

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

In the Matter of:

HUDSON OIL REFINERY SUPERFUND SITE

Land O'Lakes, Inc., Petitioner

CERCLA § 106(b)
Petition No. 15-01

Unilateral Administrative Order
U.S. EPA Region 6
CERCLA Docket No. 06-16-08

**PETITIONER LAND O'LAKES, INC.'S RESPONSE TO THE MOTION OF
RESPONDENT TO EXTEND TIME AND STAY PROCEEDINGS**

I. Introduction

The purpose of this Introduction section is to clarify the points of agreement and disagreement between Petitioner Land O'Lakes, Inc. ("Land O'Lakes") and Respondent Environmental Protection Agency ("EPA" or "Region"). Land O'Lakes and EPA filed their Joint Status Report on January 14, 2016. The next day, EPA filed its Motion of Respondent to Extend Time and Stay Proceedings ("Region's Motion"). Land O'Lakes believes that the Region's Motion is confusing, convoluted and misleading because the Motion mixes up the points from the Joint Status Report with points to which there is no agreement between the parties. This Introduction will attempt to delineate between the points so that the Environmental Appeals Board ("Board") will be able to focus its efforts as it deems appropriate.

As the parties stated in the Joint Status Report, there have been and will continue to be discussions regarding a global framework for resolving all issues between Land O'Lakes and EPA relating to the Hudson Oil Refinery Superfund Site ("Site") in Cushing, Payne County, Oklahoma. However, these discussions are in their infancy, and the parties expect that they will take substantial time and effort to come to fruition.

In the interest of economy and efficiency, Land O'Lakes believes that EPA should be required to respond on the merits to the Petition for Reimbursement ("Petition"). The Board ordered that EPA raise prerequisite challenges "no later than October 20, 2015." EPA failed to do so and waived and forfeited any such challenges. If such challenges did exist, which they do not, EPA would have raised them in a motion to dismiss. EPA's response on the merits of the Petition will move the Board proceeding forward without wasting time or effort, without interfering with the Western District of Oklahoma case ("District Court case") and will frame issues both for settlement and for litigation if settlement is ineffective.

The Board is the sole venue at this stage for adjudicating Land O'Lakes' claim for reimbursement. It is true that there is one area of overlap between the Board and District Court proceedings, which is the scope and applicability of the District Court's Final Consent Decree and Closure Order. This area of overlap forms the basis of Land O'Lakes' position that the Board's proceeding should be stayed. The District Court is the proper venue to interpret and apply its own orders. The result of the District Court proceeding should then inform and supplement the Board's proceeding.

EPA's mention of CERCLA 106(b) penalties is a red herring. No penalties were ever assessed by EPA under the Unilateral Administrative Order ("UAO"), and EPA gave no notice of any assessment. Even if EPA had a basis for such penalties, which it does not, it should have addressed the alleged non-compliance in this Board proceeding, but instead EPA waived it. Another red herring is the affidavits. The expert affidavits of Land O'Lakes are in support of its Petition in this Board proceeding and are not even filed or at issue in the District Court case.

The issues pending before the Board and the District Court are not the same. There is overlap on the one issue addressed above. EPA's position that effort will be duplicated is incorrect because the proceedings are not the same. The Government does not even employ the same legal counsel in both proceedings. EPA's argument that the Board has no jurisdiction to grant EPA recovery of its response costs is agreed and misleading. EPA's recovery of costs is not pending before the Board. If EPA elects to pursue those costs, then it may do so in the District Court case.

At the outset, Land O'Lakes does want to make crystal clear the relief that it seeks from the Board. Land O'Lakes requests that the Board enter its order finding that: (1) EPA forfeited and waived any objection to the prerequisites for the Petition; (2) EPA shall file its reply on the merits to the averments in the Petition on or before February 16, 2016 (or such other date the Board

chooses); (3) the Board's proceedings on the merits of the Petition are stayed until final resolution of the District Court case; and (4) the parties are required to continue to file with the Board all pleadings and orders filed in the District Court case, as well as to file quarterly status reports on the case and to participate in status conferences on a frequency as ordered by the Board, until the case is resolved.

The parties disagree on requests (1) and (2) above and agree on requests (3) and (4). Land O'Lakes' respectfully requests that the Board enter the attached proposed Order.

II. Land O'Lakes' Argument

Land O'Lakes requests the Board to order that EPA forfeited and waived any objection to the prerequisites for the Petition, and that EPA shall file a reply on the merits of the Petition. The purpose of this Argument section is to provide the Board with the reasons why it should grant these requests. In summary, Land O'Lakes' requests are based on these grounds:

