existed in 1987 at the Site and had described the conditions resulting from their release which contaminated the soils throughout the Site.

30. Importantly, the 1987 FCD provided that the covenant not to sue provisions expressly applied to Hudson's immediate predecessor in interest as to the Cushing Refinery, which is Midland--now Land O'Lakes after its merger with Midland, as follows:

> C. …The covenant not to sue provisions of paragraphs B. and C. of this section **shall be applicable to Defendants' immediate predecessor in interest of the Cushing Refinery** ….

Paragraph C of Section XVI EFFECT OF SETTLEMENT, Final Consent Decree (Dec. 11, 1987) (emphasis added).

B. The Closure Order Provided Protection from Liability to Land O'Lakes

31. On or about November 30, 1993, the Hudson Liquidating Trust, on behalf of Defendant Hudson companies ("Hudson Trustee"), filed Defendants' Motion for Closure of the FCD and their Brief. Defendants stated: "Because of Hudson's diligence, the requirements of the Consent Decree have been completed and, fortunately, the site is environmentally sound." Id. at p. 10 of the Brief. Defendants requested the Court to issue its order declaring that the obligations under the FCD have been satisfied.

32. The Hudson Trustee stated in a Supplemental Brief that it had "access to funds to complete some work remaining under the FCD," if necessary, in the amount of

$6,542,000 plus estimated proceeds from sale of the remaining assets of the trust "exceeding $2-3 million." Supplemental Brief of the Hudson Liquidating Trust Regarding Hudson's Motion to Terminate Consent Decree, p. 9-10 (September 23, 1994) (Attached as Exhibit 5).

33. At first, the Government indicated some concerns about the Motion for Closure of the FCD, but it ultimately resolved them and agreed that: "The United States withdraws its opposition to the Trustee's Motion and agrees to termination of the Consent Decree. The Trustee's Motion to Terminate the Consent Decree is, therefore, unopposed, and should be granted." United States' Supplemental Brief Regarding Hudson's Motion to Terminate Consent Decree, p. 1 (October 17, 1994) (Attached as Exhibit 6). Interestingly, the Government states that: "EPA, DOL [U.S. Department of Labor] and DOE [U.S. Department of Energy] agree that additional estate assets should not be made available to the Trustee for environmental clean-up [of the Cushing Refinery]." Id. at 9.

34. On October 25, 1994, counsel for Hudson faxed a letter to the Honorable Wayne B. Alley with a facsimile copy to Department of Justice ("DOJ") counsel for the United States (Attached as Exhibit 7). The letter advised that Hudson counsel and DOJ counsel "…have discussed how to proceed, and they are in agreement that the Court should enter the Order that was submitted to the Court with the filing of Hudson's Motion. For the convenience of the Court, a copy of that proposed Order is attached." This proposed Order is identical to the Order for Closure of the FCD entered by the Court as described in Paragraph 28.

35. On October 25, 1994, the Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, entered his Order for Closure of the Final Consent Decree in Civil Action No. 84-2027-A and stated:

> Came before the Court the motion of the [Hudson companies], defendants in the above-entitled and numbered cause, requesting closure of the Final Consent Decree, and upon review of the evidence, the Court is of the opinion that the motion should be granted. It is therefore,
>
> 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.

Order for Closure of the Final Consent Decree (Oct. 25, 1994), *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 (emphasis added).

36. Hudson was found by the Court to have satisfied all its obligations owing under the FCD and its incorporated Work Plan, which satisfied obligations that fell within the scope of the covenant not to sue provisions of the FCD. Hudson's obligations were terminated by the Court, and Hudson was granted a release from any further obligations under the FCD. Land O'Lakes is the immediate predecessor in interest to Hudson as to the Cushing Refinery and is the recipient and beneficiary of the covenant not to sue in the FCD, as well as the subsequent release of further obligations pursuant to the Closure Order. Land O'Lakes therefore has the right to enforce the FCD and Closure Order containing the covenant and release provisions.

37. For the reasons set forth in Paragraphs 28 supra, there are no claims remaining to the Government under the FCD based on a past or present release of a hazardous waste or hazardous constituent that was unknown or undetected by the United States at the time of lodging the FCD under Section XVI EFFECT OF SETTLEMENT, Paragraph C. 2. Further, the Closure Order precludes any claims by the Government that the Defendants failed to meet any of the requirements of the FCD--see Section XVI EFFECT OF SETTLEMENT, Paragraphs C.1. and C.3.[4] As a result, the provisions of the covenant not to sue in paragraph B of Section XVI and the release provisions of the Closure Order are fully enforceable by Land O'Lakes.

C. The 1996-97 Salvage Operations by the Subsequent Owners Resulted in Releases at the Site

38. On or about February 1989, the Hudson Trustee sold the Cushing Refinery to a new owner, U.S. Refining and Marketing, Inc. ("U.S. Refining").

39. On or about October 1996, U.S. Refining sold the Cushing Refinery to Quantum Realty Company ("Quantum").

40. In the mid-1990s, U.S. Refining, Quantum, Turner, Mason & Company ("Turner") and/or others hired Western Environmental of Oklahoma ("Western Environmental") to conduct certain salvage operations at the Site. On or about 1996 and 1997, Western Environmental, as the agent of U.S. Refining, Quantum, Turner and/or others, breached piping and tanks and cut off the tops of above-ground storage tanks causing discharges of liquids and sludge to the Site soils. Western Environmental also

[4] Section XVI Effect of Settlement, Paragraph C.4., is not applicable to this action.

left behind loose, friable asbestos, which was discarded or left loose and hanging from equipment and buildings that Western Environmental partially demolished during its salvage operations. Western Environmental, as the agent for U.S. Refining, Quantum, Turner and/or others, conducted negligent and incomplete salvage operations at the Site, resulting in leaks and releases of crude oil, products and some sludge to occur on or about 1996-1997.

41. From approximately October 1998 to December 1999, EPA performed an emergency removal action at the Site and incurred costs.

42. From approximately September 2001 to June 2003, EPA performed a non-time critical removal action at the Site and incurred costs.

D. Despite Knowledge of this Court's FCD and Closure Order, EPA Issued its Formal Demands and UAO that Breached and Violated these Orders

43. On February 2, 1998, the EPA, Region 6, on-scene coordinator for the Hudson Refinery Site sent a POLREP (a removal response report) to the Chief and Director of the Office of Emergency & Remedial Response, EPA, Region 6, and to the State Contact regarding the Hudson Site. The words in this POLREP show the knowledge of EPA concerning the FCD and Closure Order:

> The EPA issued Resource Conservation and Recovery Act (RCRA) 3008 (a) and (h) administrative actions against Hudson Refinery in 1984 and 1985 for violations including a release of hazardous waste from the Land Treatment Unit (LTU) at the site. A Final Consent Decree (FCD) was included in the Hudson Refining bankruptcy proceedings and finalized on December 10, 1987. Remediation at the site began with the lodging of the FCD, which required the following activities to be conducted at the site; tank clean-out; soil excavation; biotreatment of contaminated soil; removal of north oily water pond sludges and soils; groundwater remediation; and

> groundwater monitoring at the LTU. On October 25, 1994 The U.S. District Court for the Western District of Oklahoma determined that the conditions of the FCD were met and issued an "order for closure" of the FCD.

EPA, Region 6, *POLREP, Hudson Refinery Site, Cushing, Payne County, Oklahom*a, from Karen McCormick (OSC for Hudson Site) to Charles A. Gazda (Chief and Director, Region 6, Office of Emergency & Remedial Response) and Dennei Whitfield (ODEQ State Contact) (February 2, 1998), Bates No. LOL0049837.

44. On January 18, 2001, EPA sent a Special Notice and Demand letter (a potentially responsible party letter under CERCLA) to Land O'Lakes, as the successor to Midland, for payment of removal costs and to conduct the Remedial Investigation/Feasibility Study ("RI/FS") at the Site. On or about March 26, 2001, Land O'Lakes responded that it had no liability, but as a matter of corporate policy, Land O'Lakes desired to cooperate with government agencies and work toward an amicable resolution of allegations. Accordingly, Land O'Lakes offered to consider any other information EPA had to support the allegations. None was provided by EPA.

45. From approximately 2004 to 2007, the Oklahoma Department of Environmental Quality ("ODEQ"), on behalf of EPA, performed the RI/FS at the Site and incurred costs.

46. On or about November 23, 2007, EPA issued its ROD, which selected further remedies for the Site. In the ROD, EPA selected the remedial actions and determined that the "contaminants of concern" at the Site were: **arsenic**, **lead**, **benzo(a)pyrene** (a type of PAH), **benzo(a)anthracene** (a type of PAH) and **benzene**

(emphasis added). As noted in Paragraph 29, these were the same chemicals that EPA in its 1985 Second Amended Complaint knew existed at the Site and were impacting refinery soils, sediment and groundwater on a site-wide basis. Further, EPA in a single sentence of the ROD and without any documented basis asserted that "visual contamination" required remediation at the Site. This “visual contamination” referred to in the ROD is the same condition that EPA knew existed at the Site when it lodged the 1987 FCD and required the surface conditions of these visually contaminated soils to be remediated. EPA also had extensive information on subsurface soil contamination at the Site at the time of lodging the 1987 FCD, but did not require these known conditions to be addressed as part of the FCD.

47. On or about February 19, 2008, EPA sent another Special Notice letter to Land O'Lakes that demanded that Land O'Lakes perform the Remedial Design/Remedial Action ("RD/RA") specified in the ROD and pay EPA and ODEQ past costs of $21.8 million for ODEQ investigation costs and the costs of the two EPA removal actions.

48. On or about May 28, 2008, Land O'Lakes sent EPA a letter that **expressly referenced** the FCD and the Closure Order. The letter stated that the corrective action and closure under RCRA satisfy the requirements of both RCRA and CERCLA and cited *EPA's Coordination between RCRA Corrective Action and Closure and CERCLA Site Activities*, U.S. EPA, September 24, 1996. The letter advised that Land O'Lakes does not understand how it could have liability under CERCLA based on the FCD and Closure Order. EPA did not respond to this letter from Land O’Lakes.

49. On or about January 6, 2009, EPA issued the UAO for the Site requiring Land O'Lakes to implement the remedy selected by EPA in its ROD by performing a remedial design and remedial action at the Site, at Land O'Lakes' sole cost. Paragraph 120 of the UAO provided for penalties of $32,500 per day and potential treble punitive damages for noncompliance. The EPA purported to issue the UAO under the authority of CERCLA, 42 U.S.C. § 9606(a), without any mention of Court-ordered protections afforded to Land O'Lakes under the FCD and Closure Order.

50. EPA's issuance of a unilateral administrative order or a potentially responsible party ("PRP") letter constitutes a suit against a person. The formal demands and 2009 UAO in this case are contrary to and in complete disregard of the protections afforded to Land O'Lakes by this Court under the FCD and the Closure Order.

51. On February 9, 2009, Land O'Lakes issued its Notice of Intent letter to comply with the UAO, but also preserving Land O'Lakes' objections. 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 completed. 42 U.S.C. § 9613(h).

52. During 2009 to the present, Land O'Lakes has performed the remedial design and remedial action in accordance with the ROD and as ordered in the UAO.

53. Land O'Lakes received EPA's letter of June 19, 2015, which confirmed that the remedial action construction work has been completed, that the remedial action work has attained required performance standards, except for the performance standards required for groundwater (as to groundwater, the EPA has approved Land O'Lakes' long-term monitoring and Operation and Maintenance plan to address groundwater) and that

no additional modifications were required for Land O'Lakes' Remedial Action Report or the Data Evaluation Report. Until Land O'Lakes received the June 19 letter, Land O'Lakes did not know whether EPA would require additional modifications to these reports. On June 19, 2015, the response action at the Site was completed. EPA has provided sufficient approval, and, even if EPA had not provided sufficient approval, Land O'Lakes has the right to proceed because the response action has been completed. Land O'Lakes has now fully or substantially completed the required action under the UAO.

54. Land O'Lakes incurred significant costs as a result of compliance with the UAO. In this action, Land O'Lakes does **not** seek reimbursement of any such costs from the Hazardous Substance Fund under CERCLA, 42 U.S.C. § 9606(b)(2). On August 18, 2015, Land O'Lakes filed a separate and distinct Petition for Reimbursement under CERCLA Section 106(b) and for Relief for Constitutional Violations, U.S. Environmental Protection Agency, Environmental Appeals Board, Washington, D.C., Case No. CERCLA 106(b) 15-01, to seek reimbursement of such costs from the Fund.

55. Land O'Lakes brings this action to enforce its rights under the FCD[5] and the Closure Order in order to enforce the protections it received under the FCD covenant not to sue and the Closure Order release and to resolve pending and threatened controversies. Land O'Lakes seeks this Court's order, because of the protections afforded to it under the FCD and Closure Order of this Court, that: (1) it had no responsibility or liability

[5] With respect to the time frame, the "covenant not to sue" provisions in FCD shall "remain in effect sine die." Since these provisions remain in effect indefinitely into the future, they are in effect to the present. FCD, Section XXI.

remaining to the Government at the time EPA issued the 2009 UAO, nor (2) did it have any responsibility or liability remaining for any costs incurred by EPA for its emergency removal and non-time critical removal response actions EPA undertook, nor (3) did it have any responsibility or liability remaining for any costs incurred by EPA or ODEQ conducting the RI/FS, oversight or any other costs at the Site. Land O'Lakes is entitled to all such declaratory and citizen-suit relief.

56. Land O'Lakes fully reserves all rights, claims and defenses with respect to the Government regarding the Site and does not waive or impair any of them by the allegations in this First Amended Complaint.

E. The Conditions at the Site were "known by the United States and existing as of the date of the lodging of this Decree"

57. The FCD provided Hudson and its immediate predecessor in interest (Land O'Lakes upon merger with Midland in 1982) a covenant not to sue for any further 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 the lodging of this Decree." The Government lodged the FCD in October 1987.

58. The Government has defined the phrase "corrective action" in several of its official publications. EPA's definition has broad parameters: "Corrective 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). The phrase "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, p. 2 (Revised Sept. 2002).

59. Extensive groundwater investigations, soil borings, soil and pond sediment sampling, laboratory data, maps, photographs, refinery shut-down conditions and Site visual conditions were known and supported by multiple reports describing the various investigations, findings and Site conditions that existed at the time of EPA's lodging of the FCD. These materials and reports compiled a broad and extensive list of conditions and chemicals in the soil, sub-surface, sediments, surface water, groundwater and the refinery equipment, pipes, buildings, tanks shut-down conditions, including "visual contamination" throughout the Site from refinery releases. This data and Site information collectively comprise the Site conditions, which existed and were known to the Government at the time of lodging the FCD. The chemical list was comprehensive and sufficient to characterize the media and areas at the Site, including "visual contamination," and most but not all of these known conditions were addressed by EPA under the FCD Work Plan.

60. EPA's activities subsequent to the FCD included an emergency removal action, a non-time critical removal action, a RI/FS, ROD and the UAO. However, the response actions taken or ordered by EPA subsequent to the FCD addressed conditions that were known by the Government in October 1987 or that were caused by events or

activities by others after that time and after the sale of the refinery by Midland to Hudson, for which Land O'Lakes is not responsible.

61. The response actions at the Site by EPA in its emergency removal action and its non-time critical removal action were directed at conditions known by the Government and existing at the time the FCD was lodged. The costs associated with these response actions are costs for which Land O'Lakes is not liable.

62. The ODEQ RI/FS and ROD activities and the response actions required by the 2009 UAO for the Site were directed at the same conditions known by the Government and existing at the time the FCD was lodged. The costs associated with these response actions are costs for which Land O'Lakes is not liable.

F. The Covenant Not to Sue in the FCD and the Release of Liability in the Closure Order Establish the Non-Liability of Land O'Lakes for CERCLA Claims

63. 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.

U.S. Environmental Protection Agency, *Coordination between RCRA Corrective Action and Closure and CERCLA Site Activities* (Sept. 24, 1996); U.S. Environmental Protection Agency, *The Environmental Site Closeout Process Guide* (Sept. 1999) ("In general,

cleanups under RCRA corrective action or CERCLA can satisfy the requirements of both programs.").

64. By entering into the FCD, 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.

65. In this RCRA action, the Government in the covenant not to sue in the FCD references Section 3008(h) but it contains no reservation of rights under CERCLA. This Court's release of liability in the Closure Order has no reservation of rights under CERCLA. Further, the limited reservations found in the FCD in Section XVI EFFECT Of SETTLEMENT, Paragraph C. 1-4 under RCRA were either satisfied (1-3) or not applicable (4) to this action.

66. The Closure Order terminated all liability for the obligations of Hudson to complete the FCD 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 FCD.

G. Res Judicata and Collateral Estoppel Bar the Government's Suits against Land O'Lakes Subsequent to the FCD and Closure Order

67. The FCD 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.

68. The Government amended the original RCRA complaint in Civil Action No. 84-2027-A on multiple occasions before the entry of the FCD in 1987 and the Closure Order in 1994 and could have amended the complaint sometime in those years to include a CERCLA claim. For example, on January 7, 1985, the Department of Justice and the Superfund [CERCLA] Branch of Region 6 of EPA specifically considered whether "…to amend the civil complaint filed on August 3, 1984 alleging RCRA violations…" "…to include any possible CERCLA counts…." U.S. EPA, Region 6, *Memorandum Hudson Refining RCRA Referral/Use of FIT Personnel* (January 7, 1985), Bates No. LOL0074415. But the Government chose not to pursue a CERCLA claim in Civil Action No. 84-2027-A. The doctrine of res judicata prohibits the Government in this case from asserting claims or legal theories that were or **could have been asserted** in the prior action.

69. The Government's Civil Action No. 84-2027-A and subsequent suits had either identical, or closely related, causes of action because the 10th Circuit's "transactional approach" includes all claims or legal theories of recovery that arise from the same transaction, event or occurrence. Land O'Lakes is sufficiently in privy with the Hudson parties because: (1) Land O'Lakes benefitted from the protection against liability provisions of the FCD and Closure Order (e.g., "The covenant not to sue provisions… shall be applicable to Defendants' [Hudsons'] immediate predecessor in interest [Land O'Lakes] of the Cushing Refinery ….); and (2) Land O'Lakes (by merger with Midland) is the immediate predecessor in property interest in and title to the Cushing Refinery. The United States District Court for the Western District of Oklahoma had competent jurisdiction to enter the final, valid FCD and Closure Order, which were not appealed or challenged. Res judicata therefore barred the subsequent suits, based on CERCLA claims or theories, by the Government against Land O'Lakes.

70. Furthermore, the FCD and Closure Order are collateral estoppel (often referred to as issue preclusion). Under collateral estoppel, when an issue of ultimate fact has once been determined by a valid and final judicial ruling, that issue cannot be litigated between the same parties in any future proceeding or lawsuit. With respect to the issue in this case, this Court decided in the FCD and Closure Order to provide protections from liability to Land O'Lakes for the Site. These protections included a covenant not to sue in the FCD and a release from liability in the Closure Order. The Government cannot deny or ignore these protections in its subsequent suits. Collateral estoppel precludes subsequent litigation of the identical issue between the same parties,

even when raised in a different claim or cause of action. Collateral estoppel bars the Government's subsequent suits.

H. The Anti-Duplication Provisions of RCRA and CERCLA Prohibit Any Liability of Land O'Lakes and Any Administrative End Run by EPA

71. The anti-duplication provisions of RCRA bar the Government from seeking double liability or recovery against Hudson and Land O'Lakes under CERCLA. 42 U.S.C. § 6905(b)(1). The United States, at the request of EPA, sued the Hudson entities in 1984 for RCRA Section 3008(h) claims seeking cleanup of the Cushing Refinery. In the settlement of these claims in the FCD, the United States covenanted not to sue the Hudson entities and their immediate predecessor, Land O'Lakes, in exchange for Hudson's performance, at its own cost, of the remediation at the Cushing Refinery plus escrow and trust fund accounts of over $1 million dollars. The United States obtained its first alleged liability for the Site under RCRA in the FCD. The anti-duplication provisions of RCRA bar the United States from now seeking costs or a second or double liability against Land O'Lakes under CERCLA for the Cushing Refinery.

72. In addition, the anti-duplication provisions of CERCLA explicitly prohibit the Government from seeking double liability or recovery against Hudson and Land O'Lakes under CERCLA. The Government has already recovered relief for the same claims under the FCD under RCRA and is barred from now seeking costs or a second or double liability against Land O'Lakes under CERCLA for the Cushing Refinery. 42 U.S.C. § 9614(b).

73. Moreover, CERCLA §§ 9613(f)(2) and 9613(f)(3), 42 U.S.C. §§ 9613(f)(2), 9613(f)(3), bar the Government's past, present and future claims against Land O'Lakes. The Hudson companies, and their immediate predecessor, did resolve their "liability to the United States" in the FCD and Closure Order. Since Land O'Lakes, as the successor by merger to Midland, has "resolved" its liability to the United States, the United States may **not** bring an action against Land O'Lakes. Therefore, the future suits for cost recovery by EPA against Land O'Lakes are barred as a matter of law.

74. The Government has done an administrative end run around this Court's protections afforded to Land O'Lakes in the FCD and Closure Order and other provisions of the law by issuing the 2009 UAO and making its threatened claims for cost recovery for costs it expended subsequent to the FCD. The facts underlying the claims, not the parties' characterization of the claims, determine whether the claims arise from the same subject matter as a settlement with the Government.

75. In this case, the Government's claims in the UAO and the threatened cost recovery claims arise from the same conditions known to the United States and existing at the time of lodging the FCD and as covered by the judicially-approved FCD and Closure Order. The Government's actions against Land O'Lakes violate the Court-ordered protections under the FCD and Closure Order.

V.
Count I Plaintiff's Declaratory Judgment Claim against Defendant

76. Land O'Lakes incorporates by reference each and every allegation of Paragraphs 1 through 75 set forth above.

77. The Government's issuance of the UAO to Land O'Lakes violated and breached the covenant not to sue provisions in the FCD and the release provisions in the Closure Order.

78. The Government's threat of a cost recovery action for the emergency removal action and the non-time critical removal action is an anticipatory violation and breach of the covenant not to sue provisions in the FCD and the release provisions in the Closure Order.

79. Land O'Lakes, as the immediate predecessor in interest to Hudson, is covered by the covenant provisions and the release provisions and is entitled to enforce them.

80. Land O'Lakes seeks a declaration of present and future legal obligations and rights of the parties under this Court's FCD and Closure Order with respect to EPA's UAO and threatened cost recovery claims for EPA's emergency removal, non-time critical removal, RI/FS costs and other costs at the Site.

81. Land O'Lakes seeks a declaratory judgment concerning the rights and liabilities of the parties pursuant to 28 U.S.C. §§ 2201, 2202, 42 U.S.C. § 9613(g)(2), Rule 57, *Fed.R.Civ.P.* and Rule 71, *Fed. R. Civ. P.*

82. The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that in a case of actual controversy, a court may declare the rights and other legal relations of any interested party seeking such a declaration.

83. An actual and substantial controversy exists between Land O'Lakes and the Government as to Land O'Lakes' past, present and future non-liability under this Court's orders.

84. Absent a judicial declaration setting forth the parties' rights, duties and obligations with respect to the federal orders, multiple legal actions may result.

85. Land O'Lakes is entitled to a declaratory judgment of past, present and future non-liability under the FCD and Closure Order provisions with respect to EPA's UAO and threatened cost recovery action for ODEQ's RI/FS costs and EPA's emergency removal and non-time critical removal costs at the Site.

