

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

In re:)
)

Land O'Lakes, Inc. (Hudson Oil Refinery
Superfund Site))

Docket No. 06-16-08)

)

CERCLA § 106(b) Petition No. 15-01

JOINT STATUS REPORT

Pursuant to the Environmental Appeals Board's ("Board") February 3, 2016 Order Granting in Part and Denying in Part Motion to Extend Time and for Stay Proceedings in this matter, the parties, by and through their counsel, respectfully provide this status report.

I. THE STATUS OF THE WESTERN DISTRICT OF OKLAHOMA CASE ENTITLED *LAND O' LAKES, INC. v. UNITED STATES OF AMERICA*, CASE NO. 5:15-CV-0683-R (JUDGE DAVID L. RUSSELL) (THE "DISMISSED CASE")

On February 10, 2016, the Court (Russell, J.) entered an order and judgment dismissing the case for lack of subject matter jurisdiction. Land O' Lakes plans to file an appeal from that judgment.

The Court's order in the Dismissed Case stated, among other things, the following regarding the reassertion of Land O' Lakes' dismissed claims:

Thus, §113(h) bars subject matter jurisdiction over Plaintiff's claims unless and until the EPA files a cost recovery claim under § 107 of CERCLA. At that time, Plaintiff could pursue these claims as defenses to liability under CERCLA.

Slip Op. at 8. The order does not address the court's future subject matter jurisdiction over Land O' Lakes' independent claim for a declaratory judgment in the Dismissed Case that the Final Consent Decree bars the UAO (as opposed to the EPA's anticipated cost recovery action). This

independent declaratory judgment claim is technically not a defense to a cost recovery claim by EPA, but an affirmative legal claim relating to one of several bases for Land O' Lakes' challenge to the legality of the UAO to support its §106(b) Petition for Reimbursement. Land O' Lakes' position is that the Western District of Oklahoma Court should decide the question of whether the Final Consent Decree bars the UAO for jurisdictional and judicial economy reasons.

EPA Region 6 does not opine on the reasoning provided by Land O' Lakes concerning its appeal plans. EPA Region 6 agrees with this section of the status report as it concerns the dismissal of the case by the Western District Court, and notes Land O' Lakes stated intention to appeal the decision.

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

On February 23, 2016, the United States filed an action in the United States District Court for the Western District of Oklahoma, entitled *United States of America v. Land O' Lakes, Inc., and Cushing, Oklahoma Brownfields, LLC*, Case No. CIV-16-0170-R (Judge David L. Russell). Paragraph 2 of the Complaint states that it is a civil cost recovery action brought under CERCLA.

The United States is planning to send the named defendants, Land O' Lakes, Inc. and Cushing, Oklahoma Brownfields, LLC a request to waive personal service of the Complaint pursuant to Fed. R. Civ. P. 4(d). The defendants' counsel has advised the United States that defendants are planning to waive service. Under Fed. R. Civ. P. 4(d)(3), the defendants' answers or responsive pleadings or motions will be due 60 days after the date of the request for waiver was sent.

Defendants plan to reassert all claims made in the Dismissed Case and to defend all claims made by the United States, both in the Cost Recovery Case. With regard to its Section 106 claims for reimbursement pending before the EAB, Land O' Lakes believes it must exhaust the Petition process before the EAB (and any subsequent appeals) to receive any financial recovery. However,

in the interest of judicial economy, and to protect its right to due process, Land O' Lakes plans to reassert, in the Cost Recovery Action, its claim for declaratory judgment that the Western District of Oklahoma's Final Consent Decree and Closure Order bar the issuance of the UAO.

EPA Region 6 does not opine on the reasoning provided by Land O' Lakes concerning its CERCLA 106 claim. EPA Region 6 agrees with this section of the status report as it concerns the filing of the complaint by the United States in the Western District Court, and does not comment on Land O' Lakes stated intentions to respond to the complaint.

III. THE STATUS OF SETTLEMENT NEGOTIATIONS

Since the last status report to the EAB, counsel for the parties have had an additional brief discussion about the potential structure and scope of settlement discussions. No agreements have been reached, other than a preliminary agreement that any settlement discussions should be global in scope. Land O' Lakes has informed the United States and EPA counsel that it is only willing to engage in mediated settlement discussions in which the costs are shared. The parties plan to continue these discussions about the potential structure, scope and schedule for settlement discussions.

IV. ANY OTHER RELEVANT INFORMATION

Pursuant to a Fed. R. Civ. P. 26(d)(1) order of Judge Russell in the Dismissed Case, the planned deposition of former Refinery Superintendent Forrest Fuqua was originally scheduled for March 14-16, 2016, by mutual agreement. Because of the dismissal, new documentation authorizing the deposition must be obtained in the form of either a stipulation, or a new order, pursuant to Fed. R. Civ. P. 26(a)(1). Specifically, a new motion for leave to take the deposition of Mr. Fuqua, and a motion for leave to serve Mr. Fuqua with a Fed. R. Civ. P 45 document subpoena for such deposition by the United States, must be filed, and new orders under Fed. R. Civ. P 26(d)(1) must be obtained, or a stipulation to conduct that discovery must be executed by counsel

for the parties and the deponent, to proceed with the document subpoena and the deposition. Counsel for Land O' Lakes, the United States, and Mr. Fuqua are working together to develop and execute the documentation and plan to reschedule the deposition sometime after April 5, 2016 at a mutually convenient date.

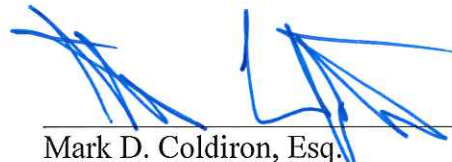
Respectfully submitted,

/s/ George Malone, III

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on March 3, 2016, the foregoing was electronically transmitted to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants of the Joint Status Report was made by electronic mail:

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