

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

IN RE:)	
)	
Hudson Refinery)	Petition No. 15-01
Superfund Site)	CERCLA 106(b)
Cushing, Oklahoma,)	
)	EPA Region 6 Docket No.
)	CERCLA-06-16-08
Land O' Lakes, Inc.,)	
)	
Petitioner)	
)	
Petition for Reimbursement Under)	
Section 106(b)(2) of the Comprehensive)	
Environmental Response, Compensation,)	
and Liability Act of 1980, as amended)	
42 U.S.C § 9606(b)(2))	

RESPONDENT'S NOTICE OF DISTRICT COURT FILINGS

I. Notice

The Respondent, the United States Environmental Protection Agency, Region 6 ("EPA" or the "Region"), by and through its Office of Regional Counsel, hereby provides the Environmental Appeals Board ("Board") with notice of filings by the Respondent in *Land O' Lakes v. United States*, No. 5:15-cv-0683-R (Western Dist. Okla. filed June 23, 2015).

II. Respondent's Filings

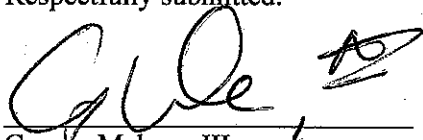
In accordance with the Board's September 18, 2015, Order, the following documents were filed on behalf of the United States in the Western District Court litigation:

- Attachment 1 – Defendant's Motion to Dismiss.
- Attachment 2 – Defendant's Memorandum in Support of the Motion to Dismiss.

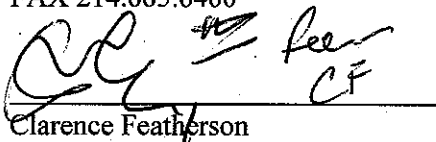
Dated this 23rd day of October 2015.

Respectfully submitted:

By:



George Malone, III
Assistant Regional Counsel
Office of Regional Counsel (6RC-S)
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733
214.665.8030
FAX 214.665.6460

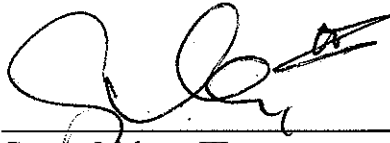


Clarence Feathersen
Office of Enforcement and Compliance Assurance
U.S. EPA (2272A)
1200 Pennsylvania Ave., NW Washington, D.C. 20460
202.564.4234
FAX 202.501.0269