VI.
Count II Plaintiff's Citizen-Suit Claim under RCRA pursuant to 42 U.S.C. § 6972(a)(1)(A) against Defendant

86. Land O'Lakes incorporates by reference each and every allegation of Paragraphs 1 through 85 set forth above.

87. The citizen-suit provisions of RCRA grant citizens, such as Land O'Lakes, the right to sue any person, such as the Government, for any and all violations of any standard, condition, requirement, prohibition or **order** which has become effective pursuant to RCRA. 42 U.S.C. § 6972(a)(1)(A).

88. The Government's issuance of the UAO to Land O'Lakes violated and continues to violate the covenant not to sue provisions in the FCD and the release provisions in the Closure Order.

89. The Government's threat of a cost recovery action for the emergency removal action and the non-time critical removal action violated and continues to violate the covenant not to sue provisions in the FCD and the release provisions in the Closure Order. On or about June 23, 2015, the Government sent to Land O'Lakes its formal demand for payment at the Site, through February 28, 2015, of alleged costs of $23,424,243.76 plus alleged interest of $4,818,215.45. The Government threatened that if Land O'Lakes does not make payment within 30 days, the Government may pursue civil litigation.

90. Land O'Lakes, as the immediate predecessor in interest to Hudson, is covered by the covenant provisions and the release provisions and is entitled to enforce them.

91. Land O'Lakes has given the 60-day notice of violation pursuant to 42 U.S.C. § 6972(b)(1)(A).

92. This Court has jurisdiction to enforce the standard, condition, requirement, prohibition or order and to order such action as may be necessary to correct any and all violations. 42 U.S.C. § 6972(a)(1)(A).

93. Land O'Lakes is entitled to this Court's order of past, present and future non-liability under the FCD and Closure Order provisions with respect to EPA's UAO and threatened cost recovery action for ODEQ's RI/FS costs and EPA's emergency removal and non-time critical removal costs at the Site.

94. Land O'Lakes is entitled to recover its costs of litigation (including reasonable attorney and expert witness fees). 42 U.S.C. § 6972(e).

95. Land O'Lakes is entitled to recover civil penalties of $37,500, or the current amount under the regulations, for each day since January 6, 2009 (which is the date Defendant issued the UAO to Land O'Lakes) to the present pursuant to 42 U.S.C. §§ 6972(a) and 6928(a) and (g).

96. The citizen-suit provisions of RCRA grant citizens, such as Land O'Lakes, the right, as private attorneys general, to sue any person, such as the Government, for violations of this Court's Orders.

VII.
Prayer for Relief

WHEREFORE, Land O'Lakes requests the following declaratory and citizen-suit relief and orders:

a. That Land O'Lakes is the immediate predecessor in interest to Hudson at the Cushing Refinery and is entitled to the protections of the covenant not to sue in the FCD and the release of liability and termination of obligations in the Closure Order;

b. That the Government violated this Court's FCD and Closure Order by issuing its UAO for the Site against Land O'Lakes;

c. That all response actions taken by the Government after the date of the Closure Order addressed conditions that were known by the Government when it lodged the FCD in October 1987 or were caused by events or activities after the sale of the Refinery to Hudson for which Land O'Lakes has no responsibility;

d. That the protections afforded to Land O'Lakes in the FCD and the Closure Order prevent the Government from seeking any additional costs for the Site under CERCLA, or otherwise, after the date of the Closure Order;

e. That res judicata, collateral estoppel, the anti-duplication provisions of RCRA and CERCLA, as well as this Court's Orders, prohibit any suits, or claims, for the Site costs alleged by the Government;

f. That this Court shall enter an Order of non-liability, for any past, present or future costs incurred at the Site, in favor of Land O'Lakes and against the Government;

g. That this Court shall award the costs of litigation (including reasonable attorney and expert witness fees) to Land O'Lakes and against the Government;

h. That this Court shall order that Defendant shall pay a civil penalty of $37,500, or the current amount under the regulations, for each day since January 6, 2009 (which is the date Defendant issued the UAO to Land O'Lakes) to the present pursuant to 42 U.S.C. §§ 6972(a) and 6928(a) and (g);

i. Such other and further relief in favor of Land O'Lakes and against the Government as this Court deems just and proper.

Respectfully Submitted,

/s/ Mark D. Coldiron
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Attorneys for Plaintiff Land O'Lakes, Inc.

Certificate of Service

I hereby certify that true and accurate copies of the foregoing were served by electronic filing through PACER upon all counsel of record on September 1, 2015.

/s/ Mark D. Coldiron
MARK D. COLDIRON

Exhibit 1

Court's Final Consent Decree

UNITED STATES OF AMERICA	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO. 84-2027-A
	)	
HUDSON REFINING CO., INC., HUDSON OIL CO., INC.,	)	
	)	
Defendants.	)	

FINAL CONSENT DECREE

WHEREAS, a Complaint was filed on August 8, 1984, as amended on June 4, 1985, and August 14, 1985, by authority of the Attorney General of the United States and at the request of the Administrator of the U.S. Environmental Protection Agency ("EPA") against Defendants Hudson Refining Co., Inc. and Hudson Oil Company, Inc. with respect to a crude oil refinery in Cushing, Oklahoma, which is the subject of this action;

WHEREAS, the Complaint initiating this action was brought pursuant to Section 3008(a) and (g) of the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. §§ 6928(a) and (g). The Amended Complaints were filed pursuant to the authority of Section 3008(a), (g) and (h) of RCRA, as further amended by the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), Public Law No. 98-616;

WHEREAS, Defendants in this action have denied all legal and equitable liability for statutory and regulatory claims and violations raised by said Complaints:

84

WHEREAS, the Court approved and entered a Partial Consent Decree in the case on May 1, 1986 which settled, in part, Plaintiff's claims for injunctive relief and civil penalties, as set forth in Section XVIII of the Partial Consent Decree and also provided for Defendants' implementation of a work plan to investigate releases of hazardous waste or hazardous constituents;

WHEREAS, the parties, by their respective attorneys consent without trial or adjudication and without any admission as to liability for any purpose, to the following judgment resolving, as detailed in Section XVI of this Decree, Plaintiff's remaining claims for relief under its Second Amended Complaint except as provided in Section XVII B. herein;

WHEREAS, the parties to this Final Consent Decree consent to the entry thereof;

NOW THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED THAT;

I. JURISDICTION

This Court has jurisdiction over the subject matter of and the parties to this action.

II. PARTIES BOUND

The provisions of this Final Consent Decree shall apply to and be binding upon and exercisable by the parties to this action, and their successors and assigns. The undersigned representative of each party to this Final Consent Decree is fully authorized by the party whom he or she represents to enter

into the terms and conditions of this Final Consent Decree, to execute this Final Consent Decree on behalf of such party and to legally bind that party to it.

III. CONVEYANCE OF TITLE

A. Defendants shall notify EPA and the Oklahoma State Department of Health in the manner specified in Section XXII at least thirty (30) days prior to the actual conveyance of title, easement, or other interest, including a leasehold, in the Cushing Refinery.

Defendants agree to include in any contract of sale or deed transferring ownership, easement or leasehold of the Cushing Refinery a provision that any such party shall be bound by the requirements of this Final Consent Decree and the addendum as set forth herein from and after the date of such conveyance and that the United States shall be specifically designated a third party beneficiary in such instrument of conveyance for the purpose of enforcing the requirements of this Final Consent Decree. Defendants also shall notify the immediately subsequent purchaser or operator of the Cushing Refinery of its applicable regulatory responsibilities in accordance with 40 C.F.R. § 265.12(b).

A copy of the applicable instrument evidencing any such conveyance of title, easement, leasehold or other interest by Defendants shall be provided to the United States in the manner set forth in Section XXII.

B. Without limiting the foregoing, Defendants specifically agree to include in all conveyancing instruments,

including specifically (1) land sale contracts and (2) deeds or other instruments to be filed of record, relating to any such conveyance, a covenant to run with the land restricting the use of the refinery property in the manner specified below:

> The grantee recognizes and agrees that there are remnants and effects of certain industrial activities and practices conducted in the past upon the property to be 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, whether by descent, devise, purchase or otherwise, and any person by the acceptance of title to said property or any part thereof 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.

Defendants shall restrict use of the Cushing Refinery to the activities specified above until the time that the property is sold by Defendants.

C. This land use restriction provided herein 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.

IV. DEFINITIONS

Whenever the following terms are used in this Final Consent Decree and the addendum hereto, the definitions specified hereinafter shall apply:

"Cushing Refinery" means the petroleum refinery located in Cushing, Oklahoma which is the subject of this action;

"Defendants" means the defendants to this action, Hudson Oil Co., Inc. and Hudson Refining Company, Inc. by and through the Trustee in Bankruptcy;

"EPA" means the United States Environmental Protection Agency;

"Land treatment unit" means the 10.7 acre tract of land in the northwestern portion of the Cushing Refinery which has been used for land treatment of hazardous wastes;

"OCIWDA" means the Oklahoma Controlled Industrial Waste Disposal Act, Okla. Stat. Ann. Title 63, §§ 1-2001, et seq. (West 1984);

"Oklahoma Rules" means the Oklahoma Rules and Regulations for Industrial Waste Management;

"OSDH" means the Oklahoma State Department of Health;

"Parties" mean the United States and the Defendants;

"Plaintiff" means the United States;

"RCRA" means the Resource Conservation and Recovery Act, as amended by the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6901 et seq;

"Second Amended Complaint" means Plaintiff United States' complaint filed pursuant to this Court's August 14, 1985 Order, and which includes all of Plaintiff's claims and requests for relief in this case;

"Trustee in Bankruptcy" means the Trustee in Bankruptcy for Hudson Refining Company, Inc. and Hudson Oil Company, Inc.;

"Work Plan" means the description of corrective action projects and activities attached hereto as an addendum to this decree and fully incorporated herein.

V. TERMINATION OF PARTIAL CONSENT DECREE

The Partial Consent Decree ("PCD") entered by the Court in this action on May 1, 1986 is superseded and terminated with respect to all matters not performed through the date of lodging of this Final Consent Decree, except for the record retention provisions of Section IX of the PCD, which shall continue in effect for the time period provided therein.

VI. CORRECTIVE ACTION

A. Defendants, subject to the review and approval provisions of the Work Plan, shall perform the corrective action projects referenced in the document entitled "Work Plan" attached hereto as an addendum and fully incorporated herein. All referenced corrective action work shall be completed within the times specified in the Work Plan.

B. In the event that the United States determines that any activities are not being conducted in accordance with the terms of this Final Consent Decree and the Work Plan, the United States shall notify the Defendants in writing and specify the work to be performed in accordance with the Final Consent Decree and Work Plan. Defendants shall perform such work unless Defendants invoke the dispute resolution provisions of Section XIII. In the event that Defendants choose to invoke the dispute resolution provisions of Section XIII of this Decree, Defendants shall initially confer with the United States for a period no longer than ten business days in an effort to resolve the dispute. After this period, if the dispute is not resolved, the Defendants shall cease the activities that the United States determined to be contrary to Defendants' obligations under the Decree and Work Plan until such time as the dispute is resolved by agreement of the parties or by the Court. Defendants shall make any contract executed by Defendants for corrective action work under this Decree subject to the terms and conditions set forth herein.

C. Notwithstanding the preceding provisions of this Section, Defendants may submit, for the United States' approval, a written proposal to modify the Work Plan to include alternative corrective action activities to those specified in the Work Plan. The proposed modification shall include a justification of how the proposed alternative will meet the objectives of the Final Consent Decree within the time limits specified in the Final

Consent Decree, and shall include a proposed schedule for implementing the suggested alternative. Submission of such a proposal, without the United States' approval, does not alter Defendants' obligations to comply with any of the requirements of this Final Consent Decree.

If the United States determines that such proposed modification is consistent with the corrective action objectives sought to be achieved, then Plaintiff may grant written approval of the proposal and authorize its implementation by Defendants. Any modification of the existing Decree or addendum shall be accomplished in accordance with Section XV of this Decree. If the United States determines that the proposed modification is not consistent with the corrective action objectives of the Work Plan, the United States' determination shall be final, and the dispute resolution provisions of Section XIII shall not apply.

VII. FUNDING FOR CORRECTIVE ACTION

A. No later than twenty (20) days following the lodging of this Final Consent Decree, Defendants shall establish an interest-bearing escrow account in the amount of $1,000,000. The escrow account is established for the sole purpose of funding the activities described in Section I of the Work Plan. The amount of money escrowed pursuant to this Section shall in no way limit Defendants' responsibility to pay all costs necessary to comply with this Decree. Neither the funds in the escrow account nor any funds expended for obligations under this Final Consent Decree constitute fines or penalties.

B. The Trustee in Bankruptcy, or such successor as the parties may agree upon, shall act as escrow agent of the escrow account. The escrow agent shall receive no fee or compensation from the escrow account for services as an escrow agent. The escrow agent shall have authority to expend funds for the accomplishment of the activities enumerated in Section I of the Work Plan in the manner specified in that Plan and in this Section, including activities conducted following the establishment of the escrow account and prior to lodging of the Final Consent Decree. Provided that the escrow agent expends funds in accordance with this section, the escrow agent shall not have liability to the United States or to Defendants.

C. The escrow agent shall provide the United States, in the manner specified in Section XXII of this Decree, with a monthly accounting including starting balance, interest earned, expenditures made and closing account balance. The accounting shall also include copies of invoices and other demands for payment settled during the month. In addition, EPA may request supplemental accounting information for all expenditures from the escrowed funds.

D. Defendants shall provide a monthly report to the United States concerning contractual obligations incurred for corrective action pursuant to the Work Plan.

E. Defendants shall incorporate in any proposed plan of reorganization in In Re Hudson Oil Company, Inc., et al. (Bank. D. Kansas) Bank No. 84-2002 etc. Defendants' obligations

under this Final Consent Decree and Work Plan, including the financial assurance requirements of Section VII. A. of the Final Consent Decree and Defendants' ongoing liability to commit funds necessary to comply with the requirements of the corrective action measures included in Section I of the Work Plan, and the regulatory requirements included in Section XI of this Decree and Section II of the Work Plan. Additionally, the terms and obligations of this Decree shall in no way be affected by, or be discharged by, any such plan of reorganization or the confirmation thereof.

F. If and when funds in the above-referenced escrow account have been depleted below $400,000, the EPA may direct that the remaining funds be expended on uncompleted Work Plan activities according to a priority deemed appropriate by EPA. Any changes in the order of Work Plan activities pursuant to this Section shall first be communicated to Defendants in writing and Defendants shall not be deemed to be in non-compliance with any schedules superseded in accordance with this Section.

G. In the event that there are any remaining funds in the escrow account established under this Section following completion of the obligations of this Final Consent Decree and the Work Plan, any remaining funds shall be returned to the Defendants in the event there is a confirmed plan of reorganization, or to the Trustee in the absence of such a confirmed plan of reorganization.

H. Some or all of the remaining funds may be released earlier than the time provided in the preceding paragraph, according to the procedures established in this paragraph. The Defendants may petition the United States to release a portion of the funds remaining in the account upon completion of all of the following components of the Work Plan: 1) I.A. (tank clean out); 2) I.B. (soil excavation); 3) I.D. (NOWP sludge removal); 4) I.E.1. (initial GWRS installation); 5) submission of the annual report under I.C.6.(b); and 6) submission of reports of three (3) sampling events under either I.E.5. or I.E.5. and 6. (if monthly sampling becomes appropriate).

At the time of the petition, Defendants shall present cost estimates for the remaining work. The EPA shall approve or disapprove the cost estimate within sixty (60) days. In the event the United States approves Defendants' cost estimate for the remaining work, the Defendants will be authorized to withdraw funds from the escrow account, provided that the funds remaining exceed Defendants' approved cost estimate by 200%. In the event the United States disapproves Defendants' cost estimate, such disapproval shall be final and shall not be the subject of dispute resolution under Section XIII of this Final Consent Decree.

VIII. SITE ACCESS

Until the termination of all of the provisions of this Final Consent Decree, EPA and its employees and authorized agents and OSDH and its employees and authorized agents shall have

authority to enter the Cushing Refinery at reasonable times, and shall provide notice upon arrival, for the purposes of monitoring compliance with the terms of this Final Consent Decree, conducting sampling, verifying any data or information submitted to EPA or OSDH in accordance with the terms of this Decree.

This provision in no way limits any right of access available to the United States and OSDH pursuant to applicable federal or state laws, regulations or permits.

IX. MONTHLY REPORTING

Defendants shall submit monthly progress reports to EPA to be postmarked no later than Friday of the first week of the month beginning with the month following the lodging of this Final Consent Decree and ending with the last month following expiration of the activities under the Work Plan, including any modifications thereto. Those reports shall describe the performance of activities outlined in the attached Work Plan during the time period covered by the report and shall detail activities completed in the prior month and those planned to be conducted in the upcoming month.

The parties may agree to less frequent reporting requirements than those described in this Section. The dispute resolution provisions of Section XIII shall not be invoked to resolve the parties' failure to reach such an agreement.

X. RECORD RETENTION

Defendants shall retain all records and documents relating to the performance of activities included in the Work

Plan, including any raw monitoring data for five (5) years from the date of lodging of this Decree. Defendants shall make available to EPA and OSDH all non-privileged information and data which underlie the reports and other documents required to be produced under this Decree. If at any time following the close of that five-year period Defendants do not elect to retain the documents, they shall offer EPA and OSDH the opportunity to take possession of all such documents. If neither EPA nor OSDH so chooses to accept possession of such documents, the Defendants may destroy these records or dispose of them in any other manner Defendants deem appropriate.

XI. COMPLIANCE RESPONSIBILITY

A. Subject to the terms of this Final Consent Decree and Work Plan, Defendants shall comply with all applicable provisions of RCRA, as amended, applicable federal regulations, and the federally authorized Oklahoma Hazardous Waste Management Program as set forth in OCIWDA and the Oklahoma Rules.

B. In accordance with the requirements of Section II of the Work Plan entitled "Interim Status Compliance-Land Treatment Unit," Defendants shall submit to EPA and OSDH an amended closure plan, an amended post-closure plan, and revised cost estimates for regulatorily required closure and post-closure activities associated with the land treatment unit that complies with the requirements of Subparts G and H of 40 C.F.R. Part 265 and Section II.C. of the Work Plan. OSDH, after consultation with EPA, shall review these submittals and comment on their

regulatory sufficiency. Any determination of the sufficiency of the plans and estimates shall be subject to the comment and appeal procedures established under OSDH rules and shall not be subject to the dispute resolution provisions of Section XIII of this Decree.

C. Except under authority of an operating permit issued pursuant to Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), OCIWDA, and rules promulgated thereunder, Defendants shall not place additional hazardous waste on the land treatment unit. Nothing in this Decree shall be construed to preclude the Defendants from seeking an operating permit for the land treatment unit under Section 3005(a) of RCRA and applicable provisions of OCIWDA.

D. Upon OSDH approval of Defendants' amended closure plan, Defendants shall begin implementation of the approved closure plan in accordance with the schedule included therein, but in no event later than thirty (30) days following such approval. Upon OSDH approval of Defendants' amended post-closure plan, Defendants shall implement the approved post-closure plan in accordance with the schedule included therein.

Within thirty (30) days of lodging this Final Consent Decree, Defendants shall fund a closure trust fund for $45,000.00, establishing the trust in accordance with 40 C.F.R. § 265.143. Within thirty (30) days of receipt of OSDH approval of the cost estimate for closure of the land treatment unit,

Defendants shall increase the closure trust fund to the amount of the final approved cost estimate for closure.

E. Defendants shall maintain for post-closure the existing trust established November 6, 1985, and revise and submit to OSDH the "Schedule A" within thirty (30) days of OSDH approval of the post-closure plan and post-closure cost estimate.

The pay-in period for the land treatment unit post-closure trust fund shall extend five (5) years from the date of lodging of the Final Consent Decree. Annual payments to the post-closure trust shall commence no later than one year following the date of lodging of the Final Consent Decree. Defendants shall increase the post-closure trust no less frequently than annually in accordance with the following formula:

$$\text{amount of payment} = \frac{CE - CV}{Y}$$

For purposes of the above formula, CE is the current post-closure cost estimate, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

Defendants shall submit a post-closure cost estimate, adjusted for inflation as required by 40 C.F.R. § 265.144(b), during the sixty (60) day period preceding the anniversary date of lodging of the Final Consent Decree for each year of the extended pay-in period. Upon OSDH approval of a post-closure cost estimate, that amount shall be used as the current post-

closure cost estimate in calculating the annual payment to the post-closure trust under the formula above.

The provisions of paragraph E. of this section describing the pay-in period for the post-closure trust fund apply to Hudson Oil Co., Inc. and Hudson Refining Co., Inc. and any reorganized company.

XII. FORCE MAJEURE

Defendants' compliance with one or more of the provisions of this Final Consent Decree may be excused only to the extent and for the duration that noncompliance is caused by a "Force Majeure" event. For purposes of this Final Consent Decree, "Force Majeure" is defined as an event that is caused by an Act of God, labor strike or work stoppage, or other circumstance beyond the Defendants' control that could not have been prevented by due diligence, and that makes substantial compliance with the applicable provision or provisions of this Final Consent Decree impossible.

If Defendants anticipate or experience an inability to comply with any of the provisions of this Final Consent Decree due to a "Force Majeure" event, Defendants shall immediately notify Plaintiff in writing of the nature, cause, and anticipated length of the delay and all steps which Defendants have taken and will take, with a schedule for their implementation, to avoid or minimize the delay. In the event that performance of any of the activities required by this Final Consent Decree are affected by a "Force Majeure" event, then Defendants shall propose a plan for

the United States' approval for achieving the objectives of this Decree by alternative means in the most timely manner. Any modification of the Final Consent Decree shall be accomplished in accordance with Section XV of this Final Consent Decree. Failure to provide written notice pursuant to this Section constitutes a waiver of Defendants' right to invoke the provisions of this Section as a basis for delay of performance under this Final Consent Decree.

If the parties agree that the delay was attributable to a "Force Majeure" event, the parties may, by written agreement in accordance with the modification provisions of Section XV, stipulate to an extension to the relevant performance schedule.

If the parties do not agree that the delay was caused by a "Force Majeure" event, or are unable to agree on a stipulated extension of time, Defendants shall comply with the United States' position or shall invoke the dispute resolution procedures included in Section XIII of this Final Consent Decree. In submitting the matter to the Court, Defendants shall have the burden of proving that the delay was attributable to a "Force Majeure" event, that Defendants have exercised due diligence in minimizing the delay, and that, as a result of the delay, a particular extension period is appropriate.

XIII. DISPUTE RESOLUTION

A. Except as provided in Sections VI.C., VII.H., IX and XI.B., in the event that the parties cannot resolve any dispute arising under this Final Consent Decree or addendum, then

the interpretation advanced by the United States shall be considered binding unless Defendants invoke the dispute resolution provisions of this Section. In the event that Defendants disagree with any such interpretation advanced by the United States, Defendants shall provide written notice to that effect in accordance with Section XXII of this Decree, thereby invoking the Dispute Resolution provisions of this Section.

Any such dispute shall in the first instance be the subject of informal negotiations between the parties. That period of informal negotiations shall not extend beyond thirty (30) days from the date of the Defendants' written notice, unless the parties agree otherwise.

Should Defendants choose not to follow Plaintiff's position, the Defendants shall file with this Court a written petition for relief within ten (10) days after the conclusion of the thirty-day period of informal negotiations, or, if such period is extended as provided above, within ten (10) days after the last day of such extension. The United States shall then have fifteen (15) days following Defendants' filing to respond to the petition. In any such dispute, Defendants shall have the burden of proof. Failure of Defendants to follow the procedures provided in this section constitutes a waiver of Defendants' right to invoke dispute resolution, and the United States' position shall be binding.

Where Defendants invoke the dispute provisions of this Section, they shall not be subject to sanctions for noncompliance

with the Plaintiff's determination on the matter in dispute for the period in which the dispute is before the Court.