- In its September 21, 2015 Motion to Extend Time, the Region stated “[i]t is appropriate to extend time to allow the Respondent to assert non-compliance issues until October 20, 2015, or when the Board decides the agreed motion for stay....Although the Respondent has performed an extensive amount of work compiling the Administrative Record Index and documenting areas where noncompliance with the CERCLA Section 106(a) Order is at issue, Respondent needs additional time to complete the above work.” *See* Respondent’s Motion to Extend Time, at 2.
- The Board's September 25, 2015 Order stated: "The Region is ordered to file a response to the Petition addressing the prerequisites for review no later than October 20, 2015" and "[t]he deadline for the Region's response on the merits of the Petition is now November 20, 2015;"
- The Region's October 15, 2015 Response Addressing Prerequisites for Review was: "EPA is not filing a response addressing prerequisites for Environmental Appeals Board (the Board) review;"
- The Region has no grounds for challenging the prerequisites for review of the Petition;
- Land O'Lakes agrees with the statement in the Board's September 25, 2015 Order that it is "in the interest of efficiency and the effective administration of its docket" that the Board

consider and determine "whether the Petition has satisfied the prerequisites for Board review prior to ruling on an indefinite stay;" and

- It is also in the interest of efficiency and the effective administration of this docket for the EPA to be required to file its response on the merits to the Petition at this time, rather than being indefinitely delayed.

On January 6, 2009, EPA issued the UAO to Land O'Lakes. It required Land O'Lakes to perform a remedial design and to then perform a remedial action at the Site. Land O'Lakes complied with and completed the action required by the UAO on June 19, 2015. Petition, p. 54-59. While Land O'Lakes provides substance to show compliance and completion in its Petition, the Region's Motion offers no substance to the contrary. *Id.*

Land O'Lakes' compliance and completion required over six and a half years and resulted in its expenditure of over \$17 million dollars. Land O'Lakes now has the right to petition for reimbursement because it completed the clean-up. 42 U.S.C. § 9606(b)(2)(A).

The Board's Guidance requires EPA to make any challenge to the prerequisites by a "motion to dismiss the petition." Board's *Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions*, Section IV.A.1. (February 23, 2012). The EPA instead waited until October 15, 2015, to file its entitled "Response Addressing Prerequisites for Review" that states that EPA "...is not filing a response addressing prerequisites...."

With knowledge of the Board's Order to address challenges and the Board's Guidance to challenge prerequisites by a motion to dismiss, EPA did not file the required motion to dismiss nor any response that addressed the prerequisites. EPA thereby forfeited and waived any objection to whether the prerequisites have been met. *United States v. Olano*, 507 U.S. 725, 731-732 (1993) (No procedural principle is more familiar to this Court than that a constitutional right, or a right of any sort, may be forfeited in criminal as well as civil cases, by the failure to make timely assertion

of the right before a tribunal having jurisdiction to determine it...); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 894 (1991) (Held, forfeiture occurred; forfeiture is not a mere technicality and is essential to the orderly administration of justice).

The Region's Motion also requested to preserve the right to object to prerequisites throughout the Board's proceedings. But the Board should reject EPA's attempt to "sandbag" the Board and Land O'Lakes by later raising objections that already have been forfeited and waived. The Supreme Court of the United States has repeatedly rejected similar attempts to "sandbag" or "game" the system. *Puckett v. United States*, 556 U.S. 129, 134-40 (2009) (The contemporaneous-objection rule prevents a litigant from "sandbagging" the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor; requiring the objection means the defendant cannot "game" the system, waiting to object and then seeking a second bite at the apple); *Stern v. Marshall*, 131 S.Ct. 2594, 2608 (2011) (A litigant cannot "sandbag" by remaining silent about an objection and then try to raise it later).

Land O'Lakes agrees with the Board's determination in its September 25, 2015 Order that EPA should file a response to the merits of the Petition. EPA's response to the averments in the Petition will be important to define and narrow the issues in this dispute for the purpose of settlement discussions and litigation. Contrary to EPA's suggestion, the issue about the Board's prerequisites for the Petition is different than the issue in the District Court case. Land O'Lakes agrees with the Board's statement in its September 25, 2015 Order that the issue of the prerequisites for the Petition does not "conflict or overlap with the issues pending in the District Court case." EPA now apparently wants the Board to resurrect alleged, and now forfeited, claims on CERCLA prerequisites to the filing of the Petition. The Board should not countenance EPA's failures and provide continuing bites at the same apple. Certainly, the Region's Motion does not demonstrate

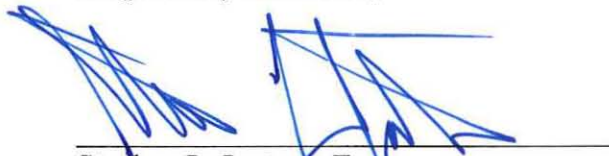
good cause for the indefinite stay the Region now seeks. Land O'Lakes' bases and proposed formulation for managing this proceeding on a going forward basis are based upon common sense, judicial economy, and efficiency of effort for all parties.

On August 18, 2015, Land O'Lakes filed its Petition. For over five months, EPA has not filed any substantive response to the Petition and now seeks to postpone any substantive response indefinitely. EPA should not be allowed to delay and hide the ball on its positions because these attempts would be contrary to the interests of justice and the effective administration of this Board's docket.

III. Conclusion

For the above reasons, Land O'Lakes respectfully requests that the Board enter the attached proposed Order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing was electronically filed with the Clerk of the Environmental Appeals Board on this 22nd day of January, 2016. In addition, on this same date, a true and correct copy was sent by U.S. Mail and email to:

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