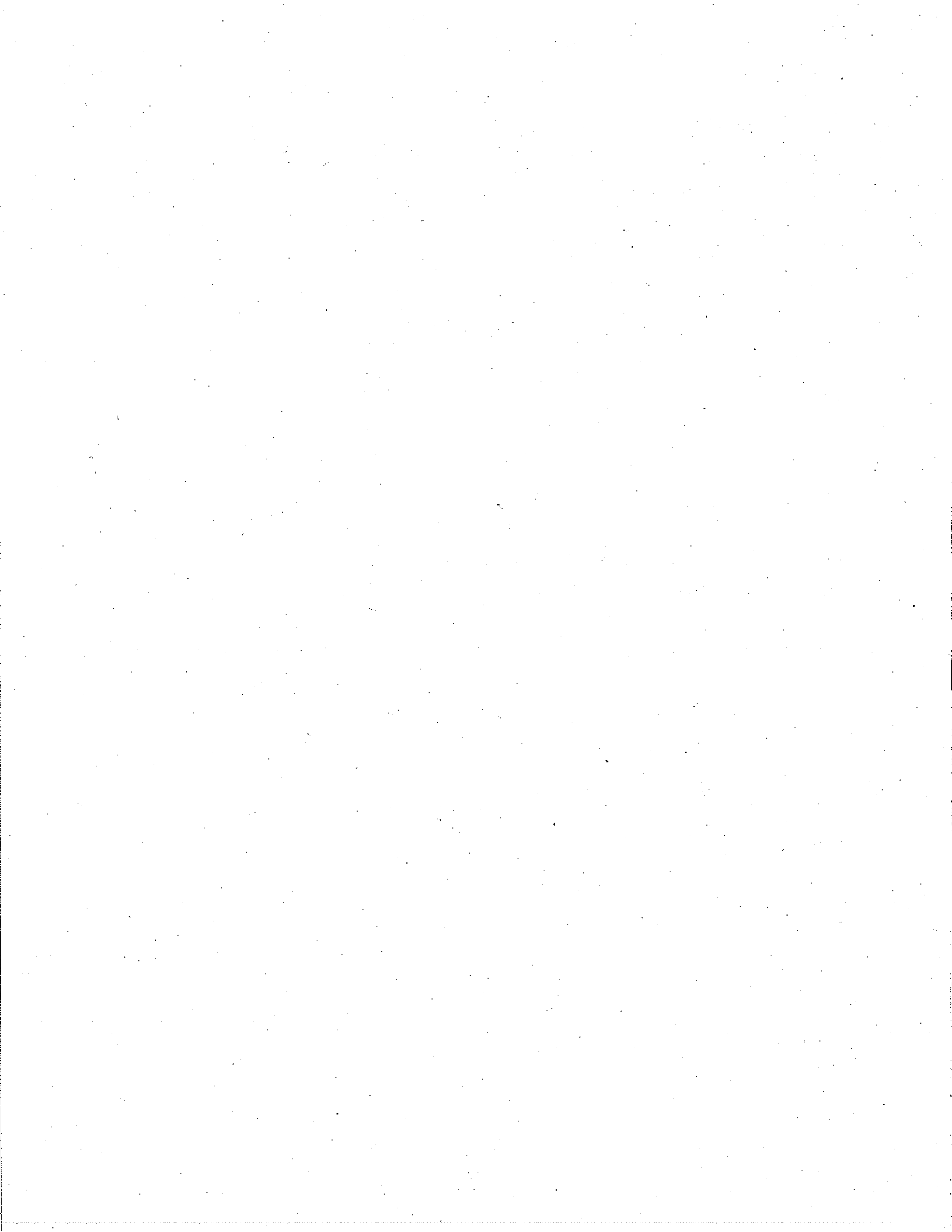
CERTIFICATE OF SERVICE

I hereby certify that on the 23rd of October 2015, I served a true and correct copy of the above Notice by mailing a copy via first class United States Mail to:

Byron E. Starns, Esq.
Stinson Leonard Street LLP
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402



George Malone, III



The grounds for this Motion to Dismiss are set forth in the attached
Memorandum in Support.

FOR THE UNITED STATES

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources
Division

/s/ John E. Sullivan

JOHN E. SULLIVAN (D.C. Bar # 1020285)
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044-7611
john.sullivan3@usdoj.gov
Telephone: (202) 305-0365
Facsimile: (202) 514-8865

SCOTT M. CERNICH (D.C. Bar # 479851)
ANNA E. GRACE (MA Bar # 686070)
Environment & Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044-7611
Scott.Cernich@usdoj.gov
Ann.E.Grace@usdoj.gov
Telephone: (202) 514-0056

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of Defendant's Motion to Dismiss were served by electronic filing through PACER upon all counsel of record on October 22, 2015.