B. In the event that the procedures for dispute resolution provided in this Section are not followed, the United States retains the right to petition the Court for immediate relief where Defendants or their successors or assigns fail to comply with any of the terms of this Final Consent Decree and Work Plan.

XIV. COSTS

Each party shall bear its own costs and attorney's fees in the action covered by this Final Consent Decree.

XV. MODIFICATION

There shall be no modifications of this Final Consent Decree without written approval by representatives of all parties to this Final Consent Decree and the Court, or by further Order of this Court.

XVI. EFFECT OF SETTLEMENT

A. Except as to claims not covered by the covenant not to sue provided in this Section and claims provided in Section XVII B., this Final Consent Decree represents a full and complete settlement of all the remaining claims for relief sought by the United States' Second Amended Complaint which were not resolved in the Partial Consent Decree.

B. 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.

C. Except as provided in item 3 of this paragraph, only those matters described in paragraph B of this section are covered by the United States' covenant not to sue. Matters not covered by the covenant include, but are not limited to, the following:

1. Claims based on a failure by the Defendants or their successors and assigns to meet any of the requirements of this Final Consent Decree;

2. Claims based on a past or present "release", within the meaning of RCRA Section 3008(h), of hazardous waste or hazardous constituents that was unknown to or undetected by the United States as of the date of lodging of this Final Consent Decree;

3. Claims based on any release of hazardous waste or hazardous constituents at Defendants' Cushing Refinery that occurs following lodging of this Final Consent Decree, except as to those future releases that occur prior to the United States' approval of Defendants' certification pursuant to the Work Plan and which are the subject of corrective action under the Work Plan;

4. Claims based on Defendants' handling, treatment,

storage or disposal of hazardous wastes or hazardous constituents outside of the Cushing Refinery;

The covenant not to sue provisions of paragraphs 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.

D. The United States and Defendants further agree that the corrective action work described in the attached Work Plan, if properly performed, as set forth herein, is fully consistent with Plaintiff's claimed authority under 42 U.S.C. § 6928(h).

XVII. RETENTION OF ENFORCEMENT RIGHTS

A. Except as specifically provided herein, Plaintiff does not waive any rights or remedies available to the United States for any violation by Defendants or their successors of federal or state laws, regulations, or permitting conditions.

B. Plaintiff specifically retains the right to bring an action pursuant to section 3008(a) of RCRA, as amended, 42 U.S.C.§ 6928(a), for violations of financial responsibility requirements set forth at 40 C.F.R. § 265.147. Defendants retain all defenses to any such action.

XVIII. PUBLIC NOTICE REQUIREMENTS

The parties acknowledge that final approval by the United States and the entry of this decree are subject to the notice requirements of 28 C.F.R. § 50.7.

XIX. BANKRUPTCY COURT APPROVAL

Prior to lodging of this Final Consent Decree and prior to Defendants' proposal of a plan of reorganization, the Trustee in Bankruptcy shall expeditiously seek approval for this Decree from the U.S. Bankruptcy Court for the District of Kansas. This Final Consent Decree is conditioned upon such approval.

XX. RETENTION OF JURISDICTION

A. This Court shall retain jurisdiction of this Final Consent Decree for purposes of ensuring compliance with its terms and conditions.

B. Plaintiff and Defendants each retain the right to seek to enforce the terms of this Final Consent Decree and take any action authorized by federal or state law not inconsistent with the terms and conditions of this Final Consent Decree or otherwise.

XXI. EFFECTIVE AND TERMINATION DATES

A. This Final Consent Decree shall be effective upon the date of its entry by the Court following notice and opportunity for public comment as described in Section XVIII and bankruptcy court approval described in Section XIX. However, the parties agree to observe the provisions of this Final Consent Decree and attached addendum as of the date of lodging with the

Court provided that, if the Final Consent Decree or any portion thereof is not entered by the Court, the parties retain the right to renegotiate this Final Consent Decree or seek further relief from the Court.

The provisions of Sections VI (corrective action), VII (funding for corrective action), VIII (site access), IX (monthly reporting) and X (record retention) shall continue in force and effect throughout the times stated in those sections. Section XI (compliance responsibility) shall continue in effect for a period of five years from the date of lodging. Section III.A. (conveyance of title notice), Section XII (force majeure), Section XIII (dispute resolution), Section XV (modification), Section XX (retention of jurisdiction) and Section XXII (notices) shall remain in effect as long as any of the sections referenced in the two preceding sentences remain in effect. Section II (parties bound), Section III.C. (alteration of land use restriction), Section V (termination of partial consent decree) and Section XVI (effect of settlement) remain in effect sine die.

XXII. NOTICES

Whenever under the terms of this Final Consent Decree notice is required to be given, a report or other document is required to be forwarded by one party or another, or where service of any papers or process is necessitated by the dispute resolution provisions of Section XII, it shall be directed to the following individuals at the addresses specified below. Any

correspondence directed to the Department of Justice shall include a reference to DOJ No. 90-7-1-262.

As to the United States:

Chief, Environmental Enforcement Section
Land & Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Chief, Solid Waste and Emergency Response Branch
Office of Regional Counsel, Region VI
U.S. Environmental Protection Agency
1445 Ross Ave.
Dallas, Texas 75202-2733

As to the State of Oklahoma:

Robert Rabatine
Program Coordinator
Industrial Waste Division
Waste Management Service
Oklahoma State Department of Health
1000 Northeast Tenth Street
P.O. Box 53551
Oklahoma City, OK 73125

As to the Defendants:

Joseph F. Guida, Esq.
Gardere & Wynne
1500 Diamond Shamrock Tower
Dallas, Texas 75201

Any reports or data required to be submitted under the Work Plan attached as an addendum to this Final Consent Decree shall also be submitted to:

Chief, Hazardous Waste Enforcement Section (6 H-C E)
U.S. Environmental Protection Agency
1445 Ross Ave.
Dallas, Texas 75202-2733

The recipient of the notices for the addresses provided for in this section may be altered by written notice of either party.

DATED: Dec 10, 1987

Wayne Alley

the Honorable WAYNE E. ALLEY
Judge, U.S. District Court
for the Western District of
Oklahoma

For the United States:

Robert L. Boyle

ROGER J. MARZULLA
Acting Assistant Attorney General
Land and Natural Resources
Division
Washington, D.C. 20530

WILLIAM S. PRICE
United States Attorney for the
Western District of Oklahoma
Oklahoma City, Oklahoma 73102

By: Eleanor Darden Thompson
ELEANOR DARDEN THOMPSON
Assistant United States
Attorney
Western District of Oklahoma
4434 U.S. Courthouse
Oklahoma City, Oklahoma 73102

for Jonathan J. Cannon

THOMAS L. ADAMS
Assistant Administrator for
Enforcement and Compliance
Monitoring
U.S. Environmental Protection
Agency
Washington, D.C. 20460

ENTERED IN JUDGEMENT DOCKET ON 12-11-87

For the Defendants, Hudson Refining Company, Inc. and Hudson Oil Co., Inc.:

JOSEPH F. GUIDA
Gardere & Wynne
Dallas, Texas

Attorney for Defendants and for the Trustee in Bankruptcy for Hudson Refining Company, Inc. and Hudson Oil Co., Inc.

WALTER KELLOGG
Trustee in Bankruptcy for Hudson Refining Company, Inc. and Hudson Oil Co., Inc.

ADDENDUM A: WORK PLAN

I. CORRECTIVE ACTION

A. Tank Cleanout

1. Activity Initiation. Within sixty (60) days of lodging the Final Consent Decree (FCD), Defendants shall initiate the following activities:

(a) Remove all remaining sludges from Tank No. 46 and transport the sludges to an approved hazardous waste disposal facility for disposal.

(b) Recover all remaining product for sale from Tank No. 40, Tank No. 64 and Tank No. 76.

(c) Wash with high pressure water the insides of Tank No. 40, Tank No. 46, Tank No. 64 and Tank No. 76 and analyze a representative sample of each rinsate for ignitability in accordance with the procedure of 40 CFR §261.21. Further, analyze a representative sample of the rinsate of Tank No. 46 for Total Organic Carbon (TOC) and total lead. If upon analysis the rinsates are not ignitable and further the rinsate from Tank No. 46 also exhibits a TOC concentration less than 700 mg/l and a lead concentration less than 0.5 mg/l, no further rinsing will be

required. All rinsate shall be discharged to the refinery's biological wastewater treatment system.

(d) Remove the water from Tank No. 104 and transfer it to the refinery wastewater treatment system for biological treatment.

(e) Drain the water from Tank No. 65 and Tank No. 66 and transfer it to the refinery wastewater treatment system. Decant any emulsion layer encountered and transport it offsite to an approved hazardous waste facility for disposal. Upon resumption of refinery activities at the site, any slop oil remaining in these tanks shall be recycled into the refining process. If for any reason refining operations do not resume within one year of lodging the FCD, the slop oil shall be sent offsite for legitimate recycling, treatment or disposal.

(f) Inspect Tank No. 65A and Tank No. 66A for the presence of residue. Manually remove any solids encountered and transport them to an approved offsite hazardous waste management facility for disposal.

(g) Document the cleaning procedures used in the clean-out of Tank No. 93, Tank No. 100 and Tank No. 103.

2. Activity Completion. Within 120 days of lodging the FCD, Defendants shall complete the activities described in Sections I.A.1.(a) through I.A.1.(g).

3. Report. Within 150 days of lodging the FCD, Defendants shall submit a report to EPA and OSDH describing the activities conducted in compliance with Sections I.A.1.(a) through I.A.1.(g), including the following specific information:

   (a) A description of the total amount of material transported offsite for disposal at an approved hazardous waste disposal facility, including a copy of the signed manifest returned to the Defendants from the disposal facility (referred to as the "generator's second" copy).

   (b) Analytic results of sampling of rinsates from tanks performed in accordance with the requirements of Section I.A.1.(c).

   (c) Documentation of cleaning procedures used in the cleanout of the tanks identified in Section I.A.1.(g).

   (d) A registered professional engineer's certification that activities required under Sections I.A.1.(a) through I.A.1.(g) have been performed in accordance with those Sections.

4. EPA Review. Within thirty (30) days of receipt of the

certified report, EPA shall review the report described in Section I.A.3. and notify Defendants in writing of its findings with respect to Defendants' compliance with Sections I.A.1. through I.A.3. of the Work Plan. Should EPA find that Defendants have satisfied the requirements of Sections I.A.1. through I.A.3., EPA's written notification of its finding of satisfaction shall constitute acknowledgment of Defendants' compliance with Section I.A. of the Work Plan. Should EPA find that Defendants have not satisfied the requirements of Sections I.A.1. through I.A.3., EPA's written notification shall include the specific deficiencies, reasons for the deficiencies, and actions required of Defendants to achieve compliance with those Sections.

B. Soil Excavation

1. Activity Initiation. Within sixty (60) days of lodging the FCD, Defendants shall initiate the following activities:

(a) Remove all soil exhibiting total oil and grease concentrations greater than 20% by weight from within the secondary containment berms around Tank No. 64, Tank No. 75 and Tank No. 96. In no event shall contaminated soil within an oil and grease concentration greater than 20% be allowed to be left in place.

(b) Remove all soil exhibiting total oil and grease concentrations greater than 5% by weight from the ditch near Tank No. 27 and the ditch between Tank No. 30 and Tank No. 76. In no event shall contaminated soil with an oil and grease concentration greater than 5% be allowed to be left in place.

(c) Repair the secondary containment berm along the ditch near Tank No. 27 to prevent release of spills to the ditch.

2. Sampling and Disposal of Soil. Defendants shall verify the removal of contaminated soil in accordance with the criteria of Sections I.B.1.(a) and I.B.1.(b) by analyzing soil samples obtained at a frequency of one per 500 sq. ft. for total oil and grease. Defendants shall handle the removed soil in accordance with state law.

3. Ditch Lining. At the completion of excavation activities in the ditch near Tank No. 27, Defendants shall install a 30 mil High Density Polyethylene (HDPE) liner in that excavated portion of the ditch which lies outside of the east refinery fence adjacent to the AT&SF railroad tracks. The liner shall extend five feet beyond the edge of the excavated area and shall be covered with at least one foot of clean soil.

Final grade of the bottom of the excavated portion of the ditch shall ensure that water flows freely through the ditch and does not pool. At the completion of excavation activities in the ditch between Tank Nos. 30 and 76, Defendants shall install a geotextile fabric or geonet suitable to prevent erosion of the ditch soils.

4. Activity Completion. Within 120 days of lodging the FCD, Defendants shall complete the soil excavation activities and verification analyses and corrective action measures described in Sections I.B.1. through I.B.3.

5. Report. Within 150 days of lodging the FCD, Defendants shall submit a registered professional engineer's certified report to the EPA and OSDH verifying that the soil excavation, liner installation and berm activities were conducted in accordance with Sections I.B.1. through I.B.3. This report shall include a description of the type, number and location of verification samples taken, the results of analyses, and a description of construction activities under taken to satisfy the requirements of Sections I.B.1.(c) and I.B.3.

6. EPA Review. Within thirty (30) days of receipt of

the certified report required by Section I.B.5., EPA shall review the report and notify Defendants in writing of its findings with respect to Defendants' compliance with Sections I.B.1. through I.B.5. of the Work Plan. Should EPA find that Defendants have satisfied the requirements of Sections I.B.1. through I.B.5., EPA's written notification of its finding of satisfaction shall constitute acknowledgment of Defendants' compliance with Section I.B. of the Work Plan. Should EPA find that Defendants have not satisfied the requirements of Sections I.B.1. through I.B.5., EPA's written notification shall include the specific deficiencies, reasons for the deficiencies, and actions required of Defendants to achieve compliance with those Sections.

C. Biotreatment of Contaminated Soils

1. Program Intent. Defendants shall institute a contaminated soil biotreatment program which is designed to minimize the potential for adverse impact on human health and environment due to direct exposure and air entrainment of contaminated soil particles. This program, described below, shall be comprised of three distinct treatment regimes:

(a) "active" biotreatment program for areas exhibiting total oil and grease concentrations no

greater than twenty percent and no less than five percent;

(b) "enhanced" biotreatment program for areas exhibiting total oil and grease concentrations no greater than five percent and no less than 2000 ppm; and

(c) "augmented" biotreatment program for bermed areas around all gasoline storage tanks exhibiting total oil and grease concentrations less than 2000 ppm.

2. Active Biotreatment Initiation. Within sixty (60) days of lodging the FCD, Defendants shall initiate an active biotreatment program for contaminated soils exhibiting a total oil and grease concentration greater than five percent, by weight.

(a) Active Biotreatment Areas. Areas to be included in the active biotreatment program are:

(i) those areas within the bermed areas surrounding tanks numbered: 21, 28, 30, 31, 35, 37/38, 39, 40, 42, 47, 63, 64, 65/66, 70, 71, 73, 75, 77, 85, 83/88, 89, 91, 96, 97, 501, 51x and 11x/12x/58x/60x;

(ii) the unloading area near Tank No. 39;

(iii) the loading rack near Tank No. 30;

(iv) the area adjacent to the Main API Separator;

(v) the area adjacent to the API-1 Separator; and

(vi) any other area where total oil and grease concentration in the upper 12" is between five and twenty percent.

(b) Active Biotreatment Program. The active biotreatment program shall consist of aeration and mixing by tilling to a depth of 12" or the maximum practicable based on limitations due to soil depth or access to a given biotreatment area; incorporation of soil conditioners to maintain soil pH between 6 and 7.5; maintenance of soil moisture content just below field capacity; and an annual application of fertilizer at an optimal rate estimated to be 300 to 500 pounds per acre, which is designed to promote biological degradation. Demonstration of achievement or lack of achievement of any of these program activity standards shall be documented, with explanation, in the annual reports required by Section I.C.6.(b).

(c) Sampling. Areas undergoing biotreatment shall be sampled on at least two occasions during the growing season - April and October in order to monitor the success of biotreatment. Samples shall be obtained by compositing grab samples

taken from within each treatment area. The minimum number of grab samples necessary in each area shall be equivalent to one per 500 sq. ft. of treatment area, but in no case less than four. Each grab sample shall extend from the soil surface to the maximum depth of tillage.

(d) Sample Analysis. The first set of composite soil samples from all of the active biotreatment areas shall be analyzed for total oil and grease and PAH constituents by High Performance Liquid Chromatography (HPLC). Subsequent samples shall be analyzed for total oil and grease. Analysis for PAHs by HPLC shall be conducted on composite samples taken from each area as oil and grease levels drop below 5% and the area becomes a candidate for the enhanced biotreatment program. These analytic results and justification for a corresponding change in classification shall be reported to the EPA within 45 days of receipt of analytic results in accordance with the requirements in Section I.C.6.(c).

(e) Active Biotreatment Performance Standard. The active biotreatment program described in Section I.C.2. shall continue until composite samples

taken from each area exhibit a total oil and grease concentration of less than 5% by weight, at which time the enhanced biotreatment program described in Section I.C.3. shall apply. Defendants shall submit sampling results demonstrating attainment of concentration levels of oil and grease of less than five percent along with PAH analyses and notify EPA of Defendants' intent to cease active biotreatment and initiate enhanced biotreatment in accordance with the procedures of Section I.C.6.(a).

3. Enhanced Biotreatment Initiation. Within sixty (60) days of lodging the FCD, Defendants shall also implement an enhanced biotreatment program for contaminated soils exhibiting total oil and grease concentrations less than five percent, by weight. These areas include bermed areas of tanks numbered 16, 17, 18, 20, 22, 23, 24, 27, 32, 33, 34, 36, 43, 44, 55, 58, 59, 60, 61, 67, 68, 69, 72, 74, 76, 78, 79, 80, 81, 82, 84, 86, 92, 94, 104, 500, Mn and the area adjacent to the API-3 Separator. Additionally, the requirement to initiate an enhanced biotreatment program described in this Section (Section I.C.3.) applies to those actively biotreated areas listed in Section I.C.2.(a) which have been shown to have been

treated to the biotreatment standard of five percent total oil and grease, as defined in Section I.C.2.(e) and the subsurface biotreatment areas described in Section I.C.3.(d).

(a) Enhanced Biotreatment Program. The enhanced biotreatment program shall be consistent with the active biotreatment program described in Section I.C.2.(b) except that tilling of the soil may be eliminated. This program shall continue until the enhanced biotreatment performance standards of Section I.C.3.(c) are satisfied in accordance with the demonstration required by Section I.C.6.

(b) Sampling and Analysis. Composite soil sampling and analysis shall be conducted at each enhanced biotreatment area listed in Section I.C.3. Each soil composite shall be obtained in accordance with the criteria of Section I.C.2.(c), except that only one composite sample per area per year (July) is necessary. Each sample shall be analyzed for total oil and grease. Within thirty (30) days of receipt of results which demonstrate that the total oil and grease concentration is below 960 ppm, Defendants shall obtain new samples in accordance with the

criteria of Section I.C.2.(c) and analyze them for PAH's by HPLC.

(c) Enhanced Biotreatment Performance Standards. Defendants may cease enhanced biotreatment at any area if it is demonstrated to EPA's satisfaction that representative soil composite sample analyses (by HPLC) prove that the total PAH constituent concentration does not exceed 15 ppm and individual PAH constituent concentrations for the carcinogens benzo(a)pyrene, benzo(a)anthracene and chrysene each does not exceed 200 ppb and that the total oil and grease concentration does not exceed 960 ppm. This demonstration shall be made and approved in accordance with Section I.C.6.

(d) Subsurface Biotreatment.

Also once per year (during July), Defendants shall obtain subsurface soil samples from at least three biotreatment areas exhibiting total oil and grease concentrations between 5% and 20% in the South Plant area. These samples shall be taken in biotreatment areas where more than one foot of fill soil is evident. The soil sample will be a composite taken of the natural (non-fill) soil from zero to one foot

below the fill material/natural soil interface. These samples shall be analyzed for total oil and grease and PAH constituents by HPLC.

4. Augmented Biotreatment Program. Within sixty (60) days of lodging the FCD, Defendants shall also implement an augmented biotreatment program for contaminated soils exhibiting total oil and grease concentrations less than 2000 ppm, by weight, within bermed areas at gasoline storage tanks. The augmented biotreatment program shall be consistent with the requirements of Section I.C.3.(a) (the enhanced biotreatment program) except that treatment may cease when the enhanced biotreatment performance standards of Section I.C.3.(c) are satisfied in accordance with Section I.C.6. for both Tank No. 86 and Tank No. 104.

5. Air Entrainment of Contaminated Soil Particles. To prevent air entrainment of contaminated soil particles, Defendants shall establish and maintain native vegetative cover within the contaminated areas identified in Section I.C., except around refinery process units, within the secondary containment berms of petroleum hydrocarbon material storage tanks, within plant ditches, and any other areas of the refinery in which vegetation is incompatible with normal refinery operations. At such areas

where vegetative cover is not desired, Defendants shall maintain a soil moisture content, in place of a cover such as gravel, or such other measure designed to prevent the air entrainment of contaminated soil particles while at the same time promote continued biotreatment. These measures shall be implemented throughout the biotreatment program until the biotreatment performance standards of Section I.C.3.(c) have been demonstrated in accordance with Section I.C.6.(d).

6. Periodic Reports. Defendants shall submit periodic reports as described below:

(a) Interim Reports. Within fifteen (15) days of receipt of any analytic results obtained as required anywhere in Section I.C. of this Work Plan, Defendants shall submit a report to EPA and OSDH presenting, summarizing, and discussing these results, and describing the location, number and types of samples taken. These reports shall include an assessment of the effectiveness of the biotreatment program, and a discussion of measures taken (if necessary) to promote treatment efficiency. Defendants shall provide notice in these reports of any biotreatment area being claimed as having satis-

fied appropriate (active or enhanced) biotreatment standards.

(b) Annual Reports. As long as active or enhanced biotreatment programs are ongoing, Defendants shall submit an annual report within thirty (30) days following receipt of the analytic results of the latest samples obtained in a calendar year which includes the results of all soil sampling and analytic results compiled to date. This annual report shall also present and discuss findings of the assessment of the biotreatment program and provide an estimate of the time necessary to achieve the biotreatment performance standards of Section I.C.2.(e) for areas undergoing active biotreatment, as well as the time necessary to achieve the biotreatment standards of Section I.C.3.(c) for all areas undergoing enhanced biotreatment.

(c) Completion Reports. Defendants shall submit a registered professional engineer's certified biotreatment completion report to EPA and OSDH which includes the soil sampling and analytic results obtained during the biotreatment as well as verification analyses. This report shall be submitted within 45 days of receipt of

analytic results which demonstrate that any candidate areas for cessation of enhanced biotreatment have achieved the enhanced biotreatment standards of Section I.C.3.(c).

(d) Final Report. Defendants shall submit a registered professional engineer's certified final biotreatment verification report to EPA and OSDH which includes all soil sampling and analytic results obtained during the biotreatment program as well as verification analyses. This report shall be submitted within 45 days of receipt of analytic results which demonstrate that all biotreatment areas have achieved the enhanced biotreatment performance standards of Section I.C.3.(c).

