EXHIBIT 1

to

Notice Regarding District Court Case Filing

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

LAND O'LAKES, INC., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No. 5:15-cv-0683-R **Judge David L. Russell**

PLAINTIFF LAND O'LAKES, INC.'S RESPONSE TO
DEFENDANT'S MOTION TO DISMISS

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This Court should deny Defendant United States of America's ("Government's") Motion to Dismiss in its entirety because the Government's arguments are fundamentally flawed as a matter of law, and overlook express language in this Court's orders retaining subject matter jurisdiction. This Court unquestionably has subject matter jurisdiction over the claims in Land O'Lakes' First Amended Complaint in this action.

INTRODUCTION

I. BACKGROUND

Land O'Lakes is a member-owned agricultural cooperative based in Minnesota. In its First Amended Complaint, Land O'Lakes seeks a declaration of its rights regarding protections from environmental liability included in this Court's Final Consent Decree regarding the Hudson Oil Refinery ("Hudson"), f/k/a Cushing Refinery and n/k/a the Hudson Oil Refinery Superfund Site, in Cushing, Oklahoma ("Site"). (First Am. Compl., ¶ 2; ECF Dkt. No. 22.) Land O'Lakes has never directly owned or operated the Site, but it is the successor by merger to Midland Cooperatives, Inc. ("Midland"), which owned the Site at the time of Midland's sale of the Site in 1977 to Hudson. Land O'Lakes, however, is the express beneficiary of the protections from environmental liability in the Final Consent Decree because they "shall be applicable to Defendants' [Hudson's] immediate predecessor in interest of the Cushing Refinery…." (Final Consent Decree, § XVI, ¶ C.)

This Court entered its 1987 Final Consent Decree and 1994 Order for Closure of the Final Consent Decree ("Closure Order") regarding the Site in the Government's 1984 suit brought under the Resource Conservation and Recovery Act ("RCRA"), styled *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.[1] This Court's Final Consent Decree and Closure Order (collectively, the "Orders") provided protections from liability to Midland, and thus to Land O'Lakes by merger, as Hudson's "immediate predecessor in interest of the Cushing Refinery." These protections included a covenant not to sue in the Final Consent Decree and a release from liability in the Closure Order.[2] (First Am. Compl., Ex. 1, ¶¶ 3, 28.) The Orders did not contain a reservation of rights as to future CERCLA claims in favor of the Government.

Land O'Lakes brings this action to enforce the protections from liability in this Court's 1987 and 1994 Orders. EPA ignored these Orders when it issued its 2009 CERCLA 106 Unilateral Administrative Order ("UAO") for the Site requiring Land O'Lakes to conduct what became an $18 million cleanup of the Site. This action could not be brought to this Court until now, however, because Land O'Lakes was barred by federal statute from invoking this Court's jurisdiction until it had completed the UAO-required cleanup. 42 U.S.C. § 9613(h). EPA confirmed completion of all required UAO actions by EPA for the Site by a written notice dated June 19, 2015. Thus, Land O'Lakes was prevented by law from coming to this Court until after June 19, 2015.

[1] This action (Case No. 5:15-cv-0683-R) is essentially a continuation of the initial RCRA suit (Civil Action No. 84-2027-A). Land O'Lakes gave notice that the two cases are related matters in its Notice of Related Case. (ECF Dkt. No. 3).

[2] With respect to these protections, they shall "remain in effect sine die." Since these protections remain in effect indefinitely into the future, they are in effect to the present. (Final Consent Decree, § XXI).

As permitted by law, Land O'Lakes timely filed (within 60 days of EPA's June 19, 2015 notice) a separate and distinct administrative Petition for Reimbursement under CERCLA § 106(b), 42 U.S.C. § 9606(b), on August 18, 2015, with the EPA's Environmental Appeals Board ("EAB") for reimbursement of costs Land O'Lakes expended to complete the remedial actions required by the UAO at the Site. Land O'Lakes does not seek any reimbursement of its UAO costs in this action. (First Am. Compl., Ex. 1, ¶ 54.)

One of the many bases for Land O'Lakes' Petition for Reimbursement is this Court's Orders. Land O'Lakes filed this declaratory judgment and citizen suit action first so that this Court, and not the EAB, could properly interpret and apply the Orders to EPA's 2009 UAO. Land O'Lakes requested the EAB to permit Land O'Lakes to supplement its Petition for Reimbursement based upon this action, and both Land O'Lakes and EPA jointly requested the EAB to stay proceedings pending the outcome of this litigation:

> The Petitioner and the Respondent agree that the stay of all further proceedings related to the Petition remain in effect until liability issues are resolved either by settlement or litigation in federal district court, whichever comes first.