/s/ John E. Sullivan
John E. Sullivan

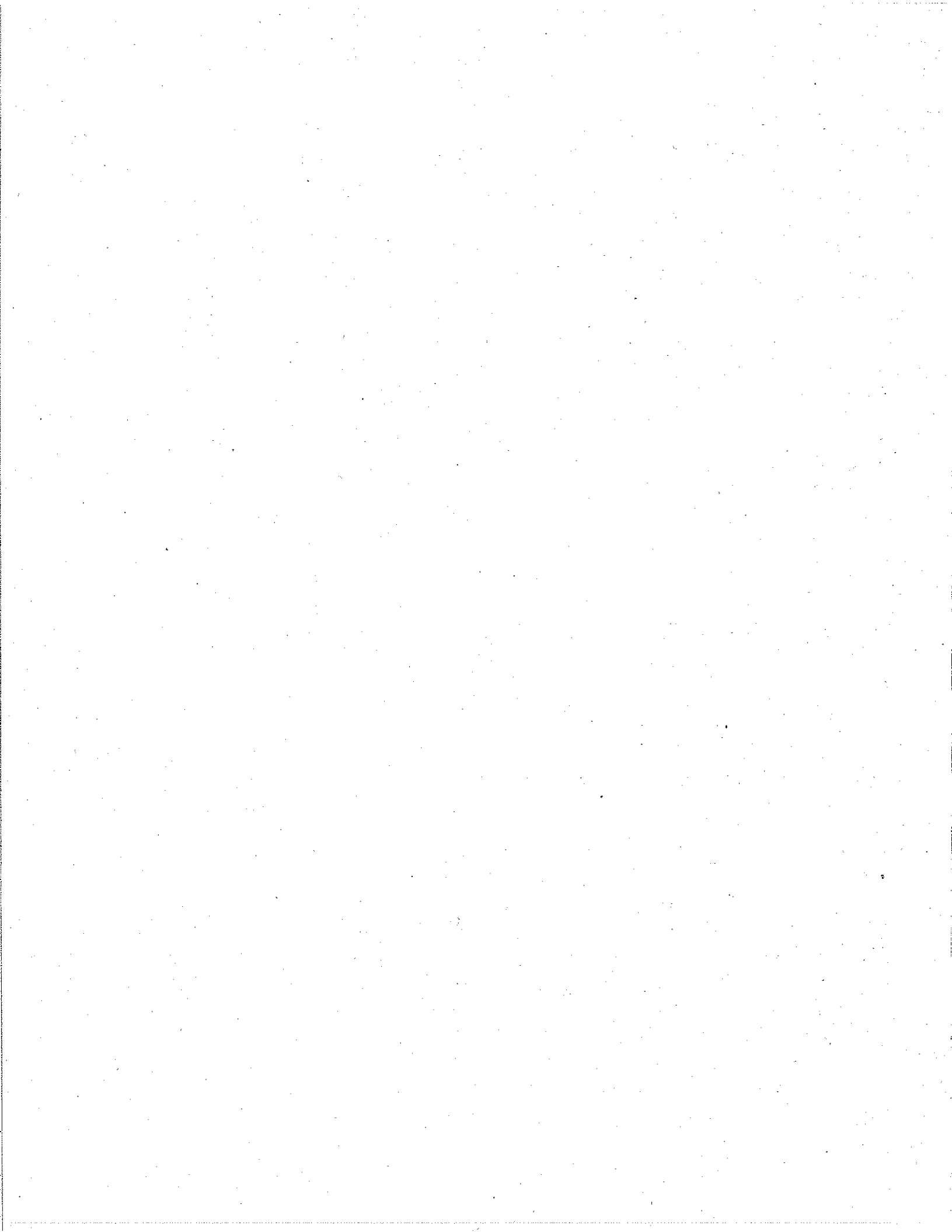


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INTRODUCTION

Plaintiff Land O' Lakes, Inc. ("Land O' Lakes"), through its predecessor Midland Cooperatives, Inc. ("Midland"), operated a 200-acre oil refinery in Cushing, Oklahoma (the "Site") from 1943 to 1977. In 2009, the United States Environmental Protection Agency ("EPA") issued a unilateral administrative order under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")¹ requiring Land O' Lakes to clean up the Site because Land O' Lakes declined to undertake the cleanup voluntarily ("2009 UAO"). Land O' Lakes performed a remedial action at the Site under the 2009 UAO. On June 19, 2015, EPA sent Land O' Lakes a demand letter to recover EPA's past costs in responding to environmental contamination at the Site. Land O' Lakes, in turn, sued EPA seeking a declaratory judgment of non-liability under CERCLA.

The issue in this motion to dismiss is whether the Court has subject matter jurisdiction over Land O' Lakes' claims. The answer is unquestionably no. The claims in Land O' Lakes' First Amended Complaint (the "Complaint") should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction because CERCLA Section 113(h) bars challenges to EPA's response actions and enforcement activities (also known as "pre-enforcement review") unless and until

¹ 42 U.S.C. § 9601-75 (also known widely as "Superfund").

EPA files a CERCLA cost-recovery action. At that time, Land O' Lakes could raise these arguments regarding its liability.²

LEGAL BACKGROUND

I. General Principles Of Federal Jurisdiction

Federal courts are courts of limited jurisdiction, and prospective plaintiffs bear the burden of demonstrating that their complaint falls within that limited jurisdiction.

Kokkonen v. Guardian Life Ins. Co. of Amer., 511 U.S. 375, 377 (1994). In order to meet this burden, a plaintiff seeking to sue the federal government must first demonstrate the existence of a waiver of sovereign immunity. See *United States v. Mitchell*, 463 U.S. 206, 211 (1983). The Supreme Court has stated in many cases that waivers of sovereign immunity must be "unequivocally expressed" in statutory text, and that any ambiguities in the statutory language must be strictly construed in favor of immunity so that the United States consent to be sued is never enlarged beyond what a fair reading of the text requires. *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (citations omitted). Prospective federal plaintiffs must also show that they have a federal cause of action, and that there is a basis for federal subject matter jurisdiction. See *id.*; *Cannon v. Gates*, 538 F.3d. 1328, 1332-36 (10th Cir. 2008); *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1384-86, 1390-91 (5th Cir. 1989).