(e) EPA Review. Within thirty (30) days of receipt of any report required by Sections I.C.6.(a), I.C.6.(c) or I.C.6.(d), EPA shall review the report and notify Defendants in writing of its findings with respect to Defendants' compliance with Section I.C. Should EPA find that Defendants have satisfied the requirements of Section I.C.2. for any biotreatment area, EPA's written notification of its finding of satisfaction shall constitute acknowledgement of Defendants'

compliance with Section I.C.2. of the Work Plan and authorize conversion from active to enhanced biotreatment programs at such areas. Should EPA find that Defendants have satisfied the requirements of Section I.C.3. and/or Section I.C.4., EPA's written notification of its finding of satisfaction shall constitute acknowledgment of Defendants' compliance with Section I.C.3. and/or Section I.C.4. of the Work Plan and authorize cessation of enhanced (and augmented, if applicable) biotreatment at such areas. Upon receipt of the Final Report which demonstrates that all areas have achieved the enhanced biotreatment performance standard, EPA's notification of its finding of satisfaction shall constitute acknowledgement of Defendants' compliance with Section I.C. of the Work Plan and no further enhanced or augmented biotreatment shall be required. Should the EPA find that Defendants have not satisfied the requirements of Section I.C., EPA's written notification shall include the specific deficiencies, reasons for the deficiencies, and actions required of Defendants to achieve compliance with those Sections.

D. Removal of North Oily Water Pond (NOWP) Sludges and Contaminated Soils

1. Program Description; Activity Initiation. Within sixty (60) days of lodging the FCD, Defendants shall initiate removal of liquids, sludges, and contaminated soils from the NOWP. Contained liquids shall be transferred to the refinery's biological wastewater treatment system. If sludges and contaminated soils are to be landfilled, they shall be treated in-situ as needed to meet landfill acceptance criteria. All sludges and contaminated soils shall be handled in accordance with state law. Sludges and contaminated soils shall be removed until the removal performance standards of Section I.D.2. are achieved.

2. Removal Performance Standards (RPS). Defendants shall remove NOWP sludges and contaminated soils until all of the sludge/soil samples taken in accordance with the requirements of Section I.D.3. prove that the total PAH constituent concentration does not exceed 15 ppm, individual PAH constituent concentrations for the carcinogens benzo(a)anthracene, benzo(a)pyrene and chrysene each does not exceed 200 ppb and the total oil and grease concentration does not exceed 2,000 ppm. This demonstration shall be made in accordance with Section I.D.4.

3. Removal Verification Sampling and Analysis. Defendants shall sample the soils remaining at the completion of removal activities. Defendants shall grid the NOWP (bottom and sidewalls) into 5000 sq. ft. sections and obtain five (5) grab samples within each 5000 sq. ft. section for compositing into one sample for analysis. Grab samples shall be obtained at a rate of one for every 1000 sq. ft. of area within the 5000 sq. ft. section and shall extend to six inches below the surface. The Defendant shall analyze the composite soil samples for total oil and grease, total PAHs and the following PAH constituents by HPLC:

Benzo(a)anthracene

Benzo(a)pyrene

Chrysene

4. Removal Schedule; Report. Within 180 days of lodging the FCD, all sludge and contaminated soil removal activities, and removal verification sampling and analysis activities described in Sections I.D.1. through I.D.3. shall be completed, including receipt of analytic results.

(a) If results indicate that the RPS have been achieved, Defendants shall, within 45 days, submit to EPA and OSDH a registered professional

engineer's certified report verifying removal of sludges and contaminated soils to the RPS, which includes a complete summary of all sampling and analytic results to date, approximate volume of material removed, discussion of the confirmation results, and a justification for a claim of attainment of the RPS.

(b) If results indicate that the RPS have not been achieved, Defendants shall notify EPA within 15 days of receipt of results. Defendants shall complete additional removal, sampling and analytic activities in accordance with Sections I.D.1. through I.D.3. within sixty (60) days of receipt of the analytic results described above. If the analytic results developed as a result of this Section indicate that the RPS have been achieved, Defendants shall submit the report described in Section I.D.4.(a).

5. EPA Review. Within thirty (30) days of receipt of the certified report described in Section I.D.4.(a), EPA shall review the report and notify Defendants in writing of its findings with respect to Defendants' compliance with Sections I.D.1. through I.D.4. of the Work Plan. Should EPA find that Defendants have satisfied the requirements of Section I.D.1. through

I.D.4., EPA's written notification of its finding of satisfaction shall constitute acknowledgment of Defendants' compliance with Section I.D. of the Work Plan. Should EPA find that Defendants have not satisfied the requirements of Section I.D.1. through I.D.4., EPA's written notification shall include the specific deficiencies, reasons for the deficiencies, and actions required of Defendants to achieve compliance with those Sections.

6. NOWP Retrofit or Regrade. Prior to submission of the final report required by Section I.D.4., Defendants shall either:

(a) regrade the NOWP area to provide free drainage into the refinery clean stormwater collection system, so as to prevent ponding of stormwater and prevent erosion, or

(b) retrofit the existing and any expansion of the western portion of the NOWP with a minimum 60 mil impermeable synthetic liner which will cover the bottom and sidewalls of the pond and extend a minimum of five feet beyond the edge of the pond to an anchor trench. At no time shall any excavation of the retrofitted portion of the NOWP expose the sandstone unit which comprises the areally extensive uppermost aquifer. Defen-

dants shall also regrade the eastern portion of the NOWP to provide free drainage into the refinery clean stormwater collection system, so as to prevent ponding of stormwater and prevent erosion.

E. Groundwater Remediation

1. Groundwater Recovery System Installation. Within ninety (90) days of lodging the FCD, Defendants shall install a Groundwater Recovery System (GWRS) to remove a contaminated groundwater from the uppermost areally extensive aquifer to the north and northwest of the NOWP. The GWRS shall consist of one groundwater recovery well, three newly installed observation wells and three existing monitoring wells identified as OW-F, OW-F (control) and OW-A. Well OW-A is designated as the upgradient or background well. With the exception of the OW-F (control) well, all wells shall be constructed of schedule 40 PVC with the screened interval extending throughout the saturated thickness of the aquifer. The OW-F (control) well screen shall be constructed of stainless steel and the screened interval shall extend throughout the saturated thickness of the aquifer. The recovery well shall have an outside diameter twelve inches whereas all other wells shall have a minimum outside

diameter of four inches. All wells shall be installed and developed in the same manner as the previously installed refinery-wide observation wells. The recovery well shall be located such that plume recovery is maximized (estimated to be 50' downgradient of the NOWP along the centerline of the plume). The three newly installed observation wells shall be located such that the first well is located outside but adjacent to the plume boundary along the centerline which will serve to define the downgradient edge of plume migration (estimated to be 175 feet downgradient from the midpoint of the northern boundary of the NOWP as presented in Figure 2 of the "North Oily Water Pond Groundwater Modeling Report", February 1987), the second well is located inside the plume along the plume centerline approximately equidistant between the recovery well and the downgradient edge of the plume (estimated to be 60 feet downgradient of the recovery well along the centerline of the plume), and the third well is located inside the plume to one side of the centerline downgradient of the recovery well (estimated to be 50 feet to one side of the plume centerline and 75 feet downgradient of the recovery well). The second and third wells will function to monitor the effec-

tiveness of plume recovery. The exact location of the wells described above will depend upon field conditions and actual plume size.

2. Initial Sampling and Analysis; GWRS Confirmation; Report. Within five (5) days of completion of installation of the GWRS, and before the recovery well pump is activated, Defendants shall sample the GWRS. Defendants shall analyze the samples for chlorides, sulfates, and PAH constituents (the latter by HPLC). In addition, Defendants shall measure and record the groundwater level elevations in each well to establish original groundwater contours.

   (a) If analytic results confirm that the monitor wells have been installed in accordance with the location criteria described in Section I.E.1., then within fifteen (15) days of receipt of analytic results, Defendants shall submit a report to EPA and OSDH which presents the well sample data, boring logs, well construction details, and confirmation that the GWRS has been installed in accordance with location criteria described in Section I.E.1. The recovery well pump shall be activated within five (5) days of submission of the GWRS design confirmation report.

   (b) If analytic results confirm that the monitor

wells have not been installed in accordance with the location criteria described in Section I.E.1., within fifteen (15) days of receipt of results, Defendants shall notify the EPA and OSDH. Defendants shall install additional well(s) as necessary to satisfy Section I.E.1. within 45 days of notification. Defendants shall sample and obtain water levels in the additional well(s) within five (5) days of completion of installation and analyze samples for chlorides, sulfates, and PAH constituents (the latter by HPLC). If these results confirm that the GWRS has been installed in accordance with the location criteria described in Section I.E.1., Defendants shall submit the GWRS design confirmation report described in Section I.E.2.(a).

3. Groundwater Protection Standards (GWPS).

(a) PAH Constituent Standards. For purposes of Section I.E. of the Work Plan, the GWPS for PAH constituents are defined as no detectable concentration of:

Anthracene

Phenanthrene

Pyrene

Chrysene

Benzo(a)anthracene

The maximum allowable detection limits using HPLC for the GWPS are as follows:

Anthracene	50 ug/L
Phenanthrene	50 ug/L
Pyrene	25 ug/L
Chrysene	10 ug/L
Benzo(a)anthracene	1 ug/L

However, higher detection limits may be approved by the EPA upon a satisfactory demonstration by Defendants that the above detection limits cannot be achieved due to analytic interferences or other justifiable cause.

(b) Indicator Standard. For the purposes of Section I.E. of the Work Plan, the GWPS for the indicator parameter Total Organic Carbon (TOC), is defined as no statistically significant increase over background concentration. Background concentration shall be defined as the mean concentration of TOC observed in well OW-A over the first four quarters of the first year of sampling of the GWRS. Statistically significant increases are determined by the use of Cochran's approximation to the Behrens-Fischer Student's t-Test or other statistical method approved by EPA.

4. Recovery Well Pumping. The recovery well shall be

pumped at a rate and frequency which will result in the most expeditious removal of contaminated groundwater. Pumped liquids shall be discharged into the refinery's biological wastewater treatment system. Pumping shall continue until the GWPS are met for three consecutive months and removal of the NOWP contaminated sludges and soils is complete in accordance with Section I.E.7.

5. Quarterly Sampling and Analysis; Interim Reports. After the recovery well pump is activated, the GWRS system shall be sampled on a quarterly basis. Groundwater samples shall be analyzed for the parameters listed in Section I.E.3. Groundwater level elevations shall also be measured and recorded monthly and at the time of each sample event. The first sampling shall be conducted within thirty (30) days of recovery well pump activation. A report which presents, summarizes and discusses these data shall be submitted to EPA and OSDH within fifteen (15) days of receipt of analytic results. If results show that achievement of the approved GWPS is indicated, Defendants shall institute monthly monitoring in accordance with Section I.E.6.

6. Conversion to Monthly Sampling and Analysis; Notification. Within thirty (30) days of receipt of results which

indicate that the approved GWPS have been met and after removal of the NOWP contaminated sludges and soils is complete, Defendants shall convert to a monthly sampling and analysis frequency for the GWPS parameters for three consecutive months. The quarterly sampling event, the analysis of which first indicated that the GWPS had been achieved, shall constitute the first of the three consecutive monthly sampling events. If each of the three monthly sampling results demonstrate continued GWPS attainment, Defendants shall notify EPA and OSDH within fifteen (15) days of receipt of the third month's analytical results and include all monthly results as part of the notification. The requirements of I.E.7. shall then apply. If any of the three months' results fail to meet the approved GWPS, then sampling and analysis shall revert to a quarterly frequency. A notification of reversion to quarterly monitoring shall be submitted to EPA and OSDH within fifteen (15) days of receipt of results, and shall include all monthly monitoring results and a discussion of the probable reason for failure.

7. Confirmation of Attainment of the GWPS; Final Report. If the approved GWPS are satisfied for three consecutive months, Defendants may cease operation of the

recovery well pump. The GWRS shall be resampled no sooner than thirty (30) days after cessation of pumping but not before restoration of the original groundwater surface contours (when the pumped cone of depression has disappeared). These samples shall be analyzed for the GWPS parameters listed in Section I.E.3. If these results confirm that the approved GWPS have been achieved, Defendants shall submit, within thirty days of receipt of results, a registered professional engineer's report to EPA and OSDH presenting the results of confirmation testing and certifying that the GWPS have been achieved.

8. EPA Review. Within thirty (30) days of receipt of any of the reports described in Sections I.E.2., I.E.5., I.E.6., and I.E.7., or any of the notifications required by Sections I.E.9.(a), I.E.9.(b), I.E.9.(c) or I.E.10., the EPA shall review the report and/or notification and notify Defendants in writing of its findings with respect to Defendants' compliance with the requirements of those Sections of the Work Plan. Should the EPA find that Defendants have satisfied the requirements of the Sections of the Work Plan for which the report or modification was submitted (described in the first paragraph), EPA's written notification of its finding of satisfaction shall

constitute acknowledgment of Defendants' compliance with those Sections of the Work Plan. Should the EPA find that Defendants have not satisfied the requirements of the Sections of the Work Plan for which the report or notification was submitted (described in the first paragraph), EPA's written notification shall include the specific deficiencies, reasons for the deficiencies, and actions required of Defendants to achieve compliance with the requirements of those Sections.

9. GWRS Performance Assessment. In order to assess the performance of the GWRS and the need for GWRS modification, Defendants shall monitor the reduction in concentration of GWPS parameters at the recovery well(s) in accordance with the following criteria:

(a) Within fifteen (15) days of receipt of analytic data from the fourth quarter sampling event, Defendants shall compare, for each GWRS well, the current GWPS parameter concentrations to those submitted in response to the requirements of Sections I.E.2. and I.E.2.(a), and notify the EPA and OSDH of the results of the comparison.

(i) If the comparison demonstrates that there has been at least a 30% reduction in each of the GWPS parameters at each GWRS well, then

Defendants shall not be required to modify the system unless as required by Section I.E.9.(c).

(ii) If the comparison fails to demonstrate that there has been a 30% reduction in each of the GWPS parameters at each GWRS well, Defendants shall, within thirty (30) days of the notification required by Section I.E.9.(a), install a pump in the GWRS monitor well immediately downgradient of the recovery well along the center line of the plume, and perform the sampling, anaylsis, and comparison required by Section I.E.9.(b).

(b) If Defendants fail to demonstrate the 30% reduction required in Section I.E.9.(a)(i), then, within fifteen (15) days of receipt of results of the sixth quarter sampling event, Defendants shall compare the sixth quarter sampling event concentrations for each GWPS parameter at each GWRS well to those submitted in response to the requirements of Sections I.E.2. and I.E.2.(a), and notify the EPA and OSDH of the results of the comparison.

(i) If the comparison demonstrates that there has been at least a 50% reduction in each

of the GWPS parameters at each GWRS well, Defendants shall not be required to modify the system unless as required by Section I.E.9.(c).

(ii) If the comparison fails to demonstrate that there has been a 50% reduction in each of the GWPS parameters at each GWRS well, Defendants shall, within thirty (30) days of the notification required by Section I.E.9.(b), install up to three (3) additional groundwater recovery wells located so as to enhance attainment of the GWPS and not result in excessive dilution of the plume. Defendants shall have the option to petition EPA for approval of higher GWPS if after three or more sampling events Defendants can demonstrate that further pumping or additional wells will not result in attainment of the GWPS as defined in Section I.E.3.

(c) Within fifteen (15) days of receipt of analytic data from the eighth quarter sampling event, Defendants shall compare the eighth quarter sampling event concentrations for each GWPS parameter at each GWRS well to those submitted in response to the requirements of Sections

I.E.2. and I.E.2.(a), and notify the EPA and OSDH of the results of the comparison.

(i) If the comparison demonstrates that there has been at least a 90% reduction in each of the GWPS parameters at each GWRS well, Defendants shall not be required to modify the system, and shall continue operation of the GWRS until the GWPS for each parameter is achieved.

(ii) If the comparison fails to demonstrate that there has been a 90% reduction in each of the GWPS parameters at each GWRS well, Defendants shall, within thirty (30) days of the notification required by Section I.E.9.(c), install additional groundwater recovery wells (the total number of groundwater recovery wells shall not exceed five) located so as to enhance attainment of the GWPS and not result in excessive dilution of the plume. Defendants shall have the option to petition EPA for approval of higher GWPS if after three or more sampling events Defendants can demonstrate that further pumping or additional wells will not result in attainment of the GWPS as defined in Section I.E.3.

(d) If by the twelfth quarter sampling event

Defendants cannot demonstrate through the provisions of Section I.E.7. that the GWPS have been achieved, Defendants shall continue to operate the GWRS and sample the GWRS in accordance with the requirements of Sections I.E.4., I.E.5. and I.E.6. until such time as Defendants can demonstrate that the GWPS have been achieved. Defendants shall supply to the EPA confirmation of attainment of the GWPS in accordance with the requirements of Section I.E.7. in order to make such a demonstration.

(e) In the event that after the twelfth quarter sampling event and achievement of a 90% reduction of GWPS parameter concentrations, and if Defendants can demonstrate that further operation of the GWRS will not likely result in improved groundwater quality, Defendants may petition the EPA to increase the GWPS for any of the parameters.

10. Notice of Well Plugging. Within thirty (30) days of receipt of written acknowledgment (Section I.E.8.) from EPA that no further groundwater remediation is necessary, Defendants shall plug the GWRS wells so as to eliminate pathways of migration of contaminants to the uppermost aquifer and notify EPA and OSDH that plugging is complete within five (5) days of

completion. The GWRS wells shall be plugged with a cement bentonite grout installed using a tremie pipe. Upon receipt by EPA of Defendants' notice and demonstration that the GWRS wells have been satisfactorily plugged, Defendants shall be deemed in compliance with Section I.E. of the Work Plan.

II. INTERIM STATUS COMPLIANCE - LAND TREATMENT UNIT (LTU)

A. Groundwater Monitoring

1. Installation of Additional Well; Report.

Defendants shall install one additional groundwater monitoring well at the point of compliance immediately downgradient of the northernmost portion of the LTU at the location specifically approved by OSDH within sixty (60) days of lodging the FCD. The well shall be constructed and developed in accordance with the criteria previously approved by EPA for those wells already completed at the LTU point of compliance and described in the report entitled, "A Report on the Hydrogeologic Investigation of the Land Treatment Unit (LTU) at the Hudson Oil Refinery in Cushing, Oklahoma," February 1986. Boring logs, well construction details, and records of development shall be submitted to EPA and OSDH within thirty (30) days following well installation. This report shall also

include the quarterly sampling and analytic data obtained to date at the existing LTU groundwater monitoring wells.

2. Groundwater Monitoring Initiation of Semi-Annual Monitoring. Defendants shall implement a groundwater monitoring program in compliance with the regulatory requirements of 40 CFR 265 Subpart F, including (if required) the implementation of a groundwater quality assessment program. The first sampling event shall take place within ten (10) days of development of the additional well required in Section II.A.1. and shall constitute the first semi-annual sampling event. The groundwater quality data previously developed under the requirements of the Partial Consent Decree (PCD) shall be used as the initial quarterly sampling data base for development of background data pool for statistical analysis of subsequent sampling event data in accordance with 40 CFR 265.92. Any alteration of this monitoring program must be approved in advance by OSDH.

3. Well Construction Performance Evaluation. Defendants shall install a stainless steel control (OW-F (control)) well immediately adjacent to well OW-F near the North Oily Water Pond (NOWP) and monitor both wells identically until groundwater monitoring

ceases under the criteria of Section I.E.7. of the Work Plan. If, from three or more sampling events, it is judged that well construction material effects are larger than sampling and experimental variations observed by the QA/QC program using the Wilcoxon Signed Rank Test, or other appropriate statistical test as approved by EPA, Defendants shall notify EPA and OSDH within fifteen (15) days of receipt of analytic results which, after statistical evaluation, demonstrate a significant difference. Within thirty (30) days of notification, Defendants shall submit a proposal, with schedules, for modifying the groundwater monitoring system at the LTU or provide justification that such modification is not necessary. After review of this proposal or justification, OSDH shall specify in writing within thirty (30) days of receipt of the proposal what further action, if any, is required. Defendants shall implement the approved revisions in accordance with approved schedules.

B. Unsaturated Zone Monitoring (UZM) at the LTU

1. Soil Core Monitoring. Defendants shall implement a soil core monitoring program in conformance with the report entitled "The Land Treatment Unit Investigation Part 1 - Historic Waste Application and Soil Survey," August 1986 and 40 CFR 265 Subpart M. The first

sampling event shall be conducted within thirty (30) days of lodging the FCD.

2. Soil Pore Liquid Monitoring. Defendants shall install twelve (12) Soil Pore Liquid (SPL) monitors and implement a SPL monitoring program in conformance with the report entitled "The Land Treatment Unit Investigation Part 1 - Historic Waste Application and Soil Survey", August 1986, and 40 CFR 265 Subpart M. At a minimum, one SPL monitor per uniform area shall be of a pan type designed to intercept flow of immiscible liquids should it be occuring; the remaining SPL monitors shall be of a pan or suction type. The first sampling event shall be conducted within sixty (60) days of lodging the FCD.

3. UZM Report. Defendants shall submit to EPA and OSDH a report of the results of the UZM program within thirty (30) days of receipt of analytic results of sampling. (Subsequent analytic results shall be maintained in the operating record of the facility and shall be submitted to EPA and OSDH or made available for inspection at the facility as required). The report shall include an evaluation of the RCRA regulatory status of the LTU Runoff Pond which considers leachate migration.

4. EPA Review. Within thirty (30) days of receipt of

demonstrate that hazardous waste or hazardous constituents are leaching from the treatment zone or if the LTU run off pond is deemed to be a regulated unit. The treatment zone is that volume of soil suitable for the effective treatment of hazardous wastes immediately underlying the LTU and extending no deeper than five (5) feet below land surface. These amended C/PC plans, if required, shall be submitted to EPA and OSDH within thirty (30) days of receipt of analytic results of UZM sampling (coincident with submission of the report required in Section II.B.3.).

3. C/PC Cost Estimate Revision. Defendants shall revise its C/PC cost estimates as necessitated by C/PC plan revisions and shall submit the revised cost estimate to OSDH, for approval, coincident with the C/PC plan revisions required by Sections II.C.1. and II.C.2.

III. SAMPLING AND ANALYTICAL METHODS

All sampling and analytical activities required in the Work Plan shall be performed in accordance with the criteria described in EPA publication SW-846, "Test Methods for the Evaluation of Solid Waste (Physical/ Chemical Methods)" or as described in any subsequent revision of that publication or other EPA-approved publication or guidance, not superceded.

Exhibit 2

Court's Order for Closure of the Final Consent Decree

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CIV-84-2027-A
	)	
HUDSON REFINING CO., INC., HUDSON OIL CO., INC.,	)	
	)	
Defendants.	)	

ORDER FOR CLOSURE OF THE FINAL CONSENT DECREE

Came before the Court the motion of the Hudson Liquidating Trust, on behalf of HUDSON REFINING CO., INC., and HUDSON OIL CO., INC., defendants in the above-entitled and numbered cause, requesting closure of the Final Consent Decree, and upon review of the evidence, the Court is of the opinion that the motion should be granted. It is therefore,

ORDERED that the obligations under the Final Consent Decree and its incorporated Work Plan are hereby satisfied and terminated, thereby releasing the Hudson Liquidating Trust, its trustee in bankruptcy, Hudson Refining Co., Inc., and Hudson Oil Co., Inc. from any further obligations thereunder.

DATED this 25th day of October, 1994.

Wayne Alley

WAYNE E. ALLEY
United States District Judge

131

Exhibit 3

Government's Second Amended Complaint

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. HUDSON REFINING CO., INC., and HUDSON OIL COMPANY, INC., Defendants.	CIVIL ACTION No. 84-2027W

SECOND AMENDED COMPLAINT

Plaintiff, the United States of America, at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges the following:

1. This is a civil action brought pursuant to Section 3008(a), (g), and (h) of the Resource Conservation and Recovery Act of 1976, as amended, ("Act" or "RCRA") 42 U.S.C. §6928(a), (g), and (h) for injunctive relief and civil penalties against Hudson Refining Co., Inc. and Hudson Oil Company, Inc. for violations of requirements of Subtitle C of the Act, 42 U.S.C. §§6921-6934.