See Exhibit 4 (Agreed Mot. to Stay Proceedings, Sept. 15, 2015). Thus, both EPA and Land O'Lakes recognize that it is necessary for this Court to interpret and apply its Orders in the first instance, and that Land O'Lakes' Petition for Reimbursement under § 9606(b)(2) can then proceed based upon this Court's adjudication. The EAB has directed both EPA and Land O'Lakes to provide updates to the EAB on the status of this action.

II. SUBJECT MATTER JURISDICTION

The basic premise underlying the Government's motion is that the Court's Orders do not provide or create continuing subject matter jurisdiction. This premise is fundamentally wrong, and contrary to the express terms of the Orders.[3]

In 1984, the Government filed a federal RCRA suit in this Court and thereby submitted to this Court's jurisdiction. Ultimately, the Government alleged in its RCRA suit that: "This Court has jurisdiction over the subject matter of this action pursuant to Section 3008 of the Act [RCRA], 42 U.S.C. § 6928; and pursuant to 28 U.S.C. §§ 1331, 1345 and 1355." (First Am. Compl., Ex. 3.) It is clear that this Court's Closure Order did not in any way dismiss the RCRA suit and that the Court retained jurisdiction to enforce the covenant not to sue in the Final Consent Decree. (First Am. Compl., Ex. 1, ¶ 35.)

In 1987, this Court entered the Final Consent Decree with the Government's consent and signatures by attorneys for the Government and the EPA. (First Am. Compl., Ex. 1.) **Article I** of the Final Consent Decree, entitled **JURISDICTION,** provided that: "this Court has jurisdiction over the subject matter of and the parties to this action." **Article II,** entitled **Parties Bound,** provided that: "The undersigned representatives 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." **Article XX** of the Final Consent Decree, entitled **RETENTION OF JURISDICTION,** provided that:

[3] *See* footnote 1, *supra*.

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

The Closure Order, issued after seven years of performance by Hudson of the Final Consent Decree requirements for Site clean-up, provides: "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 trustees in bankruptcy, Hudson Refining Co., Inc., and Hudson Oil Co., Inc., from any further obligations thereunder." It is clear that this Court's Closure Order did not in any way dismiss the RCRA suit and that the Court retained jurisdiction to enforce the covenant not to sue in the Final Consent Decree. (First Am. Compl., Ex. 1, ¶ 35.) The Final Consent Decree obligations of the Government remain in effect today, and this Court has jurisdiction to enforce them.

This Court also has the inherent authority and jurisdiction to enforce compliance with the terms and conditions of the Orders. The Government waived sovereign immunity by filing the 1984 federal RCRA suit and submitting itself to this Court's subject matter jurisdiction. The Government also waived sovereign immunity by entering into the Final Consent Decree and consenting to the retention of subject matter jurisdiction by this Court. Ignoring its obligations under this Court's continuing subject matter jurisdiction over its Orders covering the Site, the Government tries to shift this Court's focus to CERCLA's pre-enforcement review jurisdictional bar in § 9613(h), which is inapplicable. Moreover, the Government has waived sovereign immunity in this case based on clear and

unequivocal statutory waivers under both the RCRA citizen suit provision and the Administrative Procedures Act.

The Government's motion is also based on the mistaken premise that CERCLA § 9613(h) applies here to bar Land O'Lakes' claims. CERCLA § 9613(h) is not applicable. First, this Court has maintained continuing subject matter jurisdiction to enforce its Orders in this matter. Second, this Court has the inherent judicial power to enforce its decrees under Article III of the U.S. Constitution. Third, § 9613(h) does not apply to claims concerning completed cleanup activities or claims under CERCLA § 9606(b), and here all such activities have been completed at the Site. (First Am. Compl., Ex. 1, ¶ 53.) Lastly, the claims of Land O'Lakes in the First Amended Complaint do not "challenge" a removal or remedial action at the Site, but rather only seek to enforce the non-liability provisions of this Court's Orders, in part, to help facilitate the matters pending before the EAB.

In summary, this Court has subject matter jurisdiction. Land O'Lakes respectfully requests that the Court deny the Government's attempt to thwart the enforcement of this Court's Orders.