² EPA may bring a CERCLA cost recovery claim against Land O' Lakes in the future. In the meantime, Land O' Lakes is not making payments to EPA.

II. CERCLA Section 113(h)'s Jurisdictional Bar

Congress enacted CERCLA in 1980 to provide for the prompt and efficient cleanup of hazardous waste sites and “to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.” *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009); *Cannon v. Gates*, 538 F.3d at 1332; *United States v. City & County of Denver*, 100 F.3d 1509, 1511 (10th Cir. 1996).

“CERCLA protects the execution of a CERCLA plan during its pendency from lawsuits that might interfere with the expeditious cleanup effort.” *Cannon*, 538 F.3d. at 1332, quoting *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006) (internal quotation marks omitted). Section 113(h) of CERCLA provides this protection by limiting federal court jurisdiction as follows:

No Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under 9606(a) of this title, in any action except [if any of five listed exceptions apply]. . . .

42 U.S.C. § 9613(h).³ “[T]he terms ‘removal’ and ‘remedial action,’” as used in Section 113(h), include “enforcement activities related thereto.” 42 U.S.C. § 9601(25).

³ Section 113(h) of CERCLA provides the following five exceptions to this jurisdictional bar, none of which apply in this case:

- (1) An action under section 9607 of this title to recover response costs or damages or for contribution.
- (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
- (3) An action for reimbursement under section 9606(b)(2) of this title.

As many courts have stated, Section 113(h) is a “blunt withdrawal” of the jurisdiction of federal courts, which applies once the United States has begun its removal action. *See Cannon v. Gates*, 538 F.3d at 1335 *citing APWU v. Potter*, 343 F.3d 619, 624 (2d Cir. 2003). Section 113(h) continues to bar jurisdiction while the removal and remedial actions are proceeding, *id.*, and during EPA’s enforcement process, even after removal and remedial actions are completed. *Voluntary Purchasing*, 889 F.2d at 1386-88, *citing B.R. MacKay & Sons v. United States*, 633 F. Supp. 1290, 1292 (D. Utah 1986). The only thing that can lift Section 113(h)’s jurisdictional bar is one of the triggering events specified in the statute, such as the filing of an enforcement or cost recovery action under Sections 106 or 107 of CERCLA.

FACTUAL BACKGROUND

I. Historical Operations At The Site

This case concerns the operation and cleanup of the Hudson Oil Refinery Superfund Site in Cushing, Oklahoma (“the Site”). Complaint, ECF No. 22, ¶¶ 2-5. The Site operated as an oil refinery from 1915 until 1982. *Id.* ¶ 18. Land O’ Lakes, through

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

42 U.S.C. § 9613(h).

its predecessor, Midland,⁴ owned and operated the oil refinery at the Site for over 30 years of that period (from 1943 to 1977). *Id.* ¶ 20. In 1977, Land O' Lakes (Midland) sold the refinery to Hudson Oil Company/Hudson Refinery Company ("Hudson"). *Id.* ¶ 21.

II. RCRA Enforcement Action

In August 1984, EPA sued Hudson for violations of the hazardous waste management requirements of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901-92k.⁵ *See* Complaint ¶ 24; Land O' Lakes' Exhibit 3 to Complaint, ECF No. 22-3. EPA did not assert any claims under CERCLA or any other statute against Hudson. *See id.* EPA and Hudson entered a RCRA Partial Consent Decree in 1986 that required Hudson to perform a Site Investigation. Complaint ¶ 26. In 1987, EPA and Hudson entered a Final RCRA Consent Decree that required Hudson to perform RCRA corrective action activities at the refinery, which included the cleanout of certain tanks, the excavation and biological treatment of certain contaminated soils, groundwater remediation, and the off-site disposal of all RCRA wastes ("1987 Hudson RCRA Consent Decree"). *Id.* ¶ 27.

The 1987 Hudson RCRA Consent Decree contained a covenant not to sue Hudson "and their successors and assigns of the Cushing Refinery" for certain "corrective action claims under Section 3008(h) of RCRA, 42 U.S.C. § 6928(h), for conditions addressed in

⁴ Midland merged into Land O' Lakes on January 1, 1982. Complaint ¶ 22.

⁵ *United States v. Hudson Refining Co., Inc., et al.*, Case No. 84-2027W.