2. This court has jurisdiction over the subject matter of this action pursuant to Section 3008 of the Act, 42 U.S.C. § 6928; and pursuant to 28 U.S.C. §§1331, 1345 and 1355. Venue is proper in this District pursuant to 42 U.S.C. §6928 because the violations occurred in the Western District of Oklahoma. Notice of the commencement of this suit has been given to the Oklahoma State Department of Health pursuant to Section 3008 (a)(2) of the Act, 42 U.S.C. §6928(a) (2).

3. Defendants, Hudson Refining Co. Inc. and Hudson Oil Company, Inc. (collectively referred to hereinafter as "Hudson"), are Delaware and Kansas corporations respectively, and own, owned and operated, at relevant times herein, a crude oil refinery in Cushing, Oklahoma, which is the subject of this action. On January 3, 1984, Hudson filed for reorganization under Chapter 11 of the Bankruptcy Code (D. Kansas, No. 84-20003).

4. Defendants' refinery generated, at relevant times herein, wastes designated as hazardous wastes under Section 3001 of the Act, 42 U.S.C. §6921 and under 40 C.F.R. §261.32, which assigns an alphanumerical code to each, that hereinafter are noted parenthetically. Specifically, the wastes generated by Hudson were: decanter tank car sludge from coking operations (K087) and the following petroleum refining wastes: dissolved air flotation float (K048); slop oil emulsion solids (K049); heat exchanger bundle cleaning sludge (K050); API Separator sludge (K051); and tank bottoms (K052). These hazardous wastes were disposed of by Hudson on a 10 acre land treatment unit on defendants' property. Hudson therefore was and is subject to Sections 3002-3005 of Subtitle C of the Act, 42 U.S.C. §§6922-6925, and the implementing regulations.

5. Under RCRA, the hazardous waste management program initially is administered by the Administrator of the EPA. Pursuant to Section 3006 of Subtitle C of RCRA, 42 U.S.C. §6926, the Administrator of EPA may authorize a State to administer the Subtitle C RCRA program in lieu of the federal program when he deems the state program to be substantially equivalent.

6. The Administrator on January 14, 1981, December 13, 1982, and June 24, 1983, (46 Fed. Reg. 3207, 47 Fed. Reg. 5560 and 48 Fed. Reg. 28989) authorized the State of Oklahoma to carry out a hazardous waste program in lieu of the Administrator's federal program.

7. The Oklahoma Controlled Industrial Waste Disposal Act, OKLA. STAT. tit. 63, §§ 1-2001, et seq. (West 1981) and the Oklahoma Rules and Regulations for Industrial Waste Management have, through the Administrator's authorization, become requirements of the Subtitle C program of the Act, federally enforceable under Section 3008 (a),(g) of the Act, 42 U.S.C. §6928 (a),(g).

8. During EPA's administration of the program in Oklahoma, Hudson notified EPA, as required by Section 3010 of RCRA, 42 U.S.C. §6930, that it was a generator of hazardous wastes and owned and operated a land treatment facility for the storage and disposal of hazardous waste. Hudson also filed a Part A permit application for its hazardous waste activities pursuant to Section 3005 of the Act, 42 U.S.C. §6925. The submission of the notification form and permit application by Hudson, qualified Hudson for "interim status," under Section 3005(e) of the Act, 42 U.S.C. §6925(e). Interim status allows an existing facility to be treated as having been issued a permit until such time as final administrative disposition of such application is made.

9. After Oklahoma assumed authority to administer the hazardous waste program, Hudson's interim status continued pursuant to Rule 8.5.1 of the Oklahoma Rules and Regulations for Industrial

Waste Management. Under Rule 8.5.1 of the Oklahoma Rules and Regulations for Industrial Waste Management, Hudson is required to maintain full compliance with the interim status standards for controlled industrial waste facilities under Chapter 7 of the state regulations. Chapter 7 of the Oklahoma Rules and Regulations for Industrial Waste Management requires, inter alia, that the owner or operator of a controlled industrial waste facility [hereinafter referred to as "facility"] comply with certain security, inspection, training, preparedness and prevention, and groundwater monitoring requirements. The Oklahoma requirements over time have been recodified.

FIRST CLAIM FOR RELIEF

10. The United States realleges and incorporates by reference herein the allegations of paragraphs 1 through 9.

11. Section 3008(a) of the Act, 42 U.S.C. §6928(a), provides that "...whenever on the basis of any information the Administrator determines that any person is in violation of any requirement of Subtitle C," he may commence a civil action for injunctive relief. Section 3008(g) of the Act provides for the assessment of civil penalties not to exceed $25,000 per violation for each day of violation of Subtitle C.

12. Hudson was and is in violation of the following Oklahoma Rules and Regulations for Industrial Waste Management, with respect to its land treatment facility:

(a) Rule 7.1.6 and parallel recodifications with associated amendments [which incorporates by reference 40 C.F.R. §§265.90,

265.91, 265.92 and 265.94] requires the owner or operator of a facility to implement a groundwater monitoring program capable of determining the facility's impact on the quality of groundwater in the uppermost aquifer underlying the facility. This groundwater monitoring system must be capable of yielding samples for analysis and must consist of at least one hydraulically upgradient and three hydraulically downgradient wells. The defendants' existing groundwater monitoring system is not capable of determining the impact on the quality of groundwater in the uppermost aquifer underlying the facility because the location of the uppermost aquifer has not been determined and the existing monitoring wells are insufficient in number and improperly placed.

(b) Rule 7.1.6 and parallel recodifications with associated amendments [which incorporates by reference 40 C.F.R. §265.93] requires the owner or operator of a facility to prepare an outline of a groundwater quality assessment program capable of determining: 1) whether hazardous waste or hazardous waste constituents have entered the groundwater; 2) the rate and extent of migration of hazardous waste or hazardous waste constituents in the groundwater; and 3) the concentrations of hazardous waste constituents in the groundwater. The groundwater quality assessment outline submitted by Hudson on November 2, 1983, did not adequately address the three areas identified above.

(c) Rule 7.2.2 and parallel recodifications with associated amendments requires the owner or operator of a facility

to contain all precipitation and runoff which may become contaminated with industrial waste, in a manner to prevent degradation of ground or surface waters. The diking constructed by Hudson around its land treatment facility is inadequate to contain precipitation and runoff. Portions of the dikes have been breached and eroded.

(d) Rule 7.1.6 [which incorporates by reference 40 C.F.R. §265.278] and Rule 7.12 with parallel recodifications and associated amendments require the owner or operator of a land treatment facility to prepare and implement an unsaturated zone monitoring plan which is designed to: (1) detect the vertical migration of hazardous waste and hazardous waste constituents under the active portion of the land treatment facility, and (2) provide information on the background concentrations of the hazardous waste constituents in similar but untreated soils. Hudson prepared an unsaturated zone monitoring plan, but has not implemented it.

(e) Rule 7.1.6 and parallel recodifications with associated amendments [which incorporates by reference 40 C.F.R. §265.13] requires the owner or operator of a facility to obtain a detailed chemical and physical analysis of a representative sample of the waste, prior to treating, storing, or disposing of such waste, and set forth in a waste analysis plan the procedures to be used in obtaining such data. The waste analysis plan submitted by Hudson was inadequate inasmuch as: (1) the plan was not updated to reflect the scope of wastes disposed of; (2) the plan did not indicate the preservatives to be used in the sampling and analysis; (3) the

plan did not specify the sampling methods; and (4) the plan did not address the sampling and analysis of the waste entering the land farm run-off pond.

(f) Rule 2.11 and Rule 7.1.6 [which incorporates by reference 40 C.F.R. §265.37 and 265.52(c)] and parallel recodifications with associated amendments requires the owner or operator of a facility to obtain agreements with state emergency response teams and emergency response contractors in order to coordinate emergency services in the event of an emergency. Such arrangements must be detailed in a contingency plan. Hudson's contingency plan did not describe the arrangements made with appropriate emergency response teams and emergency response contractors.

(g) Rule 2.11 and Rule 7.1.6 [which incorporates by reference 40 C.F.R. §§265.112, 265.115, 265.280] and parallel recodifications with associated amendments require the owner or operator of a facility to have a closure plan. This closure plan, inter alia, must include: an estimate of the maximum inventory of wastes in storage and in treatment, and an estimate of the expected year of closure. The plan submitted by Hudson failed to include the items listed above.

(h) Rule 7.1.6 and parallel recodifications with associated amendments [which incorporates by reference 40 C.F.R. §265.144] requires the owner or operator of a disposal facility to submit an estimate of the annual cost of post-closure monitoring and maintenance of the facility. The post-closure cost estimate

submitted by Hudson was inadequate in that did not reflect the costs of maintenance of the run-off control system or the costs of soil monitoring.

(i) Rule 7.1.6 [which incorporates by reference 40 C.F.R. §§265.143, 265.145] and Rule 7.1.9.2.1 and parallel recodifications with associated amendments require the owner of a facility to demonstrate financial responsibility for the facility by establishing financial mechanisms to assure the closure of the facility, and the post-closure maintenance and monitoring of the facility. Hudson has failed to demonstrate financial responsibility for the facility by failing to establish financial mechanisms to assure the proper closure and post-closure maintenance and monitoring of the facility.

(j) Rule 7.1.6 [which incorporates by reference 40 C.F.R. §265.147] and Rule 7.1.9.1.1 and parallel recodifications with associated amendments require the owner of a facility to secure and maintain environmental impairment liability insurance for claims arising from injuries to other parties. Such insurance shall include coverage for bodily injury or damage to property of others on, below, or above the surface resulting from the release of controlled industrial wastes. Hudson has failed to secure or maintain any environmental impairment liability insurance.

13. Hudson has violated and continues to violate the Oklahoma Rules and Regulations for Industrial Waste Management which are requirements of Subtitle C of RCRA. Hudson is subject to civil penalties and injunctive relief.

14. Unless restrained the defendants will continue to violate the Oklahoma Rules and Regulations for Industrial Waste Management and the requirements of Subtitle C of RCRA.

SECOND CLAIM FOR RELIEF

15. The United States realleges and incorporates by reference herein the allegations of paragraphs 1 through 9.

16. Section 3005(a) of RCRA, 42 U.S.C. § 6925(a) generally provides that the treatment, storage, or disposal of hazardous wastes except in accordance with a permit is prohibited. Pursuant to Section 3005(e) of RCRA facilities which notified EPA of their existence and applied for a permit before November 19, 1980 are treated as permitted facilities.

17. In the notification filed by Hudson pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930 and Part A permit application pursuant to Section 3005 of the Act, Hudson qualified for interim status pursuant to 3005(e) for only those waste activities listed in its Part A application. Any waste activity not so identified did not receive interim status.

18. In its application, Hudson identified only the land treatment facility and storage tanks as hazardous waste facilities. In addition to these units Hudson has maintained a surface impoundment which collects precipitation run-off and hazardous waste leachate from the land treatment facility.

19. A hazardous waste surface impoundment is a facility for which a permit is required under Section 3005(a), and 40 C.F.R. Part 265.

20. Hudson's failure to identify the surface impoundment as a hazardous waste facility in its application constitutes a violation of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a).

21. Pursuant to Section 1-2009.1 of the Oklahoma Controlled Industrial Waste Disposal Act ("OCIWDA"), the equivalent of Section 3005(a) of RCRA, and Sections 7.5.1 and 8.5.1 of the Oklahoma Rules and Regulations, the treatment, storage, and disposal of hazardous waste without a permit is prohibited. As with the federal scheme, facilities in existence on November 19, 1980 can continue to operate under interim status if they comply with the notice requirements and file a complete Part A permit application.

22. Hudson failed to file a Part A permit application with the State of Oklahoma for its hazardous waste surface impoundment.

23. Hudson's storage of hazardous waste in a surface impoundment without a permit constitutes a violation of Section 1.2009.1 of OCIWDA, and Sections 7.5.1, and 8.5.1 of the Oklahoma Rules and Regulations.

24. Hudson also maintained an API separator to separate oil, solids, and water at its refinery which qualifies as a hazardous waste storage facility pursuant to 7.1.6, for which a permit is required under 8.5.1.

25. Hudson failed to revise its Part A permit application to include the API separator as a hazardous waste storage

facility in violation of 1.2009.1 of OCIWDA, and Section 8.4.15 of the Oklahoma Rules and Regulations.

THIRD CLAIM FOR RELIEF

26. The United States realleges and incorporates by reference herein the allegations of paragraphs 1 through 9.

27. Section 3008(h) of RCRA, 42 U.S.C. § 6928(h), provides as follows:

> (h) Interim Status Corrective Action Orders - (1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under Section 3005(e) of this subtitle, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment of the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

28. The Administrator's functions with respect to the determination under 3008(h) have been delegated to the Regional Administrator of the Environmental Protection Agency on April 16, 1985.

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.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff, the United States of America, respectfully prays this Court for:

1. An injunction requiring defendants to comply with the Oklahoma Controlled Industrial Waste Disposal Act and the Oklahoma Rules and Regulations for Industrial Waste Management at its oil refinery in Cushing, Oklahoma;

2. An injunction requiring the defendants to:

(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 timetable 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.

3. Judgment imposing upon the defendants civil penalties in the amount not to exceed $25,000 per day per violation of 3005(a) of RCRA, the Oklahoma Controlled Industrial Waste Disposal Act and the Oklahoma State Rules and Regulations for Industrial Waste Management, provided that collection of such judgment shall be subject to the bankruptcy proceeding;

4. Judgment awarding plaintiff the costs of this action; and

5. Such other and further relief as this court may deem appropriate.

Respectfully submitted,

F. HENRY HABICHT, II
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D. C. 20530

WILLIAM S. PRICE
United States Attorney

By: _____
Assistant United States Attorney
4434 U.S. Courthouse
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CERTIFICATE OF SERVICE

This is to certify that on the 28th day of June, 1985, a true and correct copy of the foregoing United States Motion to Add Hudson Oil, Memorandum in Support thereof, and Second Amended Complaint, was served by Federal Express on Joseph F. Guida, Gardere and Wynne, 1500 Diamond Shamrock Tower, Dallas, Texas 75201, and upon William G. Cunningham, Cunningham and Johnson, 3000 Turner Drive, Suite 508, Del City, Oklahoma 73115 by United States mail, postage prepaid.

Ruth McQuade

RUTH A. McQUADE, ATTORNEY
Environmental Enforcement Section
U.S. Department of Justice
Washington, D.C. 20530

Exhibit 4

Court's Partial Consent Decree

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. HUDSON REFINING CO., INC., HUDSON OIL CO., INC., Defendants.	CIVIL ACTION NO. 84-2027-A

PARTIAL CONSENT DECREE

WHEREAS, a Complaint was filed on August 8, 1984, as amended on June 4, 1985, and August 14, 1985, by authority of the Attorney General of the United States and at the request of the Administrator of the U.S. Environmental Protection Agency ("EPA") against Defendants Hudson Refining Co., Inc. and Hudson Oil Company, Inc. with respect to a crude oil refinery in Cushing, Oklahoma, which is the subject of this action;

WHEREAS, the complaint initiating this action was brought pursuant to section 3008(a) and (g) of the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. §§6928(a) and (g). The Amended Complaints were filed pursuant to the authority of section 3008(a), (g) and (h) of RCRA, as further amended by the Hazardous and Solid Waste Amendments of 1984 ("HSWA");

WHEREAS, pursuant to the authority of section 3008(a) and (g) of RCRA, the Complaint as amended seeks the imposition of injunctive relief and civil penalties for past violations of the Oklahoma Controlled Industrial Waste Disposal Act ("OCIWDA"), Okla. Stat. Ann. Title 63, §§1-2001, et seq. (West 1984) and the Oklahoma Rules and Regulations for Industrial Waste Management ("Oklahoma Rules"),

81

as well as injunctive relief under section 3008(h) of RCRA, 42 U.S.C. §6928(h). Pursuant to section 3006 of RCRA, 42 U.S.C. §6926, the Administrator of EPA has authorized the State of Oklahoma to administer the RCRA Subtitle C program in lieu of the federal program, thereby making the OCIWDA and the Oklahoma Rules requirements of the Subtitle C program and federally enforceable pursuant to section 3008(a) and (g) of RCRA, 42 U.S.C. §6928(h);

WHEREAS, Defendants in this action have denied all of the allegations in said Complaint on behalf of said Defendants;

WHEREAS, the parties, by their respective attorneys, consent without trial or adjudication and without any admission as to liability for any purpose, to the following judgment resolving, as detailed in section XVIII of this decree, Plaintiff's claim for injunctive relief and for civil penalties sought in Plaintiff's first and second claims for relief of its Second Amended Complaint pursuant to section 3008(a) and (g) of RCRA, 42 U.S.C. §6928(a) and (g) and resolving in part, as addressed herein, Plaintiff's third claim for relief brought pursuant to section 3008(h) of RCRA, 42 U.S.C. §6928(h);

WHEREAS, the parties to this Partial Consent Decree consent to the entry thereof;

NOW THEREFORE, IT IS ORDERED, ADJUDGED,

AND DECREED THAT:

I.

JURISDICTION

This Court has jurisdiction over the subject matter herein and the parties to this action.

II.

PARTIES BOUND AND NOTICE OF TRANSFER

The provisions of this Partial Consent Decree shall apply to and be binding upon the parties to this action, its officers, directors, employees, successors, assigns, and all persons, firms, entities and corporations in active concert with them. The undersigned representative of each party to this Partial Consent Decree certifies that he or she is fully authorized by the party whom he or she represents to enter into the terms and conditions of this Partial Consent Decree and to execute and to legally bind that party to it.

Defendants shall notify EPA and the Oklahoma State Department of Health (OSDH) in the manner specified in Oklahoma Rule 8.7.5.6.5. (40 C.F.R. §270.72(d)), prior to the conveyance of title, easement, or other interest, including a leasehold interest, in Defendants' refinery located in Cushing, Oklahoma, 90 days prior to any such conveyance. Defendants agree to include in any such conveyance a provision for the continuation by Defendants or Defendants' designee of all activities and agreements included in this Partial Consent Decree and addendum.

III.

DEFINITIONS

Whenever the following terms are used in this Partial Consent Decree and the addendum thereto, the definitions specified hereinafter shall apply:

"Defendants" means the defendants to this action, Hudson Refining Company, Inc. and Hudson Oil Company, Inc. by and through the Trustee in Bankruptcy;

"HSWA" means the Hazardous and Solid Waste Amendments of 1984, Public Law 98-616.

"Land treatment unit" means the 10.7 acre tract of land in the northwestern portion of Hudson Refining Company, Inc.'s petroleum refinery, which has been used for land treatment of hazardous petroleum refining wastes;

"OCIWDA" means the Oklahoma Controlled Industrial Waste Disposal Act, Okla. Stat. Ann. Title 63, §§ 1-2001, et seq. (West 1984);

"Oklahoma Rules" means the Oklahoma Rules and Regulations for Industrial Waste Management;

"OSDH" means the Oklahoma State Department of Health;

"Parties" mean the United States and the Defendants;

"Plaintiff" means the United States of America, its agencies and departments and all other entities in privity with same;

"RCRA" means the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §6901 et seq;

"Trustee in Bankruptcy" means the Trustee in Bankruptcy for Hudson Refining Company, Inc. and Hudson Oil Company, Inc.;

"USEPA" means the United States Environmental Protection Agency;

"Work Plan" means the description and schedule of activities attached hereto as an addendum to this Partial Consent Decree and fully incorporated herein.

IV.

PENALTY

A judgment shall be entered in the amount of $280,000 as satisfaction for penalties proposed for past violations of OCIWDA and the Oklahoma Rules alleged in Plaintiff's first and second claims for relief in its Second Amended Complaint filed pursuant to section 3008(a) and (g) of RCRA, 42 U.S.C. §6928(a) and (g). The judgment shall be satisfied by the payment of a certified or cashier's check in the amount of $100,000 made payable to the "Treasurer of the United States" to be deposited with the Court at the time that this Partial Consent Decree is lodged. The certified or cashier's check shall be tendered to the United States Attorney for the Western District of Oklahoma at the time that the Partial Consent Decree is entered by the Court.

V.

COMPLIANCE WITH OKLAHOMA RULES

A. Defendants shall within sixty (60) days of the entry of this Partial Consent Decree submit the following documents concerning the land treatment unit to the Oklahoma State Department of Health in accordance with applicable OSDH rules:

1. Waste Analysis Plan
2. Contingency Plan
3. Closure/Post-Closure Plan
4. Outline of Groundwater Quality Assessment Program

Those plans shall be modified to include any regulated units subsequently identified through performance of the attached work plan.

B. Defendants shall perform the following activities: install a groundwater monitoring system around the land treatment unit; implement an unsaturated zone monitoring plan; and conduct

other analytical work in accordance with the terms and schedule of the work plan attached hereto as an addendum to this decree and incorporated by reference as is fully set forth herein.

C. 1. Within fifteen (15) days of the lodging of this Partial Consent Decree, Defendants shall establish a closure/post-closure trust fund for the land treatment unit and for additional units subject to regulation which may later be identified in accordance with the work plan attached hereto as an addendum. This closure/post-closure trust fund shall be funded at an initial level of $100,000.00. The Defendants are authorized to use the existing closure/post-closure fund established for the Hudson Refining Company, Inc. land treatment unit for this purpose.

2. Within sixty (60) days of the entry of this Partial Consent Decree, Defendants shall submit for approval to the Oklahoma State Department of Health, a revised closure/post-closure cost estimate for the land treatment unit, and any other regulated hazardous waste management units which may have been identified by that time through performance of the work plan, to the Oklahoma State Department of Health. Within thirty (30) days of receipt of notification of OSDH approval, the closure/post-closure trust fund shall be increased to one-third (1/3) of the revised closure/post-closure cost estimate, if that amount exceeds $100,000.00. Subsequent annual payments toward the balance of the estimate will be made in equal amounts over a time period of seven (7) years; provided that, if the time required for permit issuance is less than two (2) years, the annual payment schedule will be modified to

coincide with the permit term, as required in applicable Oklahoma Rules and; provided further, in the event a dispute arises as to the appropriate amount of the closure/post-closure fund, Defendants agree to pay into the fund one-third (1/3) of their estimated costs pending resolution of the issue.

In the event that any regulated hazardous waste management units are identified through performance of the work plan following submission of the revised closure/post-closure cost estimate, the fund and subsequent annual payments shall be adjusted according to the method prescribed in 40 C.F.R. 265.143(a)(5) and 40 C.F.R. 265.145(a)(5) as incorporated under Oklahoma Rules, subject to the time periods stated in this provision.

D. The terms of this Partial Consent Decree do not require Defendants to permit the land treatment unit or any regulated unit identified through performance of the work plan.

VI.

SITE INVESTIGATION

Defendants shall perform the activities enumerated in the work plan attached as an addendum to this Partial Consent Decree in the manner described and within the time limitations indicated therein. Defendants shall immediately notify Plaintiff, in writing, of any deviation from the terms or schedule of the work plan. That notification shall include a detailed explanation of any such deviation including the date or dates of same, the reasons therefor, and a proposal to correct or mitigate, as appropriate, such deviation, except insofar as such deviation is a force majeure event covered under Section XIII of this Partial Consent Decree.

In the event a dispute arises over whether further sampling, testing, or analysis is required by the terms of the work

plan, EPA's determination that such testing, sampling, or analysis is needed shall be binding unless Defendants invoke the dispute resolution procedures set forth in section XIV of this Partial Consent Decree.

VII.

ESCROW ACCOUNT

No later than 10 days following the lodging of this Partial Consent Decree, Defendants shall establish an interest-bearing escrow account in the amount of $450,000. The parties agree that the trustee in bankruptcy for Hudson Refining Co., Inc., and Hudson Oil Company, Inc. shall act as trustee of the escrow account. It is the intent of the parties that the escrow account shall be established for the sole purpose of ensuring the availability of funds for the payment of activities outlined in the attached work plan. However, the amount in the escrow account shall in no way limit Defendants' responsibility to pay all costs necessary to complete all activities in the work plan.