STANDARD OF REVIEW

The Government's motion to dismiss under Rule 12(b)(1) is a facial attack on Land O'Lakes' First Amended Complaint. The Government admits that "a district court must accept the allegations in the complaint as true." Land O'Lakes agrees.

FACTUAL BASIS

For purposes of the Government's motion, the Court must accept as true the allegations in the First Amended Complaint. Land O'Lakes incorporates by reference all

allegations in the First Amended Complaint and the attached exhibits. (ECF Dkt. No. 22). For the convenience of the Court and ease of reference, Land O'Lakes attaches Exhibit 1, which contains several key paragraphs in the First Amended Complaint that relate to the issues in the Government's motion.

As described in the First Amended Complaint, EPA issued the 2009 UAO to Land O'Lakes requiring Land O'Lakes to conduct remedial design/remedial action activities at the Site to implement EPA's Record of Decision. (First Am. Compl., ¶¶ 4, 49.) Land O'Lakes fully complied with the UAO, and on June 19, 2015, EPA provided its written notification that work under the UAO at the Site has been completed. (*Id.* at ¶¶ 52, 53.) This notification by EPA started a 60-day clock under CERCLA § 9606 for the filing of Land O'Lakes' Petition for Reimbursement, which was timely filed on August 18, 2015. (*Id.* at ¶ 54.) Land O'Lakes filed its First Amended Complaint seeking this Court's declaration that EPA's 2009 UAO violated this Court's Orders.

In February 2015, EPA issued a Five-Year Report (February 27, 2015) for the Site ("Five-Year Report") (excerpts from this Report are attached as Exhibit 2). Seven authorized representatives of EPA, ranging from the Remedial Project Manager to the Director of the Superfund Division, signed their concurrence with the Five-Year Report. EPA stated in the Executive Summary of the Five-Year Report:

> EPA signed the Record of Decision (ROD) for the Site on November 23, 2007. The selected remedy included excavation and off-site disposal of contaminated soil and sediments, monitoring groundwater, and institutional controls. The Site achieved construction completion with the signing of the Preliminary Close Out Report on November 23, 2010.

> The assessment of this five-year review found that the remedy was constructed in accordance with the requirements of the ROD, as amended by an Explanation of Significant Difference (ESD), signed November 19, 2010. The ESD was issued to document significant differences to the remedy described in the ROD and to also document some minor changes. No follow up actions are required as a results [sic] of this five-year review. The remedy at the Hudson Refinery Superfund Site is protective of human health and the environment. Contamination at the former refinery has been addressed.

(Ex. 2 at 1.)[4]

ARGUMENT

I. CERCLA SECTION 9613(h) DOES NOT APPLY

The Government contends that this Court lacks subject matter jurisdiction over this action because § 9613(h) applies. This argument is flawed for at least two reasons. First, § 9613(h) does not apply to claims concerning completed cleanup activities, and such activities have been completed at the Site. Second, the claims of Land O'Lakes in the First Amended Complaint do not "challenge" a removal or remedial action at the Site, or seek this Court's review of an order issued under 9606(a). Rather, the First Amended Complaint seeks to enforce the non-liability provisions of this Court's Orders.

[4] Reliance on documents and evidence outside of the pleadings in responding to a motion for dismissal under Federal Rule 12(b)(1) is proper and does not convert the motion into a motion for summary judgment. *Sizova v. Nat'l Institute of Stds. & Tech.*, 282 F.3d 1320 (10th Cir. 2002); *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987) ("As a general rule, a 12(b)(1) motion cannot be converted into a motion for summary judgment under Rule 56.")

A. Section 9613(h) Does Not Apply To Claims Concerning Completed Cleanup Activities, And All Such Activities Have Been Completed At the Site

CERCLA § 9613(h) does not apply to a claim asserted by a potentially responsible party concerning cleanup activities that have been *completed.* When they are *completed*, a claim does not constitute a "challenge" for purposes of § 9613(h) because the claim will not delay or halt the cleanup activities. *Raytheon Aircraft Co. v. United States*, 2007 U.S. Dist. Lexis 33494, *5-6 (D. Kan. 2007) (attached as Exhibit 5) (Holding that the claims are not barred because the cleanup activities were completed; the EPA had issued an order to Raytheon under § 9606(a), but the cleanup was completed); *United States v. State of Colorado*, 990 F.2d 1565, 1576 (10th Cir. 1993), *cert. denied*, 510 U.S. 1092, 127 L. Ed. 2d 216, 114 S. Ct. 922 (1994) (Holding that a claim that did not seek to delay cleanup did not constitute a "challenge" to the CERCLA cleanup for purposes of § 9613(h)); *Aztec Minerals Corp. v. EPA*, 1999 U.S. App. Lexis 26916, *8 (10th Cir. October 25, 1999) ("Clear import" of section 113(h) is that challenges to the EPA's removal or remedial activities are precluded "until such activities are completed.").