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." *Id.* ¶ 28. EPA did not covenant not to sue Hudson or its successors and assigns for CERCLA claims in the 1987 Hudson RCRA Consent Decree. *See id.* In 1994, this Court entered an Order for Closure of the 1987 Hudson RCRA Consent Decree ("Closure Order"). *Id.* ¶ 35. The Closure Order stated that the obligations of the 1987 Hudson RCRA Consent Decree were "satisfied and terminated, thereby releasing the [Hudson companies] from any further obligations thereunder." *Id.*

III. CERCLA Cleanup

Despite the cleanup performed under the 1987 Hudson RCRA Consent Decree, hazardous substances remained at the Site. *Id.* ¶ 46. From October 1998 through December 1999, EPA conducted inspections, investigations, and an emergency removal action under Section 104(a) at the Site.⁶ Complaint ¶ 41.

In January 2001, EPA sent Land O' Lakes, as successor to Midland, a Special Notice and Demand Letter under CERCLA⁷ requesting that Land O' Lakes reimburse EPA's past costs for the removal actions at the Site, and perform a Remedial Investigation and Feasibility Study ("RI/FS") under CERCLA concerning the further

⁶ Section 104(a) of CERCLA authorizes EPA "to remove or arrange for the removal of" hazardous substances released to the environment. 42 U.S.C. § 9604(a)(1).

⁷ Under Section 107 of CERCLA, any person who owns a facility at which hazardous substances are located may be liable for the cost of cleaning up those substances. 42 U.S.C. §§ 9601(9), 9607(a)(1).

cleanup of the Site. *Id.* ¶ 44. Land O' Lakes told EPA it had no liability at the Site and declined to undertake the work. *See id.* ¶¶ 44-45.

From September 2001 through June 2003, EPA conducted an additional CERCLA removal action at the Site. *Id.* ¶ 42. From 2004 through 2007, EPA oversaw the Oklahoma Department of Environmental Quality's performance of the RI/FS to identify possible remedies for cleaning up the Site. *Id.* ¶ 45. In 2007, EPA prepared a Record of Decision ("ROD") under CERCLA that selected the final cleanup remedies for the Site. *Id.* ¶ 46.

In 2008, EPA sent a Special Notice letter to Land O' Lakes that directed Land O' Lakes to perform the remedial design and remedial action work ("RD/RA") specified in the ROD for the Site (i.e., clean up the Site). *See id.* ¶ 47-48. Land O' Lakes again declined. *See id.* ¶ 48. So, in January 2009, EPA issued Land O' Lakes a unilateral administrative order under section 106(a) of CERCLA, 42 U.S.C. § 9606(a), which required Land O' Lakes to perform the RD/RA at the Site ("2009 UAO"). *See id.* ¶ 49; *see also* 42 U.S.C. § 9606(a). CERCLA Section 106(a) authorizes EPA to issue such orders when EPA determines there "may be an imminent and substantial endangerment to the public health or welfare or the environment" because of an actual or threatened release of a hazardous substances from a facility. *See* 42 U.S.C. § 9606(a). From 2009 through 2015, EPA oversaw Land O' Lakes' work under the 2009 UAO. *See id.* ¶¶ 47-53.

In June 2015, the United States sent to Land O' Lakes its formal demand under CERCLA for payment of \$23,424,243.76 in past costs EPA incurred at the Site through

February 28, 2015, plus interest of \$4,818,215.45 (“2015 Demand Letter”). *Id.* ¶ 89. The United States has not filed suit against Land O’ Lakes.

IV. Land O’ Lakes’ Lawsuit

On June 23, 2015, Land O’ Lakes filed suit against EPA in this Court under 28 U.S.C. §§ 2201, 2202, 42 U.S.C. § 9613(g)(2), and Rules 57 and 71 of the Federal Rules of Civil Procedure seeking a declaratory judgment that it is not liable to EPA for past response costs (costs EPA incurred to clean up the Site) under sections 106 or 107 of CERCLA.⁸ On September 1, 2015, Land O’ Lakes filed its First Amended Complaint adding a citizen suit claim under a completely different statute—Section 7002(a)(1)(A) of the RCRA, the federal hazardous waste statute—as another basis for a declaration of CERCLA “non-liability.” 42 U.S.C. §§ 6901-92k; 42 U.S.C. § 6972(a)(1)(A).⁹ Land O’ Lakes included an odd demand that the United States pay civil penalties to Land O’

⁸ 42 U.S.C. §§ 9606 and 9607. *See* Plaintiff’s original Complaint filed July 23, 2015, ECF No. 1.

⁹ Section 7002(a)(1)(A) of RCRA provides as follows:

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; . . .”