VIII.

SITE ACCESS

Until the termination of the provisions of this Partial Consent Decree, EPA and its employees and authorized agents and OSDH and its employees and authorized agents shall have authority to enter the facility covered by this decree at reasonable times for the purposes of monitoring compliance with the terms of this Partial Consent Decree and verifying any data or information submitted to EPA or OSDH in accordance with the terms of this decree. This provision in no way limits any right of entry available to Plaintiff pursuant to applicable federal or state laws, regulations or permits.

IX.

MONTHLY REPORTING

Defendants shall submit monthly progress reports to EPA to be post-marked no later than the last Friday of each month beginning with the month following the lodging of this Partial Consent Decree. Those monthly reports shall describe the performance of activities outlined in the attached work plan and include a justification for any deviation from the methodology or manner of investigating, testing, or sampling outlined in the plan. Defendants shall retain all records and documents relating to the performance of activities included in the work plan, including any raw monitoring data, for a period of five (5) years. Defendants shall make available to EPA and OSDH all information and data which underly the reports and other documents required to be produced under the work plan.

X.

INFORMATION REQUEST

A. No later than thirty (30) days following the lodging of this Partial Consent Decree, Defendants shall provide full and complete responses to the following information requested:

1. All information related to potential spills, overflows, leaks, evidence of leachate migration, or other releases of hazardous waste or hazardous waste constituents into the environment (air, surface water, groundwater, soil surface, unsaturated or saturated soils), including the date, location of release, source of release, any sampling, testing, or analyses conducted of the source of release or of the release itself, and any response action taken.

2. In aid of the investigation of releases, information known to Defendants of past disposal of solid wastes in solid waste management units at its facility including:

(a) Date(s) of such disposal;

(b) Description and quantity of wastes disposed; and

(c) Description of solid waste management unit(s) including type of unit, period of operation, dimensions of unit, description of liners, if any, and how unit was closed.

B. As used in this section, "information" means data, records, or documents, as well as facts within the knowledge of Defendants' employees. Defendants shall identify with reasonable specificity the documents that are responsive to the information requested in this section. Defendants shall certify that the information provided under this section is complete and accurate.

C. Defendants shall provide the information requested in this section subject to applicable privileges, and any assertion of privilege by Defendants shall include a designation of the specific privilege asserted, shall adequately establish the basis for the privilege, and shall identify the specific portion of the request that is alleged to be privileged material.

D. Any dispute regarding information sought, including any assertion of privilege, shall be governed by the dispute resolution procedures specified in section XIV of this Partial Consent Decree.

XI.

MAINTENANCE OF ESTATE FUNDS

The Defendants shall maintain a minimum balance of $1,000,000.00 in the cash funds of the estate above and beyond any amounts committed to or segregated for any other parties or purposes. The purpose of such balance is to provide a source of funding for any expenditure associated with corrective action

pursuant to Plaintiff's claims under 42 U.S.C. §6928(h) and subject to all claims and defenses assertable by Defendants. This balance shall be maintained until thirty (30) days after a final consent decree is entered, or thirty (30) days after a final judgment has been rendered on all issues not addressed by this Partial Consent Decree, or until such time as the Parties agree otherwise. This cash balance shall be reflected in the line item monthly accounting reports of the estate.

XII.

COMPLIANCE RESPONSIBILITY

A. Beginning with the lodging of this Partial Consent Decree, Defendants shall comply with all applicable provisions of RCRA and the federally authorized Oklahoma Hazardous Waste Management Program as set forth in OCIWDA and the Oklahoma Rules, subject to the limitations, defenses, and schedules set forth herein.

B. Defendants shall, within ninety (90) days of lodging of this Partial Consent Decree, conduct sampling of selected surface impoundments as follows:

1. Surface impoundments to be sampled:

   a. Aeration lagoon

   b. Biopond immediately east of the aeration lagoon and in direct hydraulic communication with the aeration lagoon (Bipond No. 1)

   c. Biopond immediately preceeding the NPDES discharge point (Biopond No. 6)

   d. North Oily Water Pond

   e. South Oily Water Pond

2. Sampling locations within each surface impoundment

   a. Sludge/sediment of each surface impoundment listed above in accordance with the sampling procedures detailed in paragraph V.A.1. of the attached work plan.

   b. Standing liquids
   Two (2) grab samples, one (1) each from the influent and effluent portions of each surface impoundment listed above.

3. Parameters to be analyzed

   a. Ignitability (standing liquids only)

   b. Total metals (As, Ba, Cd, Cr, Hg, Pb, Se, Ag) (all samples)

   c. EP Toxic metals (same metals listed above, all samples),

C. The Parties agree that the entry of the Partial Consent Decree will not interfere with the OSDH and EPA Part B permitting processes or any other applicable regulatory requirements, except insofar as the provisions of sections V and VI provide otherwise, and provided that nothing in this agreement shall limit the right of the Defendants to utilize any data, reports, or other materials developed in connection with this Partial Consent Decree for purposes of compliance with any applicable Part B permitting requirements.

XIII.

FORCE MAJEURE

Defendants' compliance with one or more of the provisions of this Partial Consent Decree may be excused only to the extent and for the duration that noncompliance is caused by a "force

majeure" event. For purposes of this Partial Consent Decree, "force majeure" is defined as an event that is caused by an Act of God, labor strike or work stoppage, or other circumstance beyond the Defendants' control that could not have been prevented by due diligence, and that makes substantial compliance with the applicable provision or provisions of this decree impossible.

If Defendants anticipate an inability to comply with any of the provisions of this decree due to a "force majeure" event, Defendants shall immediately notify Plaintiff in writing of the nature, cause and anticipated length of the delay and all steps which Defendants have taken and will take, with a schedule for their implementation, to avoid or minimize the delay. Failure to provide this written notice constitutes a waiver of Defendants' right to invoke the provisions of this section as a basis for delay of performance under this Partial Consent Decree. If the parties agree that the delay was attributable to a "force majeure" event, the parties may, by written agreement, stipulate to an extension to the relevant performance schedule by a period not to exceed the actual duration of the delay.

If the parties do not agree that the delay was caused by a "force majeure" event, or are unable to agree on a stipulated extension of time, and should Defendants choose not to follow Plaintiff's position on the matter, Defendants shall invoke the dispute resolution procedures included in section XIV of this Partial Consent Decree. In submitting the matter to the Court, Defendants shall have the burden of proving that the delay was attributable to a "force majeure" event, that Defendants have exercised due diligence in minimizing the delay, and that, as a result of the delay, a particular extension period is appropriate.

XIV.

DISPUTE RESOLUTION

In the event that the parties cannot resolve any dispute, then the interpretation advanced by the United States shall be considered binding unless Defendants invoke the dispute resolution provisions of this section.

Any dispute which arises with respect to the meaning or application of this Partial Consent Decree or the addendum hereto shall in the first instance be the subject of informal negotiations between the parties. Such period of informal negotiations shall not extend beyond thirty (30) days, unless the parties agree otherwise.

At the termination of unsuccessful informal negotiations, should Defendants choose not to follow Plaintiff's position, the Defendants shall file with the Court a petition which shall describe the nature of the dispute and include a proposal for its resolution. The United States shall then have twenty (20) days to respond to the petition. In any such dispute, Defendants shall have the burden of proof.

Where Defendants invoke the dispute provisions of this section, they shall not be subject to sanctions for noncompliance with the Plaintiff's determination on the matter in dispute pending the Court's ruling.

XV.

RETENTION OF ENFORCEMENT RIGHTS

A. Except as specifically provided herein, Plaintiff does not waive any rights or remedies available to the United States for any violation by Defendants of federal or state laws, regulations, or permitting conditions following the lodging of this decree.

B. Plaintiff specifically retains the right to bring an action pursuant to section 3008(a) of RCRA, as amended, 42 U.S.C. §6928(a) for violations of section 3005(a) of RCRA, 42 U.S.C. §6925(a), and applicable regulations, resulting from any failure by Defendants to certify compliance with financial responsibility requirements pursuant to section 3005(e)(2)(B) of RCRA, 42 U.S.C. §6925(e)(2)(B). Defendants retain all defenses to any such action.

XVI.

COSTS

Each party shall bear its own costs and attorneys' fees in the action covered by this Partial Consent Decree.

XVII.

MODIFICATION

Except as provided for herein, there shall be no modifications of this Partial Consent Decree without written approval of all parties to this decree or further order of this Court.

XVIII.

EFFECT OF SETTLEMENT

A. This Partial Consent Decree represents a complete settlement of the claims for civil penalties alleged in Count I, and for injunctive relief alleged in paragraphs 10, 11, 12(a)-(i), 13, and 14 of Count I of Plaintiff's Second Amended Complaint. The Partial Consent Decree represents a complete settlement of the claims alleged in Count II of Plaintiff's Second Amended Complaint.

Without any admission of liability, Defendants hereby agree to waive all defenses which have been raised to the claims listed above of Counts I and II of Plaintiff's Second Amended Complaint.

B. Except as provided in this paragraph, the parties hereby specifically reserve all claims and defenses with respect to any and all liability relating to the claims contained in Count III of Plaintiff's Second Amended Complaint. Nothing in this Partial Consent Decree shall be construed to settle any part of the claims included in Count III or the relief sought by Plaintiff in connection with Count III, except that the performance of the activities agreed to in the work plan attached hereto as an addendum to this decree, to be conducted in the manner prescribed by that plan, constitutes a full and complete settlement of Plaintiff's claim for relief in Count III for a site investigation pursuant to 42 U.S.C. §6928(h).

C. The Plaintiff and Defendants agree that the investigative work described in the attached work plan, if properly performed, as set forth herein, constitutes an investigation of releases or potential releases to the environment which is fully consistent with Plaintiff's claimed authority under 42 U.S.C. §6928(h).

XIX.

USE OF DECREE

It is the intention of the Plaintiff and Defendants that this Partial Consent Decree shall not be admissable in any judicial or administrative proceeding, with the exception of the following: this proceeding and any proceeding to enforce this decree; any other proceeding between the parties addressing issues raised by Plaintiff's Second Amended Complaint that have not been addressed by this Partial Consent Decree; any future enforcement proceeding between the parties; any judicial or administrative proceeding

between the Defendants and their insurance companies concerning the obligation of the insurance company to cover liabilities incurred by the Defendants in connection with, or as a result of, this Partial Consent Decree; or any proceeding through which Defendants seek to obtain contribution or indemnification for any costs to which the Defendants may be subject for investigatory or other corrective action work.

XX.

NOTICE REQUIREMENTS

The parties acknowledge that final approval by the United States and the entry of this decree are subject to the notice requirements of 28 C.F.R. §50.7.

XXI.

RETENTION OF JURISDICTION

A. This Court shall retain jurisdiction of this Partial Consent Decree for purposes of ensuring compliance with its terms and conditions.

B. Plaintiff and Defendants each retain the right to seek to enforce the terms of this Partial Consent Decree and take any action authorized by federal or state law not inconsistent with the terms of this decree and take any action authorized by federal or state law not inconsistent with the terms of this Partial Consent Decree to achieve or maintain compliance with the terms and conditions of this Partial Consent Decree or otherwise.

XXII.

EFFECTIVE AND TERMINATION DATES

A. This Partial Consent Decree shall be effective upon the date of its entry by the Court.

B. The parties request that a status conference be held not later than sixty (60) days following Plaintiff's response to Defendants' final submittal, whichever it may be, required under the attached work plan. The purpose of the status conference will be to determine the possible disposition of subjects in dispute in this case that are not covered by this Partial Consent Decree. Plaintiff shall notify the Court at the time of the status conference whether all provisions of the Partial Consent Decree have been satisfied, in its judgment. The provisions of this Partial Consent Decree, except the record retention provisions of section IX, and the provisions of sections V.C., XI and XIV, shall terminate at that time.

The provisions of sections V.C., IX and XI referenced above shall continue in force and effect throughout the times stated in those sections, unless earlier incorporated in a Final Consent Decree or final Order of this Court. Section XIV shall remain in effect for the duration of the time that section V.C. remains in effect.

XXIII.

NOTICES

Whenever under the terms of this Partial Consent Decree notice is required to be given, a report or other document is required to be forwarded by one party or another, where service of any papers or process is necessitated by the dispute resolution provisions of section XIV, it shall be directed to the following

individuals at the addresses specified below. Any correspondence directed to the Department of Justice shall include a reference to DOJ No. 90-7-1-262.

As to the United States:

F. Henry Habicht II
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Carla S. Nelson
U.S. Environmental Protection Agency
Office of Regional Counsel
Region VI
1201 Elm Street
InterFirst II Building
Dallas, Texas 75270

As to the State of Oklahoma:

Donald A. Hensch
Director, Industrial Waste Division
Waste Management Service
Oklahoma State Department of Health
1000 Northeast Tenth St.
P.O. Box 53551
Oklahoma City, Oklahoma 73152

As to the Defendants:

Joseph F. Guida
Gardere & Wynne
1500 Diamond Shamrock Tower
Dallas, Texas 75201

Any reports or data required to be submitted under the work plan attached as an addendum to this Partial Consent Decree shall also be submitted to:

William J. Focht
U.S. Environmental Protection Agency
Hazardous Waste Management Division
Hazardous Waste Compliance Branch
1201 Elm Street
Dallas, Texas 75270

DATED: May 1, 1986

Wayne Alley
Judge, U.S. District Court
for the Western District
of Oklahoma

We hereby consent to the entry of this Partial Consent Decree without further notice.

DATED: 1/28/86

F. HENRY HABICHT II
Assistant Attorney General
Land and Natural Resources
Division
U.S. Department of Justice
Washington, D.C.

DATED: 4-30-86

WILLIAM S. PRICE
United States Attorney
Western District of Oklahoma

by: Eleanor Darden Thompson
ELEANOR DARDEN THOMPSON
Assistant United States Attorney

DATED: Jan 27, 1986

Frederick J. Stiehl for
COURTNEY M. PRICE
Assistant Administrator
Office of Enforcement and
Compliance Monitoring
U.S. Environmental Protection
Agency
Washington, D.C.

OF COUNSEL:

STEVE BOTTS
U.S. Environmental Protection Agency
Washington, D.C.

CARLA S. NELSON
U.S. Environmental Protection Agency
Office of Regional Counsel - Region VI
Dallas, Texas

$100,000 CK delivered to Faye Skiles
w/ US Atty this date 5-2-86

Jackie Maloney
Financial Deputy

DATED: 12/21/85

Hudson Refining Co., Inc.
and Hudson Oil Company, Inc.

by: _____
JOSEPH F. GUIDA
Gardere and Wynne
Dallas, Texas

Attorney for Defendants and for
Trustee in Bankruptcy for
Hudson Refining Co., Inc. and
Hudson Oil Company, Inc.

_____
WALTER KELLOGG
Trustee in Bankruptcy for
Hudson Refining Co., Inc. and
Hudson Oil Company, Inc.

ADDENDUM: WORK PLAN

I. Unit Inventory

A. Tanks

1. Defendants shall inspect all tanks including API Separators, in the refinery site and submit a report to EPA and OSDH within thirty (30) days of lodging the Partial Consent Decree "PDC", containing the following information:

   a. Map uniquely identifying all tanks.
   b. Identification of each tank (number, name, etc.).
   c. Purpose of each tank.
   d. Current contents of tank and quantity of such contents. If cleaned, state the method and approximate date of cleaning.
   e. Design capacity of each tank.
   f. Determine indicators and analytical parameters for the contents of each tank and submit to EPA and OSDH for approval.

2. Defendants shall submit justification as to which tanks are not subject to regulation as hazardous waste storage units, including any records of:

   a. Tank inspections.
   b. Material transfers.
   c. Continuing use as storage units.
   d. Tank leasing arrangements.

3. For those tanks determined to be subject to regulation as hazardous waste storage units, Defendants shall provide:

   a. Characterization of tank contents as to definition of hazardous waste. Provide EPA hazardous waste code, if appropriate.

   b. Description of operation of tank, including:

      (1) Piping and valving.
      (2) Bypass or overflow systems.
      (3) Pumps.
      (4) Emission controls, pressure controls, liquid level monitors.
      (5) Frequency of tank contents change, i.e., how often is the tank routinely emptied/refilled?

   c. Materials of construction including liners, if any.

   d. Current average wall thickness.

   e. Current age of tank.

   f. Whether tank is closed or open.

g. A preference in the report on whether Defendants desire to pursue closure of any of the additional tanks which are subject to RCRA or whether Defendants prefer to include any of these tanks in its permit and comply with all applicable interim status requirements. If the latter option is preferred, then Defendants shall request a change during interim status in accordance with 40 CFR 270.72. Further, if soil contamination is indicated in any tank included in the "permit" option, the Defendants shall propose implementation of its contingency plan. If the "closure" option is preferred, Defendants shall submit an amended closure plan to EPA and OSDH for their review within thirty (30) days of lodging the PDC. EPA, after consultation with OSDH, shall indicate initial approval/disapproval of Defendants' preferences or conclusions and require amendments or revisions to submitted documents as appropriate within thirty (30) days of receipt of this report.

h. Defendants shall amend Part B application documents, as necessary, for submittal to OSDH within thirty (30) days of receipt of EPA's comments.

4. For those API separators currently in operation, in which sludge has accumulated in excess of 40% of volumetric capacity, Defendants shall remove the sludge and handle it as a hazardous waste within thirty (30) days of receipt of EPA's comments.

II. Soil

A. Defendants shall conduct a site survey to assess:

1. Physical condition of tanks, including:

a. Evidence of internal or external corrosion or other physical damage.

b. Defects in construction or installation which could cause the tank to leak.

c. Evidence on the tank of the tank leakage.

d. Evidence on the ground of tank leakage, e.g., dead vegetation, stains, odors, or accumulated liquids or sludges.

2. Any available plant records of reportable spills and actions taken in response.

3. Any storm or process water drainage ditches which could receive contamination from the site.

B. Defendants shall conduct soil sampling in accordance with the following procedures:

1. For those tanks which contain materials, releases of which can be ascertained visually; observed soil contamination shall be sampled in accordance with 40 CFR 261, Appendix I and SW-846.

2. For those tanks which contain materials, releases of which cannot be ascertained visually, four (4) grab samples from equally spaced locations around the tank will be obtained.

3. For any spill incidents for which remedial action did not completely remove spill residues, representative soil samples shall be obtained in accordance with 40 CFR 261, Appendix I and SW-846. In lieu of such sampling, Defendants shall submit justification to EPA as to why sampling is not necessary.

4. For those ditches where visual contamination is observed, representative samples of the entire contaminated area shall be obtained in accordance with 40 CFR 261, Appendix I and SW-846.

5. For those ditches where no visual contamination is observed, a sample shall be obtained at the refinery property boundary.

C. Defendants shall analyze each sample obtained in accordance with Paragraph II. B for the following parameters:

1. For releases from tanks (Paragraphs I. B. 1., 2., and 3.) soil samples shall be analyzed for those indicator parameters approved at Paragraph I. A. 1. f., in accordance with approved analytical procedures provided in SW-846.

2. For ditches (Paragraphs I. B. 4. and 5.) soil samples shall be analyzed for phenolics, oil and grease, total lead and total chromium in accordance with approved analytical procedures provided in SW-846.

D. Defendants shall submit to EPA a report within sixty (60) days of lodging the PDC, to include:

1. Sample locations and procedures.

2. All analytical results including a reference to the SW-846 procedures utilized.

3. An assessment of the potential for migration of hazardous contaminant constituents to groundwater or surface water.

4. A proposal and schedule for any remedial action determined to be necessary to protect groundwater or surface water.

5. Where insufficient or inconclusive data exists, Defendants shall submit a proposal for additional investigation including a schedule to complete II. D. 3. and 4. above.

6. EPA shall review and comment on the report within 30 days of receipt.

7. Defendants shall, as necessary, amend the report to complete II. D. 3. and 4. within thirty (30) days of receipt of EPA's comments.

III. Groundwater

A. Defendants shall conduct a geological assessment of the entire refinery property to include:

1. Six deep soil borings to intercept the regional aquifer.

2. Seventeen additional shallow soil borings to penetrate the weathered shale aquifer at locations approved by EPA.

3. Boreholes shall be drilled utilizing air rotary drilling techniques to the extent practicable. Should borehole caving conditions be encountered, drilling fluids will be utilized to advance the borings, with the choice of fluids subject to prior approval by EPA.

4. All bore-holes shall be logged by a qualified geotechnical engineer or geologist. At a minimum, samples shall be taken throughout the depth of the boring at least every ten feet or whenever a change in lithology is encountered, whichever is less. The boring logs shall, at a minimum, include standard geological logging information.

5. A description of soil properties, such as grain size, moisture content, and soil structure of each lithologic horizon encountered.

B. Defendants shall conduct a hydrogeologic investigation of the shallow weathered shale water bearing unit, to include:

1. A determination of the maximum saturated thickness, potentiometric surface, areas of recharge and discharge (as determinable), and calculated flow velocity (by slug or pump testing).

2. Observation wells completed in each shallow boring according to the following guidelines:

a. All wells shall be constructed of two-inch diameter PVC casing and well screen, subject to a demonstration that PVC materials will not interfere with constituents to be evaluated.

b. Each well shall be screened throughout the maximum expected saturated thickness (seasonal high-water table). The well annuli shall be gravel-packed with clean material which will serve to prevent the entry of formation materials into the well. The well annuli shall be bentonite-cement grouted from the top of the screen up to five feet from the ground surface. The final three feet of the well annuli shall be sealed with bentonite cement. Finally, the tops of the well casings shall be surveyed into a known elevation datum. Documentation of well design and construction shall be accomplished.

c. Prior to sampling, each well shall be properly developed, using only formation water, so as to remove turbidity from groundwater samples and restore natural conductivity in the formation.

d. At least 24-hours after well development, Defendants shall determine groundwater elevation at each well. Slug tests or other techniques shall be conducted at each well in order to define field permeabilities, flow velocities, and estimated storage coefficients.

3. After the wells are completed and developed, each well shall be sampled once and the groundwater analyzed for chloride, iron, manganese, phenols, sodium, sulfate, pH, specific conductance, total organic carbon, total lead, total chromium, and temperature in accordance with approved sampling and analytical procedures.

C. Defendants shall conduct a hydrogeological investigation of the regional watertable aquifer, to include:

1. The hydrogeologic characteristics of the saturated zone beneath the facility, including groundwater quality, flow direction, horizontal flow velocity, storage, effective porosity, groundwater elevation (potentiometric surface), saturated thickness of the water-bearing units, areas of recharge and discharge (as determinable), hydraulic inter-connections with the weathered shale, extent and influence of impermeable zones, transmissivity, permeability, and other pertinent hydrologic influences.

2. Observation wells completed in each deep boring according to the following guidelines:

a. All wells shall be constructed of four inch diameter PVC casing and well screen, subject to a demonstration that PVC materials will not interfere with constituents to be evaluated.

b. Each well shall be screened throughout the maximum expected saturated thickness (seasonal high-water table). The well annuli shall be grouted and sealed as specified in Paragraph III. B. 2. b. The tops of well casings shall be surveyed into a known elevation datum. Documentation of well design and construction shall be provided as described in Paragraph III. B. 2. b.

c. Well development: Development shall be performed as specified in Paragraph III. B. 2. c.

d. Conduct sufficient aquifer testing to allow Defendants to estimate or calculate hydraulic parameters. These estimates or calculations are necessary because of apparent low hydraulic conductivity of the water bearing unit.