42 U.S.C. § 6972(a)(1)(A).

Lakes for an alleged RCRA violation. *See* Complaint ¶¶ 4-5, 86-96. Land O' Lakes alleges that a covenant not to sue provision contained in the 1987 Hudson RCRA Consent Decree between the United States and Hudson absolved Land O' Lakes of any liability at the Site, including CERCLA liability, and that EPA "violated" that decree when it issued the 2009 UAO under Section 106 of CERCLA to Land O' Lakes and "threatened" to sue Land O' Lakes for EPA's past CERCLA response costs.¹⁰ *See id.* ¶¶ 87-96.

STANDARD OF REVIEW

Motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) take two forms—a facial attack on the complaint's allegations as to subject matter jurisdiction, or an attack on the factual allegations upon which subject matter jurisdiction depends.

Holt v. United States, 46 F.3d 1000, 1002 (10th Cir. 1995), *citing Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). In reviewing a facial attack on the complaint, such as the United States' Motion to Dismiss in this case, "a district court must accept the allegations in the complaint as true." *Id.*

The party asserting federal jurisdiction bears the burden of demonstrating that it exists; thus, the plaintiff bears the burden of proof on a motion to dismiss under Rule 12(b)(1). *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing these elements.").

¹⁰ The United States contends Land O' Lakes claims are without merit, but that is not the subject of this motion and will be addressed at an appropriate time.

ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction Over Land O' Lakes Claims.

Land O' Lakes relies on the following United States Code provisions for subject matter jurisdiction: 28 U.S.C. § 1331 (Federal question), 42 U.S.C. § 9613(b)

(CERCLA--Jurisdiction), 42 U.S.C. § 9620 (CERCLA—Federal facilities), 42 U.S.C. § 6928 (RCRA—Federal enforcement), 42 U.S.C. § 6972 (RCRA—Citizen suits).

Complaint ¶¶ 14-15. Land O' Lakes also asserts that this Court has jurisdiction under the retention of jurisdiction provisions of the 1987 Hudson RCRA Consent Decree and the Closure Order in the Hudson Refining RCRA case. *Id.* ¶¶ 11-14. None of these provisions establishes jurisdiction in this case.

A. 28 U.S.C. § 1331 Is Not An Independent Basis for Jurisdiction

The United States, as a sovereign, may only be sued with its consent. The Supreme Court has stated in many cases that waivers of sovereign immunity must be “unequivocally expressed” in statutory text, and that any ambiguities in the statutory language must be strictly construed in favor of immunity so that the United States’ consent to be sued is never enlarged beyond what a fair reading of the text requires. *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (citations omitted).

The federal question jurisdiction statute, 28 U.S.C. § 1331, simply provides that district courts have original jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States.” However, it is well settled that Section 1331 implies no general waiver of sovereign immunity, and cannot alone be relied upon as the basis of jurisdiction in this case. *Goodwill Indus. Serv. Corp. v. Comm.*

for *Purchase from People Who are Blind or Severely Disabled*, 378 F. Supp. 2d 1290, 1294 (D. Colo. 2005), citing *Fostvedt v. United States*, 978 F.2d 1201, 1203 (10th Cir. 1992); see also *Voluntary Purchasing*, 889 F.2d at 1383. Thus, unless the United States has waived its sovereign immunity and consented to jurisdiction under one of the other statutory provisions Land O' Lakes relies upon, 28 U.S.C. § 1331 does not establish this Court's jurisdiction over Land O' Lakes' claims.

B. Land O' Lakes Declaratory Judgment Claim (Count I) Is Barred By CERCLA § 113(h).

Land O' Lakes cannot file a declaratory judgment action¹¹ regarding its CERCLA liability unless and until EPA files a CERCLA cost recovery action. See *Voluntary Purchasing*, 889 F.2d at 1389-91. Plaintiff's reliance on Section 113(b) of CERCLA as a basis for jurisdiction for this claim is misplaced.¹² Like the federal question jurisdiction statute, CERCLA Section 113 contains no general waiver of the sovereign immunity by

¹¹ Land O' Lakes alleged in its Complaint that this Court has "authority" to issue declaratory judgments, Complaint ¶ 15, but this authority does not provide a basis for subject matter jurisdiction. The Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, does not constitute the United States' consent to be sued, it "merely grants an additional remedy in cases where jurisdiction already exists in the court." See *Western Shoshone Nat. Council v. United States*, 408 F. Supp. 2d 1040, 1047-48 (D. Nev. 2005), citing *Brownell v. Ketcham Wire & Mfg. Co.*, 211 F.2d 121, 128 (9th Cir. 1954).

¹² Land O' Lakes also claims jurisdiction under Section 120 of CERCLA (Federal Facilities), 42 U.S.C. § 9620, but Section 120 does not convey jurisdiction here. First, Land O' Lakes does not allege that the Site is a Federal Facility (because it is not) or that the United States is a CERCLA liable party in this case. Second, Section 120 of CERCLA is not listed as an exception to the jurisdictional bar in Section 113(h). See 42 U.S.C. § 9613(b) and (h); Complaint ¶¶ 76-96. Thus, Section 120 of CERCLA provides no basis for jurisdiction in this case.

the United States. *See id.* at 1385 (citing *B.R. MacKay & Sons, Inc. v. United States*, 633 F. Supp. 1290, 1296 (D. Utah 1986) (Section 113(b) “does not operate to waive the United States’ sovereign immunity.”). While CERCLA Section 113(b) conveys federal district court jurisdiction in CERCLA cases, that jurisdiction is expressly limited by exceptions in subsections (a) and (h) of Section 113. 42 U.S.C. § 9613(b). CERCLA Section 113(h) clearly prohibits this Court from exercising subject matter jurisdiction over Land O’ Lakes’ declaratory judgment claim.

Land O’ Lakes specifically seeks a declaration that EPA’s 2009 UAO and 2015 Demand Letter were improper under CERCLA because they “violated” the 1987 Hudson RCRA Consent Decree and the subsequent 1994 RCRA Closure Order. Land O’ Lakes further requests a declaration of “non-liability” for EPA’s past CERCLA response costs. Section 113(h), however, expressly bars this court from hearing Land O’ Lakes’ challenge to the 2009 UAO. *See* 42 U.S.C. § 9613(h). Land O’ Lakes admits that EPA issued the UAO under the authority of 42 U.S.C. § 9606(a). *See* Complaint ¶ 49. And, section 113(h) expressly provides that “[n]o Federal court shall have jurisdiction under Federal Law . . . to review any order issued under section 9606(a) of this title” 42 U.S.C. § 9613(h). Thus, Section 113(h) bars this Court from hearing Land O’ Lakes’ claims concerning its liability under the 2009 UAO.

Section 113(h) also bars this Court from hearing Land O’ Lakes claims concerning EPA’s cost recovery enforcement actions, such as the 2015 Demand Letter. Section 113(h) provides that this Court does not have jurisdiction “to review challenges to any removal or remedial action selected under section 9604 of this title.” *Id.* “[T]he terms

‘removal’ and ‘remedial action,’” as used in Section 113(h), include “enforcement activities related thereto.” 42 U.S.C. § 9601(25); *Voluntary Purchasing*, 889 F.2d at 1386-88.

In *Voluntary Purchasing*, for example, the Fifth Circuit held that EPA’s letter informing PRPs of their potential liability and requesting payment of past EPA costs was part of EPA’s enforcement process and, therefore, a removal or remedial action protected from judicial review by the Section 113(h) bar. 889 F.2d at 1386-91. The Fifth Circuit, after reviewing Section 113(h)’s legislative history, reasoned that “[a]lthough review in the case at hand would not delay actual cleanup of hazardous wastes, it would force the EPA—against the wishes of Congress—to engage in “piecemeal” litigation and use its resources to protect its rights to recover from any PRP filing such a declaratory judgment action.” *Id.* at 1390, quoting 132 Cong. Rec. 28,441 (1986) (Senator Thurmond stated that section 113(h) “is designed to preclude piecemeal review and excessive delay of cleanup.”); and *In re Combustion Equip. Assoc.*, 838 F.2d 35, 40 (2d Cir. 1988) (“any time an agency is forced to litigate it expends funds it might otherwise have used to further its primary purpose, but ... Congress has directed the courts to be especially wary of interfering with CERCLA work. . . .”). Sanctioning Land O’ Lakes’ declaratory judgment actions could lead to inefficient uses of EPA resources and would detract from the EPA’s ability to apportion its enforcement resources as it deems most appropriate. *See Voluntary Purchasing*, 889 F.2d at 1390.

EPA’s 2015 Demand Letter to Land O’ Lakes threatened to bring a judicial enforcement action under CERCLA if Land O’ Lakes declined to reimburse EPA’s past

costs at the Site. EPA has not filed a judicial enforcement action. As the Fifth Circuit held in *Voluntary Purchasing*, EPA's 2015 Demand letter clearly was part of EPA's enforcement process concerning Land O' Lakes' liability under CERCLA for costs related to the Site. Thus, Section 113(h) bars this Court from hearing Land O' Lakes' claim seeking a declaration of non-liability for the response costs enumerated in EPA's 2015 Demand Letter.