3. After the wells are completed and developed, each well shall be sampled and the groundwater analyzed for chlorides, sulfates, specific conductivity, pH, temperature, TOC, and total metals (Cr, Pb). EPA-approved sampling and analytical procedures shall be used.

D. Defendants shall fully define the uppermost aquifer in the area of the land treatment unit (LTU) as follows:

1. Where discontinuities are encountered around the LTU as identified under Paragraph III. A., additional boring(s) shall be advanced between the adjacent boreholes which located the discontinuity.

2. Any such borings necessary under this procedure shall be drilled, sampled, and logged in accordance with Paragraph III. A.

E. Defendants shall provide reports to the EPA and OSDH to document the activities of this hydrogeologic assessment task and to propose a groundwater monitoring system around the LTU. These reports shall include:

1. Based upon the results of the investigation in Paragraph III. B. and C., as modified by any additional studies in Paragraph III. D., a groundwater monitoring plan for the LTU will be prepared and submitted to the EPA and OSDH within fifteen (15) days of lodging the PDC. This plan will include:

a. Sufficient geologic cross-sections to identify the stratigraphy and uppermost water bearing unit(s) beneath the LTU.

b. A description of the groundwater flow direction and the establishment of the Point of Compliance (POC) for the LTU.

c. Proposed well locations (with justification) along with drilling, installation, and completion procedures for a groundwater monitoring system which meets the requirements of 40 CFR 264 Subpart F.

2. EPA shall approve the proposed groundwater monitoring system or request additional information within thirty (30) days of receipt of report.

3. In the event that additional information is requested, Defendants shall submit a schedule for obtaining and submitting the requested information within thirty (30) days of receipt of request.

4. Defendants shall complete and develop monitor wells around the LTU in accordance with an approved system developed under Paragraph III. E. 1. c. and sample monthly for the first four months, for all interim status parameters listed in 40 CFR 265.92(b). The first sampling shall include analyses for benzene, toluene, and xylene. Following these initial analyses, a statistical data base shall be submitted from the data developed. Provision is explicitly allowed to alter this requirement should significant seasonal variations in groundwater quality become apparent. A report shall present all groundwater data complete with a statistical framework for proceeding with contamination indicator monitoring (detection monitoring) and be submitted to EPA and OSDH within ninety (90) days of approval of the LTU groundwater monitoring system, unless further information was requested in accordance with Paragraph III. E. 3. If additional information was requested in accordance Paragraph III. E. 3, then Defendants shall submit a schedule for submission of the report required in Paragraph III. E. 4. within thirty (30) days of receipt of request.

F. Based upon all data collected by the groundwater investigation, a report shall be prepared and submitted to EPA and OSDH within one hundred twenty (120) days of lodging the PDC, which characterizes the groundwater in the weathered shale zone and the regional watertable aquifer for the entire refinery. This report shall include:

1. Sufficient geologic cross-sections to identify the stratigraphy and hydrogeology of these water-bearing units beneath the refinery.

2. A description of the groundwater flow direction and quality within both water-bearing zones.

3. Results of all groundwater test data developed during this program.

G. Defendants shall develop a proposed monitoring program for the refinery to determine whether a release to groundwater has occurred. This plan, with a schedule, shall be submitted to EPA and OSDH for approval within one hundred twenty (120) days of lodging the PDC, and shall consider:

1. A determination as to which of the overall refinery wells can be utilized as groundwater monitor wells.

2. An evaluation as to the location of additional wells, if necessary, to evaluate the possibility of a release.

3. The establishment of groundwater quality parameters to serve as indicators of a release, along with procedures for determining the statistical significance of the data.

4. Potential sources of a release as determined under Paragraph II. D.

H. Within thirty (30) days of receipt of report, EPA shall approve or approve with modification the plan developed under Paragraph III. G.

I. The approved plan shall be implemented and a report of findings submitted to the EPA and OSDH within thirty (30) days of completion of the activities. Should a release be indicated from this effort, an assessment as to the source, significance, and potential for remedial action will be developed. Results of the determination, including a schedule, shall be submitted to EPA and OSDH in this report.

IV. Land Treatment Unit

Defendants shall evaluate the existing LTU for purposes of proceeding with closure or further permitting activities. This evaluation shall develop the following data:

A. Historical waste application: List all solid wastes which have been applied to the LTU since November 19, 1980. Identify which of these solid wastes are also hazardous wastes. Submit a historical application schedule which includes approximate dates, quantities, and areal placement of each solid waste applied. Include a plan view map of the LTU, scaled one inch = 200 feet, which delineates areas of waste application. If detailed logs are not available, estimates of waste application shall be provided.

B. Soil survey: Evenly spaced across the LTU, bore at least twenty (20) two-inch diameter bore-holes, down to ten feet; or to the top of the uppermost aquifer (weathered shale), or to the point of auger refusal, whichever is shallower, using a hollow-stem auger. Backfill each hole with bentonite cement grout. A qualified soil scientist must be present throughout all soil coring operations to identify and correlate soil types between borings and to render judgment as to the need for additional borings, should more than one soil series be encountered. If additional borings are deemed necessary to adequately define variations in soil series, such borings shall be conducted as soon as possible. The need for a more detailed investigation shall be limited to major changes in either areal extent or soil character. A major change in areal extent is defined as an area greater than 5,000 square feet. A major change in soil character is defined as a change which may significantly affect the land treatability of the waste(s) applied. The report required at IV. C. shall include the following:

1. Plan view and cross-sectional maps which depict lateral and vertical changes in soil series. These maps shall be scaled to one inch = 200 feet.

2. Estimates of erodibility. If the erodibility estimates demonstrate the potential of erosion of the soil/waste zone-of-incorporation (ZOI), then the soil survey report shall include design measures to control such erosion, including supporting calculations (e.g., terracing, furrowing, diking,

3. Depth and texture of surface horizons and subsoils.

4. Depths to season high-water table.

5. Description of aquitards or other zones which limit vertical water movement.

6. Boring logs which contain the information listed in Paragraph III. A. 4.

C. Defendants shall submit a report to EPA and OSDH within one hundred fifty (150) days of lodging the PDC, containing data developed in IV. A. and B. above and a map (1 inch = 200 feet) which designates "uniform areas". A uniform area is an area of the active portion of a LTU composed of soils of the same soil series to which similar wastes are applied at similar rates.

D. EPA, upon consultation with OSDH, shall approve, or approve with modification, the designation of uniform areas within thirty (30) days of receipt of report.

E. Defendants shall develop data regarding the potential for migration of constituents below the treatment zone. This shall be based upon:

1. Soil core monitoring: Eleven two-inch soil core samples shall be obtained at five to five-and-one-half feet in areas of maximum waste application, with at least one sample taken from each uniform area. In addition, four such samples will be obtained at background locations from each soil series and composited to two samples from each series for analysis. All of these samples will be analyzed for pH, conductivity, lead, chromium, oil and grease, and cation exchange capacity in accordance approved analytical procedures.

2. SPL monitoring: Four soil pore liquid (SPL) monitors shall be installed in each uniform area in accordance with EPA/530-SW-84-016. In addition, two background SPL monitors will be installed in each soil series. These monitors will be sampled and analyzed for pH, conductivity, lead, chromium, and oil and grease in accordance with approved procedures.

3. Report: A report shall be submitted to EPA and OSDH within three hundred thirty (330) days of lodging the PDC, which includes a map showing all sampling locations, procedures, and analytical data developed under this section. In addition, a preliminary determination shall be submitted based upon these data regarding migration below the land farm treatment zone. This preliminary determination will propose whether the LTU should continue through the permitting process, close or undergo remedial action. A schedule will also be proposed for implementation of the proposed course. EPA and OSDH shall approve, approve with modification, or deny the preliminary determination within thirty (30) days of receipt of report.

F. Defendants shall amend Part B application documents on LTU as necessary for resubmittal to OSDH.

V. LTU Run-Off

A. Defendants shall make a hazardous waste determination in accordance with 40 CFR 261 to identify any potential hazardous waste characteristics of the LTU run-off pond. This shall be conducted as follows:

1. Five grab samples will be obtained from the sediment in each quadrant of the pond, with each set of grab samples composited to form a single sample, providing four samples for analysis.

2. Each of these composite samples will be subject to the hazardous waste characteristic analyses in 40 CFR 261 in accordance with approved analytical procedures.

3. A report will be submitted to EPA and OSDH within thirty (30) days of lodging the PDC, including sampling locations and procedures, analytical results, and a final determination as to whether the pond contains characteristics of hazardous waste. Should this be the case, the report will also contain proposed plans for permitting or closure of this pond as a hazardous waste storage unit.

B. Defendants shall also determine the presence and concentration of Appendix VIII constituents identified as present in petroleum refining waste (Skinner list, as modified). This analysis shall be performed on one composite sample taken from the influent quadrant described in Paragraph V. A. 1., and will be performed in accordance with approved analytical techniques. These data will be reported to EPA and OSDH within ninety (90) days of lodging the PDC, and shall serve as potential source contamination data to specify analytical parameters in any required refinery groundwater assessment plan discussed in III. G.

C. Defendants shall utilize data developed in V. A. and B. above to evaluate the status of the LTU run-off pond under OSDH requirements for permitting, delisting, or closure. Report shall be submitted to OSDH and EPA within thirty (30) days of lodging the PDC.

Exhibit 5

Supplemental Brief of the Hudson Liquidating Trust Regarding Hudson's Motion to Terminate Consent Decree

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v	§	CIVIL ACTION NO. 84-2027A
	§	
HUDSON REFINING CO., INC.	§	
HUDSON OIL CO., INC.,	§	
	§	
Defendants.	§	

SUPPLEMENTAL BRIEF OF THE HUDSON LIQUIDATING TRUST REGARDING HUDSON'S MOTION TO TERMINATE CONSENT DECREE

COMES NOW, Walter Kellogg, Trustee of the Hudson Liquidating Trust ("Hudson Trust"), on behalf of Hudson Refining, Co., Inc., and Hudson Oil Co., Inc., by and through the Trustee in Bankruptcy, in the above-entitled action by and through its attorneys of record, and files this Supplemental Brief pursuant to the request of the Honorable Judge Wayne Alley on August 26, 1994.

I. Background

During the August 26, 1994, hearing on Hudson's Motion to Terminate Consent Decree, Hudson Trust orally modified the relief it requested from the Court by requesting the Court to: (1) order the Trustee to complete the Work Plan of the Final Consent Decree ("FCD") with available funds in the Hudson Trust, and (2) order that upon completion of the Work Plan, the Trustee and Hudson Trust, its successors and assigns are released from any further obligation under the FCD.

Just prior to the August 26, 1994, hearing, the United States filed a Supplemental Report Regarding Hudson's Motion to Terminate Consent Decree ("Supplemental Report"). In the

128

Supplemental Report the United States claimed that based on the August 17, 1994, A. T. Kearney Report (attached as Exhibit "A" to the United States' Supplemental Report), the Corrective Action elements of the FCD (*i.e.*, Tank Cleanout, Soil Excavation, Biotreatment of Contaminated Soil, Removal of North Oily Water Pond (NOWP) Sludges and Soils, and Groundwater Remediation) was completed except for Biotreatment of Contaminated Soil and Groundwater Remediation. At the hearing the Hudson Trust agreed with the conclusions of the A. T. Kearney Report and therefore requested the Court to allow it to use Hudson Trust funds to: (1) perform additional analysis of relevant soils and groundwater to determine their status, and (2) perform any additional remediation to complete the Work Plan requirements of the FCD.

Based on these developments, the Court ordered supplemental briefing on two questions. First, other than the obligation created under the FCD, is the Trustee under an obligation to perform the Work Plan? Second, what funds remain in the Hudson Trust and what is their availability to the Trustee to complete the obligations of the Work Plan? Parts II and III, *infra*, discuss these two issues. Finally, Part IV provides a short report of recent discussions between the parties to narrow outstanding issues.

II. Obligations Concerning Performance of Final Consent Decree

In January 1984, Hudson Oil Company, Inc., Hudson Refining Company, Inc., and several regional affiliates (collectively "Hudson Oil Company") filed Chapter 11 proceedings in the United States Bankruptcy Court for the District of Kansas (the "Bankruptcy Court"). The unsecured creditors' committee in those cases filed, and the Bankruptcy Court confirmed, the Third Amended Joint Plan of Reorganization dated July 16, 1990 (the "Plan"), a true and correct copy of which is attached hereto as Exhibit "A."

Prior to confirmation of the Plan, and in connection with administration of the bankruptcy estates of Hudson Oil Company, two significant transactions occurred concerning a petroleum refinery owned by the bankruptcy estates. First, on December 10, 1987, Hudson Oil Company, through its bankruptcy trustee and with the approval of the Bankruptcy Court, entered into the FCD entered by this Court. The FCD required Hudson Oil Company, by and through the Trustee, to establish a $1,000,000 escrow to fund the required corrective action. The FCD was explicit that the Trustee was expected to expend even more than such $1,000,000 if necessary to perform the FCD ("The amount of money escrowed pursuant to this Section shall in no way limit Defendants' responsibility to pay all costs necessary to comply with this Decree." -- Page 8 of FCD). The FCD also purported to "apply to and be binding upon and exercisable by the parties to this action, *and their successors and assigns.*" (page 2 of FCD -- emphasis added) Importantly, the FCD anticipated that the defendants might sell the refinery before completion of the corrective action and, therefore, provided:

> Defendants agree to include in any contract of sale in deed transferring ownership . . . of the Cushing Refinery a provision that any such party shall be bound by the requirements of this Final Consent Decree . . . and that the United States shall be specifically designated a third party beneficiary in such instrument of conveyance for the purpose of enforcing the requirements of this Final Consent Decree.

(Page 3 of FCD)

Second, well after entry of the FCD and well into the Trustee's performance thereunder, the refinery was sold to U.S. Refining and Marketing, Inc. or its assign pursuant to the Agreement for Sale and Purchase of Assets (the "Sale Contract"), a true and correct copy of which is attached hereto as Exhibit "B." The Sale Contract contained a section of representations,

warranties and covenants of the seller (Hudson Oil Company, through the bankruptcy trustee), including the following:

> 5.3 Environmental Issues and Work. Seller has performed the majority of all the work required under the Final Consent Decree . . . Seller will complete any and all work in compliance with the Final Consent Decree, the EPA Work Plan or any other order or decree arising out of or associated with *The U.S. v. Hudson* litigation. Seller shall hold Buyer harmless from any litigation arising out of Seller's inability to complete or perform the work as outlined in the [Final Consent Decree] or the EPA Work Plan or any other judgment or decree or associated work required or arising out of *The U.S. v. Hudson* litigation.

(Page 5-6 of Sale Contract). The Sale Contract also provided that the bankruptcy trustee would convey the refinery by a special warranty deed "subject . . . to . . . *The U.S. v. Hudson.*" (Page 13 of Sale Contract). Section 9.2 of the Sale Contract again addressed the requirements of the FCD:

> Seller will complete all work to be performed by Seller under . . . the terms of the FCD . . . as set forth in the FCD and any work to be performed as directed by the Oklahoma State Department of Health in a good and workmanlike manner and in accordance with the respective terms thereof. Seller shall be solely responsible for all work related to the [FCD] and such costs deemed appropriate to complete the EPA work plan and Seller shall hold Buyer harmless from all cost incurred relating [sic] the [FCD], EPA work plan or any other judgment or decree arising out of the *U.S. vs. Hudson* litigation.

The Sale Contract was approved by the Bankruptcy Court after notice to all creditors, including service of the Sale Contract upon all of the government agencies who were creditors (Department of Labor, Department of Energy, Environmental Protection Agency, Internal Revenue Service) and their counsel. Indeed, the EPA actively participated in the drafting of the

Sale Contract, particularly as regards language pertaining to the FCD.[1] Accordingly, all parties, including especially the EPA, were aware of, and did not object to, the provisions in the Sale Contract binding the bankruptcy estates of the Hudson Oil Company, through their bankruptcy trustee, to perform the FCD and indemnify the buyer against all costs associated with the FCD. Because the Sale Contract was the agreement of Chapter 11 bankruptcy estates, through their bankruptcy trustee, approved by the Bankruptcy Court, the obligations and undertakings thereunder became administrative obligations enjoying the highest priority in the distribution scheme of the United States Bankruptcy Code. 11 U.S.C. §§ 503(b) and 507 (a).[2]

The Creditors' Plan as confirmed by the Bankruptcy Court provided, generally, that all of the assets and obligations of the bankruptcy estates would be transferred for the benefit of creditors to the Hudson Liquidating Trust with Walter Kellogg as trustee (the "Trustee"). The non-cash assets were to be sold by the Trustee. Claims against, and obligations of, the bankruptcy estates were to be satisfied by the Trustee from the assets of the Hudson Liquidating Trust according to the classifications and treatments afforded specific claims, or groups of claims in the Plan. The Plan set forth 16 classes of claims. Some classes contained a single claim, such as Class 8 containing only the EPA claim for performance of the FCD, Class 9 containing only

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[1] In 1993, the purchaser of the refinery (U.S. Refining & Marketing, Inc.) filed bankruptcy. As part of the liquidation of the purchaser's assets it has contracted to sell the Refinery to Ameritex Corporation, subject to approval of the Bankruptcy Court. (A true and correct copy of the Contract for Purchase and Sale is attached as Exhibit "C".) Pursuant to §4.3 of the Contract, the Trustee, Walter Kellogg, is obligated to complete its obligations under the FCD and obtain an official "Final Approval" of the FCD. If the Trustee does not complete its obligations under the FCD, Ameritex may terminate the Contract and the Trust Estate would be subject to damage claim by the Estate of U.S. Refining, Inc., the original purchaser; or, Ameritex may decide to close and then file a claim against the Trust Estate for breach of representations in §4.3 of the Contract. In either event, the assets of the Trust Estate are still subject to claims for failure to perform the Work Plan of the FCD.

[2] Transactions that occur during bankruptcy administration and are beneficial to the bankruptcy estate give rise to administrative claims. *In re Frontier Properties, Inc.*, 979 F.2d 1358, 1367 (9th Cir. 1992) (damages resulting from a bankruptcy trustee's refusal to close the purchase of land under a contract assumed by the trustee after commencement of the bankruptcy case have first priority as administrative expense); *In re Jartran, Inc.* 732 F.2d 584 (7th Cir. 1984); *In re Hemingway Transport, Inc.*, 126 B.R. 656 (Bankr. D. Mass 1991) (postpetition purchaser of property from the bankruptcy estate has first priority, administrative claim for indemnification or contribution when the purchaser subsequently incurs response costs for environmental conditions on the property previously caused by the debtor).

the claim of the Department of Energy ("DOE") for approximately $30 million and Class 10 containing only the claim of the Department of Labor ("DOL") for approximately $13 million.

With respect to the Class 8 EPA claim, the Plan provided that the Hudson Liquidating Trust "shall assume and perform all of [the Hudson Oil Company's] unperformed obligations under the FCD in satisfaction of the EPA Claim." (Plan, page 21). As discussed above, funding of the obligations under the FCD was not restricted to the $1 million escrow, but, rather, was open ended. Accordingly, the Hudson Liquidating Trust became obligated, by virtue of the Bankruptcy Court's direct order confirming the Plan, to perform the FCD whatever the cost.

Class 2 claims pertain to administrative claims. The Plan provides that such claims would be paid in cash, in full, either on the Effective Date or when allowed. The provision was intended to comply with 11 U.S.C. § 1129(a)(9), which provides that a Plan may not be confirmed at all unless it affords payment in full and in cash of all administrative claims. As discussed above, the claim of the buyer of the refinery for indemnity against costs associated with the FCD, if any, was or would be an administrative claim with the highest priority for payment under 11 U.S.C. § 507(a)(1). The general unsecured claims of the DOE and DOL, in contrast, enjoyed no priority whatsoever, and, under general bankruptcy law would not be entitled to payment until after all priority claims were paid in full.

In summary, were the Trustee to discontinue performance of the FCD, the buyer of the refinery arguably would be obligated to complete that performance at the insistence of the EPA and would have a claim against the Trustee for reimbursement, which would be required to be paid in full in cash as an administrative priority claim. Thus, there is no advantage to the agencies to cause the Trustee to cease performance; savings from cessation of performance become payment obligations to the refinery buyer (although it can be expected that the claims

of the refinery buyer will substantially exceed the Trustee's expected costs of completion because the refinery buyer will spend substantial sums in attorneys' fees and similar costs just getting up on the learning curve).

III. Funds Available To Complete Performance Of Final Consent Decree

As explained above, under the Plan as approved by the Bankruptcy Court, the Trustee has the absolute obligation to complete performance of the FCD, as it might be amended. The question has arisen whether the Trustee is limited as to the funds that might be accessed by him for that purpose. The Court should have an understanding of the several sources for funding that might be available. The balances are as of July 31, 1994, and are not believed to be materially different now.

The Trustee has approximately $58,000 in the Hudson Liquidating Trust's general operating account. For the most part, these funds represent revenues from operation and are available for any trust purpose.

The Trustee maintains a separate account with a balance of approximately $200,000, which the DOE apparently believes is restricted to payment of the DOE's claim. This account was established with the consent of the DOE in the original amount of $360,000 as a safety fund to cover unanticipated costs of the Trustee arising from the Plan.[3] The difference between the present balance and the opening balance of this account was utilized by the Trustee, after exhaustion of the $1,000,000 EPA escrow, to continue to perform his obligations under the FCD.

[3] A short explanation of how the Plan worked is necessary to understand this account. The Plan called for the Trustee to pay the DOE all "Available Cash" after payment in full of various claims (including Class 2 administrative claims). The term "Available Cash," however, was defined by the Plan to mean all cash on hand on the Effective Date of the Plan *except* the $1,000,000 EPA escrow, the closure/post-closure escrow (discussed later in this memorandum), and *"reasonable amounts necessary to enable the Liquidating Trustee to operate, preserve and dispose of the Trustee Assets, and close the Hudson Bankruptcy estates consistent with the Hudson Liquidating Trust Agreement.* (§ 1.10 of Plan) Such $360,000 was held back from DOE for these latter purposes.

Arguably, the balance of these funds are similarly available for that purpose under the broad language of the Plan (*see* footnote 2). In the event the Trustee becomes obligated to make administrative claim payments to the refinery buyer as a result of cessation of performance of the FCD, this fund would appear to be available for that purpose because payments of "Available Cash" to the DOE are subject to first paying Class 2 administrative claims (*see* Section 4.9 of Plan). Indeed, should any obligation to the refinery buyer exceed the balance in this fund or other funds, arguably the DOE will be required to disgorge a portion of prior payments made to the DOE by the Trustee (exceeding $6,000,000) because the DOE was not entitled to payments until all administrative claims were paid in full.

A third fund is the closure/post-closure escrow on behalf of the State of Oklahoma relative to the "land treatment unit," which is a portion of the refinery still owned by the Hudson Liquidating Trust. The FCD requires the maintenance of this escrow and the Trustee believes no portion of the approximately $284,000 balance is presently available for any purpose other than closure of the land treatment unit. However, the Trustee believes that closure costs will be less than this balance and, therefore, some of these funds will be available some day for any legitimate trust purpose.

The Trustee has approximately $25,000 on deposit to cover priority claims as to which the claimants failed to cash their distribution checks. These funds are not available because they will be paid either to the claimants, if they appear, or to a government unit as escheat in behalf of such claimants.

There is a fund as to which the Trustee has no access. It is generally referred to as the "Unsecured Creditors' Fund" and is controlled directly by the chairman of the creditors' committee and its counsel for the purpose of making distributions to unsecured creditors. Most

of the fund was distributed to trade creditors on a pro rata basis soon after the effective date of the Plan, although certain amounts are yet to be distributed pending resolution of disputed claims. Additionally, the sum of $440,000 is potentially distributable from this fund to the DOL pursuant to complicated provisions of the Plan.[4] It is not believed that such $440,000 will be available for general trust purposes in light of the restrictive language of the Plan.