C. Land O' Lakes' RCRA Citizen Suit Claim (Count II) Is Barred By CERCLA § 113(h).

Section 113(h) likewise bars jurisdiction over Land O' Lakes' RCRA citizen suit claim. Numerous Circuits, including the Tenth Circuit, have held that Congress did not intend to except RCRA, including RCRA's citizen suit provision, from the broad jurisdictional bar of Section 113(h) of CERCLA. *See, e.g., El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 880 (D.C. Cir. 2014); *Cannon v. Gates*, 538 F.3d at 1332–36; *OSI, Inc. v. United States*, 525 F.3d 1294, 1297–99 (11th Cir. 2008); *APWU v. Potter*, 343 F.3d at 624; *Clinton Cnty. Comm'rs v. EPA*, 116 F.3d 1018, 1026–28 (3d Cir. 1997); *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 328–30 (9th Cir. 1995); *Ark. Peace Ctr. v. Ark. Dep't of Pollution Control & Ecology*, 999 F.2d 1212, 1217–18 (8th Cir. 1993).

In addition, Land O' Lakes cited as a basis for jurisdiction and its demand for civil penalties in its RCRA citizen suit claim section 3008(a) and (g) of RCRA, which concerns federal enforcement actions. Complaint ¶¶ 14 and 95, citing 42 U.S.C. § 6928(a) and (g). It also cited as a basis for jurisdiction the 1987 Hudson RCRA Consent

Decree and the 1994 Closure Order entered in EPA's RCRA enforcement action against Hudson, which EPA brought under Section 3008 of RCRA. Complaint ¶¶ 14, 92-95; Land O' Lakes' Exhibit 3 to Complaint, ECF No. 22-3, p.1. Section 3008 of RCRA, however, refers only to *federal* enforcement of RCRA, and thus has no applicability to an action brought by private parties. And, Section 113(h) of CERCLA does not provide an exception to the jurisdictional bar for enforcement actions brought under Section 3008 of RCRA, much less proceedings concerning orders entered in enforcement actions under Section 3008, such as the 1987 Hudson RCRA Consent Decree or the 1994 Closure Order. *See* 42 U.S.C. § 9613(h); Land O' Lakes' Exhibit 1 to Complaint, ECF Nos. 22-1, p.1. Thus, neither Section 3008 of RCRA, the 1987 Hudson RCRA Consent Decree, nor the 1994 Closure Order provide a basis for subject matter jurisdiction in this case.

Thus, Section 113(h) bars jurisdiction over Land O' Lakes' RCRA citizen suit claim.

II. Land O' Lakes Can Raise its "Defenses" When EPA Files A CERCLA Enforcement Action

The United States does not concede that the allegations in Land O' Lakes' Complaint are valid defenses to EPA's potential CERCLA claims. Nonetheless, a finding that the Court lacks jurisdiction over Land O' Lakes' instant claims does not mean that Land O' Lakes will be deprived of the opportunity to assert its defenses. If the EPA and Land O' Lakes cannot otherwise resolve EPA's demand for response costs and EPA does eventually file a CERCLA judicial enforcement action, Land O' Lakes will be able to assert all of its allegations as defenses in such an action. *Cf. B.R. MacKay &*

Sons, Inc., 633 F. Supp. at 1297 (“[O]nce the cost-recovery action is brought, the alleged responsible party can assert all its statutory and non-statutory defenses and can obtain a complete declaration of its rights and liabilities.”).

CONCLUSION

Under Section 113(h) of CERCLA, this Court does not have jurisdiction to hear Land O’ Lakes’ claims for declaratory or citizen suit relief. Thus, Land O’ Lakes’ First Amended Complaint should be dismissed.

FOR THE UNITED STATES

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division

/s/ John E. Sullivan
JOHN E. SULLIVAN (D.C. Bar # 1020285)
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044-7611
john.sullivan3@usdoj.gov
Telephone: (202) 305-0365
Facsimile: (202) 514-8865

SCOTT M. CERNICH (D.C. Bar # 479851)
ANNA E. GRACE (MA Bar # 686070)
Environment & Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044-7611
Scott.Cernich@usdoj.gov
Ann.E.Grace@usdoj.gov
Telephone: (202) 514-0056

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing Memorandum in Support of Defendant's Motion to Dismiss were served by electronic filing through PACER upon all counsel of record on October 22, 2015.

/s/ John E. Sullivan
John E. Sullivan