Finally, although cash has not yet been realized by the Trustee at this time, the Trustee does expect to sell the remaining assets of the trust for gross proceeds exceeding $2-3 million. Contracts for sale of such assets are pending. The Plan calls for payment of the "Net Proceeds" from such sales to the DOL. However, the term "Net Proceeds" is defined as net cash "following payment" of several categories of expenditures "consistent with the Hudson Liquidating Trust Agreement," including (a) "normal expenses of operation and maintenance of the Trust Assets," and (b) "reasonable fees and expenses of professionals engaged by the Liquidating Trustee." (Section 1.50 of Plan). The Trustee believes that the Trust's expenses of performing the FCD, especially the costs of the Trustee's professionals in that regard, are payable out of gross proceeds of sale of trust assets before any distribution of Net Proceeds to the DOL under the Plan.

The Hudson Liquidating Trust Agreement is attached as Exhibit "A" to the Plan (see Tab 1). At Paragraph 2.3, the trust agreement provides that:

> . . . In determining whether there are any Net Proceeds available for distribution, *the Trustee shall first pay* . . . the compensation, fees and expenses . . . of the trustee [and] . . . normal and customary operating expenses of the Trust . . . (emphasis added).

[4] Section 4.10 of the Plan required that as much as $446,000 of the sums comprising the Unsecured Creditors' Fund be held back from distribution to creditors until all remaining trust assets were sold. If the gross sale price of the remaining assets were less than $5,000,000, then the fund would have to make funds available for the DOL claim. The maximum payment would be $440,000. Although not all trust properties have been sold, it appears the Unsecured Creditors' Fund will have to make the maximum payment.

Importantly, the same paragraph of the trust agreement provides, with respect to determining whether Net Proceeds are available for distribution, that:

> . . . the Trustee may, in his discretion, give due consideration to the possibility there may exist unasserted claims against the Trust or asserted claims which are not yet due and payable . . .

Needless to say, it is the Trustee's position that the combined effect of the language of the Plan and the trust agreement, which is incorporated into the Plan, is to permit the Trustee to use proceeds of sale of trust assets to either (a) perform the FCD as normal and customary operating expenses of the trust, particularly because the Plan explicitly provided that the Liquidating Trust *shall* assume and perform the FCD, or (b) provide for payment of the asserted or unasserted claims of the refinery buyer that might arise if the Trustee were to cease performance under the FCD.

Summarizing this discussion concerning access to funds to complete the FCD, as it might be amended, the Trustee believes he should be able to use the following funds or sources of funds:

(a) $58,000 general operating funds;

(b) $200,000 in the so-called DOE account;

(c) if necessary, disgorgement of up to $6 million of payment previously made to the DOE;

(d) closure fund of $284,000 to the extent any portion exceeds closure costs; and

(e) proceeds of sale of trust assets.

IV. Status of Negotiations Between the Parties and Conclusion

The position of the United States seems to be: "Let's stop the Trustee from spending money performing the FCD which could be distributed to the Federal agencies under the Plan,

because we can make the refinery buyer or any other successor finish the FCD, or otherwise clean up the property, at their expense instead of ours." The logic is faulty because if the Trustee does stop performance, the Hudson Trust and its assets will then be liable to pay the claims of the refinery buyers or other successors. Further, the position of the United States is contrary to the spirit and explicit provisions of the very Plan and trust agreement the U.S. agencies negotiated and had approved by the Bankruptcy Court. The Plan required the Hudson Trust to perform the FCD. The EPA insisted on this provision and the other agencies joined in that demand. Creditors and other parties in interest, including contingent claimants such as the refinery buyer, relied upon this provision in the Plan (presumably, the refinery buyer would have opposed confirmation of any plan that did not assure performance of the bankruptcy estate's obligation to perform the FCD as required in the Sale Contract approved by the Bankruptcy Court). Now, the agencies want to shift the burden of the FCD to the party or parties who were assured under both sales contracts that they would be protected from that burden. The agencies approved the first Sale Contract, even negotiated aspects of it, and encouraged the Bankruptcy Court to approve it. And, the agencies, or at least the DOE, received substantial sale proceeds from the refinery. It is disappointing, now, to hear the agencies take a position betraying all of the parties with whom they negotiated the Plan and trust agreement.

The Trustee believes that extremely little remaining effort and expense would be necessary to complete the FCD. In order to show this, the Trustee has been negotiating with the EPA, with the concurrence of the DOL, to perform a Sampling and Analysis Plan to determine the status of the corrective action areas under the Work Plan that have not yet demonstrated completion, *to-wit*: Biotreatment of Contaminated Soil and Groundwater Remediation. It is the Trustee's goal to have a complete round of sampling and analysis performed on these Work Plan areas

prior to the upcoming hearing in order to provide the Court with reliable information on the status of cleanup for these two areas. Once cleanup status is determined, the amount of funds needed to complete the Work Plan can be fairly established.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon counsel for Plaintiffs and upon all counsel of record by mailing copies of the same via U.S. mail, postage prepaid this 22nd day of September, 1994.

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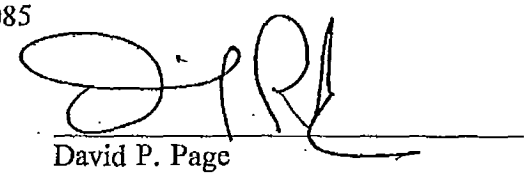

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Exhibit 6

United States' Supplemental Brief Regarding Hudson's Motion to Terminate Consent Decree

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
v.)
)
HUDSON REFINING CO., INC.) Civil Action No. 84-2027-A
HUDSON OIL CO. INC.,)
)
Defendants.)
)
_____/

UNITED STATES' SUPPLEMENTAL BRIEF REGARDING
HUDSON'S MOTION TO TERMINATE CONSENT DECREE

The United States of America, on behalf of the Department of Labor ("DOL"), Department of Energy ("DOE"), and Environmental Protection Agency ("EPA"), submits the following Supplemental Brief pursuant to the Court's request of August 26, 1994.

SUMMARY OF ARGUMENT

The United States withdraws its opposition to the Trustee's Motion and agrees to the termination of the Consent Decree. The Trustee's Motion to Terminate the Consent Decree is, therefore, unopposed, and should be granted.[1]

In light of the foregoing, nothing remains for this Court to resolve and further briefing on the issue is unnecessary. Given the Court's prior request for Supplemental Briefing, however, the

[1] The provisions of the Consent Decree relating to closure/post-closure activities, however, which are fully funded and implemented pursuant to the Oklahoma Hazardous Waste Management Program, should remain in effect.

United States will briefly address whether, consistent with the terms of the Hudson Plan of Reorganization, estate assets remain for further environmental clean-up work at Cushing Refinery.

The Trustee's Supplemental Brief contends that virtually all of the assets of the Hudson estate earmarked for distribution to governmental entities are available for environmental clean-up. This contention is based upon an incomplete and misleading reading of the Plan of Reorganization for Hudson Refining Co. and Hudson Oil Co. ("Plan of Reorganization") entered by the United States Bankruptcy Court for the District of Kansas on September 14, 1990. Expenditure of additional estate assets for environmental clean-up of the Cushing Refinery would be contrary to the understanding of the parties who voluntarily agreed to entry of the Hudson Plan of Reorganization. Accordingly, in the event the Court reaches out to address this issue, it should hold that no further assets remain for completion of the terms of the Consent Decree.

Finally, even were the Court to conclude that estate assets can be used for additional clean-up of the Cushing Refinery, the Trustee fails to explain why only government assets, and not the assets of similarly situated non-governmental creditors, should be used for this purpose. The Trustee's disparate and discriminatory treatment of the governmental creditors is contrary to the terms of the Plan of Reorganization and the Bankruptcy Code.

FACTS

DOL CLAIMS

In June of 1977, DOL brought a derivative action on behalf of 30,000 service station employees based on Hudson's violations of the Fair Labor Standards Act. Brock v. Hudson Oil Company, Inc., Civ. Action No. 77-2173 (D. Kan. 1977). DOL's complaint asserted that Hudson required its employees to pay for service station cash and merchandise shortages -- thus reducing their pay below the applicable minimum wage -- and that employees were required to work beyond their scheduled hours without compensation. The complaint sought a permanent injunction of future violations, as well as back wages due on Hudson's employee's behalf, and an equal amount as liquidated damages, pursuant to Fair Labor Standards Act section 16(c). Following a several week trial, in October of 1983, the court issued a decision enjoining future violations and prescribed a formula to compute the amount of damages due. Application of this formula resulted in a judgment being entered on behalf of DOL in the amount of $12,850,000.

DOE CLAIMS

Prior to the filing of Hudson's bankruptcy petition, DOE initiated administrative enforcement proceedings against Hudson and its affiliates concerning overcharges in connection with the sale of refined petroleum products. The aggregate amount of the overcharges as of the date of filing of the bankruptcy petition was approximately $30,000,000.

FINAL CONSENT DECREE

On December 10, 1987, EPA and Hudson entered into a Final Consent Decree which required Hudson to perform clean-up activities at its refinery located in Cushing, Oklahoma. Pursuant to the Consent Decree, Hudson was required to establish an escrow account of $1,000,000 for funding clean-up activities. In addition, an escrow account for closure/post-closure work at the site by the state of Oklahoma was also established.

On February 16, 1989, the Cushing Refinery was sold to U.S. Refining and Marketing, Inc. ("U.S. Ram").

PLAN OF REORGANIZATION

On September 14, 1990, the bankruptcy court in In re Hudson Oil, Civ. No. 84-20002 (Bankr. D. Kan. Sept. 14, 1990), entered an order confirming a plan of reorganization for the defendants. Exhibit A. The plan of reorganization confirmed was the "Unsecured Creditors' Second Amended Joint Plan of Reorganization dated July 16, 1990, and the Amendments and Technical Corrections to the Second Amended Joint Plan of Reorganization."[2]

The Disclosure Statement accompanying the Plan of Reorganization, Exhibit B, details the amount and bases for the claims asserted by Hudson's various debtors. In describing EPA's claim pursuant to the Final Consent Decree, the Disclosure Statement provides that the

[2] The Trustee's Supplemental Brief incorrectly refers to the July 16, 1990 Second Amended Joint Plan of Reorganization as the Third Amended Plan of Reorganization.

> [Plan of Reorganization] 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 accor[d]ance with the Final Consent Decree.

Disclosure Statement at 22 (emphasis supplied).

Pursuant to the Second Joint Plan of Reorganization, Exhibit C, the Trustee was to disburse $1,760,000 to prepetition unsecured claimants on the Effective Date of the Plan. On that same date, the Trustee was to disburse to DOE all "Available Cash" from estate assets. Available Cash was defined in the Plan as:

> all cash on hand and in deposit on the Trustee's account on the Effective Date, provided that Available cash shall not include (i) the EPA Escrow (ii) such amount, if any, as may be necessary to increase the closure/post-closure escrow required by the Final Consent Decree described in Paragraph 4.8 of this plan . . . .

Id. at ¶ 1.10 at 4.

Thus, the Plan expressly provides that additional funds may be used to supplement the closure/post-closure escrow fund on

behalf of the State of Oklahoma. No similar provision is included in regard to the EPA escrow fund.[3]

On the Effective Date of the Plan of Reorganization, DOE received in excess of $6,000,000. The Trustee retained approximately $360,000 at the request of the United States so that the government could direct its distribution.

The Plan of Reorganization provides that the Department of Labor Claim is to be paid from the liquidation of Trust Assets. ¶ 4.10 at p. 22. In the event these Trust Assets are sold for a gross price of less than $5,000,000, a formula is set forth in the Plan providing for additional payment of the Department of Labor Claim from the Unsecured Creditors' Fund. Id.

The Unsecured Creditors' Committee Amendments and Technical Corrections to the Second Amended Joint Plan of Reorganization Dated July 16, 1990 ("Amendments and Corrections"), Exhibit D, further defines and clarifies the source of payment of the DOL Claim. The Amendments and Corrections specifically states: "DOL Properties - Shall mean the Handy Stops (with associated inventories, receivables and other tangible and intangible properties), the Rainbow Office Building and related personalty, and any other real properties of Debtors owned by the Debtors on

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[3] The failure to provide for additional funding for the EPA escrow fund is not surprising, given the Trustee's representation that only $30,000 of the $291,000 from the escrow fund would be needed to complete the Final Consent Decree. Indeed, the Unsecured Creditors' Committee Amendments and Technical Corrections to the Second Amended Joint Plan of Reorganization Dated July 16, 1990 ("Amendments and Corrections"), Exhibit D, defines Trust Assets as including the EPA Escrow Refund. Id. at ¶ 1.57, p. 3.

July 16, 1990." ¶ 1.31(A) at p. 2. The Amendments and Corrections further provide that the Liquidating Trustee shall pay the Class 10 claimant [DOL] the Net Proceeds attributable to liquidation of the DOL Properties. ¶ 4.10 at p.6

Finally, the Amendments and Corrections provide that:

> [I]n the event the Class 9, 10 and 11[4] Claimants agree in writing to distributions which vary from the distributions as provided in this Plan, then the Liquidating Trustee shall distribute in accordance with such Agreement.

¶ 4.09. at 6.

Because DOL's claim was to be paid from the sale of the DOL Assets identified above, DOL did not receive any payment of its claim on the Effective Date of the Plan of Reorganization. Although the Plan of Reorganization originally contemplated that DOL would receive approximately $5,000,000 from the sale of the DOL assets,[5] the Trustee now reports that the sale of the DOL assets will result in a payment of less than half that amount.

PROCEDURAL POSTURE

On March 8, 1994, Hudson and EPA filed a Joint Motion to Terminate the Consent Decree. The EPA subsequently withdrew from this joint motion, while Hudson continued to assert that the Final Consent Decree should be terminated. The United States now withdraws its opposition to the Termination of the Final Consent

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[4] The Class 9, 10 and 11 Claimants are government agencies receiving assets pursuant to the Plan of Reorganization.

[5] See, e.g., Plan of Reorganization at ¶ 4.10, p. 22. "The DOL Properties are appraised at approximately $5,000,000."

Decree. The motion presently before the Court is, therefore, unopposed.

ARGUMENT

I. THE UNITED STATES DOES NOT OPPOSE TERMINATION OF THE FINAL CONSENT DECREE

Under the circumstances presented, expenditure of additional assets is unwarranted. Accordingly, the United States withdraws its opposition to the Termination of the Final Consent Decree.

II. USE OF ADDITIONAL ESTATE ASSETS FOR CLEAN-UP WOULD BE CONTRARY TO THE INTENT OF THE PLAN OF REORGANIZATION

The Trustee would have this Court read the Plan of Reorganization as providing that all of the government's assets may be used for clean-up of the Cushing Refinery, while DOE and DOL receive only the assets, if any, remaining thereafter. The Trustee's reading is contrary to the terms of the Disclosure Statement and the Plan of Reorganization adopted by the Bankruptcy Court, as well as the intent of the affected parties.

The Plan of Reorganization provides that Available Cash may be used to supplement the closure/post-closure fund on behalf of the State of Oklahoma, but contains no similar provision in regard to the EPA escrow account. See Plan of Reorganization at ¶ 1.10 at 4. Thus, the language of the Plan simply does not support the position now advanced by the Trustee.

In addition, the explicit language of the Disclosure Statement contemplates that additional money would be coming into the estate from the EPA escrow account, not vice versa. Indeed, the Trustee represented that only approximately $30,000 of the

$291,000 remaining in the escrow account would be needed to finalize compliance with the Consent Decree. Disclosure Statement at 22, attached as Exhibit B.[6] The government agreed to the terms of the Plan of Reorganization based upon this understanding. If the government had known that not only would the entire $291,000 in the escrow account be spent, but also that an additional $160,000 of DOE funds would be used and that the Trustee would then seek to use the remainder of the government's assets for additional clean-up activities (as well as administrative expenses -- such as payment of the Trustee's environmental experts and attorney fees), the United States would not have consented to the terms of the Plan of Reorganization.

The Trustee's position is flatly contrary to the intent of the only parties whose assets are at issue. EPA, DOL and DOE agree that additional estate assets should not be made available to the Trustee for environmental clean-up. It was in contemplation of just the situation now presented to the Court, in which the Trustee seeks to manufacture a dispute as to the distribution of governmental assets, that language was included in the Plan providing that the respective governmental agencies could agree among themselves as to the proper distribution of their assets. See Amendments and Corrections at ¶ 4.09 at 6. Pursuant to this provision of the Plan, DOE, DOL and EPA

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[6] A similar statement appears in the sales contract with U.S.Ram. See Sales contract at ¶ 5.3, "Seller has performed the majority of all the work required under the Final Consent Decree."

previously agreed that no more than $1,000,000 could be used for Consent Decree activities. Not surprisingly, the Trustee's Supplemental Brief chooses to simply ignore this controlling language in the Plan of Reorganization.

The Trustee's argument that distribution of the remaining assets of the estate should not made to creditors because the buyer of the Cushing Refinery might have an administrative claim for future costs in complying with the Final Consent Decree is baseless. As set forth above, the United States has agreed to terminate the Consent Decree. U.S. Ram, or subsequent buyers, therefore, would incur no expenses in complying with the Consent Decree.

III. THE TRUSTEE'S PROPOSED USE OF ESTATE ASSETS UNFAIRLY DISCRIMINATES AGAINST THE UNITED STATES

In addition to wrongfully characterizing the intent of the Plan of Reorganization, the Trustee's proposal for further expenditure of estate assets on environmental clean-up blatantly discriminates against the United States and its agencies.

The Trustee's Supplemental Brief identifies five purported sources of funds to conduct further clean-up of the Cushing Refinery: 1) $58,000 in general operating funds from the DOL's Handy Stops; 2) $200,000 from the DOE fund: 3) $6,000,000 previously disbursed to DOE; 4) $284,000 from the closure fund for the state of Oklahoma in the unlikely event any assets remain following closure; and 5) $2,300,000 from the sale of the DOL Properties. Simultaneously, the Trustee posits that $1,760,000 previously disbursed to prepetition unsecured claimants, and

remaining funds not yet disbursed in the Unsecured Creditors Fund, are not available for further clean-up. No plausible explanation is provided, however, as to why funds earmarked for like situated government entities can be used for clean-up while non-governmental assets are sacrosanct.

Pursuant to the Plan of Reorganization, DOE and the allowed prepetition unsecured claimants are treated as impaired classes. On the Effective date of the Plan of Reorganization, DOE and the prepetition unsecured claimants received cash distributions. Incredibly, however, the Trustee now proposes that DOE funds should be disgorged for environmental clean-up, while the prepetition unsecured claimants remain inviolate. No justification exists for such blatantly disparate treatment of governmental versus non-governmental entities.

Similarly, DOL retained the rights to the associated inventories, and receivables from the Handy Stops, as well as the proceeds from their future sale. See Amendments and Corrections ¶ 1.31(A) at p. 2. The $58,000 in general operating funds identified by the Trustee fall within the definition of DOL Property. This $58,000 in DOL assets, as well as the estimated $2,300,000 in proceeds from the future sale of DOL assets, is no more available for environmental clean-up than the assets of any other prepetition unsecured claimants cannot. The proposed distribution of estate assets for environmental clean-up is, therefore, discriminatory and unjustified.

Conclusion

The United States does not oppose the Trustee's Motion to Terminate the Consent Decree. No legitimate issue, therefore, remains before this Court for resolution.

To the extent that the Court addresses additional questions, it should conclude that no further estate assets remain for environmental clean-up of the Cushing Refinery. Finally, if the Court were to determine that estate assets can be used for further environmental clean-up, it should do so on a pro-rata basis among similarly situated claimants, rather than using solely government assets for further clean-up efforts.

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Dated: October 14, 1994.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 14th day of October, 1994, I caused to be sent via first-class mail one copy of the United States' Supplemental Brief Regarding Hudson's Motion To Terminate Consent Decree to the following:

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Brendan Collins

Brendan Collins, Esq.

Exhibit 7

Facsimile Letter to the Honorable Wayne E. Alley from counsel for Hudson with a facsimile copy to Department of Justice counsel for the United States

GARDERE & WYNNE, L.L.P.
ATTORNEYS AND COUNSELORS

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TELEFONOS 011(525)596-5580

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October 25, 1994

VIA TELECOPY (405-231-4529)

The Honorable Wayne E. Alley
3102 U.S. Courthouse
200 Northwest 4th Street
Oklahoma City, Oklahoma 73102

Re: United States of America v. Hudson Refining Co., Inc.
Civil Action No. 84-2027-A

Dear Judge Alley:

On October 14, 1994 the United States of America filed its pleading withdrawing all opposition to the Defendants' Motion for Closure of the Final Consent Decree. Counsel for the United States and counsel for the Defendants have discussed how to proceed, and they are in agreement that the Court should enter the Order that was submitted to the Court with the filing of Hudson's Motion. For the convenience of the Court, a copy of that proposed Order is attached.

Counsel for the Plaintiff and the Defendants are of the belief that further hearings in this matter are unnecessary and that all matters in contest can be resolved by the entry of the proposed Order. If the Court agrees with these conclusions, then it will be unnecessary for counsel, parties, and witnesses to travel to Oklahoma City for the hearing presently scheduled for tomorrow afternoon. Because we are uncertain as to how the Court may wish to proceed, please advise us whether the Court still desires to conduct a hearing tomorrow afternoon.

If the Court will dispense with that hearing and sign the submitted Order, I will advise counsel for the Plaintiff that it is unnecessary to travel to Oklahoma. Obviously, the earlier we learn of the Court's wishes in this regard, the better it will be for the parties who may need to make travel arrangements.

120

Thank you for your consideration.

Very truly yours,

Michael D. Richardson

MDR:fr
Enclosure
cc: Brendan Collins
Civil Division
Department of Justice
P. O. Box 875
Ben Franklin Station
Washington, D.C. 20044
(Via Telecopy - 202-514-9163)

0183283.4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA	§	
	§	
Plaintiff	§	
	§	
v.	§	CIVIL ACTION NO. 84-2027-A
	§	
HUDSON REFINING CO., INC.,	§	
HUDSON OIL CO., INC.,	§	
	§	
Defendants.	§	

ORDER FOR CLOSURE OF THE FINAL CONSENT DECREE

Came before the Court the motion of the Hudson Liquidating Trust, on behalf of HUDSON REFINING CO., INC., and HUDSON OIL CO., INC., Defendants in the above-entitled and numbered cause, requesting Closure of the Final Consent Decree, and upon review of the evidence, the Court is of the opinion that the motion should be granted. It is therefore,

ORDERED that the obligations under the Final Consent Decree and its incorporated Work Plan are hereby satisfied and terminated, thereby releasing the Hudson Liquidating Trust, its trustee in Bankruptcy, Hudson Refining Co., Inc., and Hudson Oil Co., Inc. from any further obligations thereunder.

SIGNED this _____ day of _____, 1993.

_____
JUDGE PRESIDING

150956/5

GARDERE & WYNNE, L.L.P.
Attorneys and Counselors
1601 Elm Street, Suite 3000
Dallas, Texas 75201
214-999-3000

TELECOPY COVER LETTER

October 25, 1994 11:00am

Please deliver the following pages to: Honorable Judge Alley

ATTN:
COMPANY/FIRM:
CITY & STATE: Oklahoma City, OK
Client/Matter #: 45055.11
Telecopier No: 405-231-4529

FROM: Michael D. Richardson
(214) 999-4590

NUMBER OF PAGES (including this cover sheet): 4

XEROX 7021 TELECOPIER NO. (214) 999-4274

ADDITIONAL MESSAGE:

Is this for service of Documents? NO
Please indicate local time deadline: N/A

Confirmation Requested: No