The Government's argument fails to account for the current posture of this case and remedial activities at the Site. The remedial action has been completed as confirmed by EPA's June 19, 2015 notice, and as such, § 9613(h) is simply inapplicable to the present suit. Indeed, the Government has failed to identify any concrete example or argument as to how Land O'Lakes' present action could interfere with an on-going removal or remedial action at the Site. Nowhere does the Government state how Land O'Lakes' action will alter the terms of an on-going cleanup order or challenge a remedy selection. Land O'Lakes

filed its original complaint in this suit on June 23, 2015, and alleged in the First Amended Complaint: "On June 19, 2015, the response action at the Site was completed." (First Am. Compl., ¶ 53.) As agreed by the parties, this Court must accept this allegation in the First Amended Complaint as true. In EPA's Five-Year Report in February 2015, EPA admitted that: "The remedy at the Hudson Refinery Superfund Site is protective of human health and the environment." (Response, Ex. 2.) The Court in *Raytheon* stated:

> Nonetheless, the United States urges that the court cannot exercise jurisdiction over Raytheon's as-applied challenge because the claim does not fall within any of the five enumerated exceptions to section 113(h). This argument misses the mark. Because the remedial action has been completed, section 113(h) simply does not apply to Raytheon's claim and, thus, the exceptions to section 113(h) are never implicated. *See Employers Ins. of Wausau v. Bush*, 791 F.Supp. 1314, 1321 (N.D. Ill. 1992) (section 113(h) does not limit jurisdiction to review completed remedial or removal actions; **where cleanup is complete, section 113(h) 'is simply inapplicable' and it is irrelevant whether claims fall within exceptions**).

Raytheon, 2007 U.S. Dist. Lexis 33494 at *7-8 (emphasis added). Since it is irrelevant whether claims fall within exceptions under § 9613(h), the Tenth Circuit law rejects the Government's argument that Land O'Lakes' suit must wait until the Government files its cost recovery suit under § 9607(a) (a type of action under exception (1) to § 9613(h)). *Raytheon*, 2007 U.S. Dist. Lexis 33494 at *7-8; *Colorado*, 990 F.2d at 1578-79.

In summary, Land O'Lakes alleges in the First Amended Complaint that: "On June 19, 2015, the response action at the Site was completed," and that allegation must be accepted as true. Section 9613(h) simply does not apply because the cleanup activities at the Site have been completed. Thus, Land O'Lakes can now proceed with the claims in

the First Amended Complaint without waiting, as suggested by the Government, to file a cost recovery suit.

B. The Claims of Land O'Lakes in the First Amended Complaint Do Not "Challenge" a Removal or Remedial Action at the Site, But Rather Seek to Enforce the Non-Liability Provisions of this Court's Orders

Claims are barred under § 9613(h) only if they constitute a "challenge" to an active, non-completed CERCLA cleanup. *United States v. State of Colorado*, 990 F.2d 1565, 1575-79 (10th Cir. 1993), *cert. denied,* 510 U.S. 1092, 127 L. Ed. 2d 216, 114 S. Ct. 922 (1994) (Holding that Colorado's claim to enforce its RCRA final amended compliance order at the site is not a "challenge" to the Army's CERCLA response action and thus § 9613(h) does not apply); *Raytheon Aircraft Co. v. United States*, 2007 U.S. Dist. Lexis 33494, *4-8 (D. Kan. 2007) ("Thus, a claim, asserted by a potentially responsible party concerning removal or remedial activities that have been completed, does not constitute a "challenge" for purposes of section 113(h) because the claim will not delay or otherwise interfere with the cleanup."); *Coffey v. Freeport-McMoran Copper & Gold Inc*., 623 F. Supp. 2d 1257, 1272-73 (W.D. Okla. 2009) (Holding that plaintiffs' claims are not a challenge to a CERCLA cleanup; "[t]he question is whether the plaintiffs' lawsuit challenges the [response action] by calling into question" the EPA response plan….).

The Tenth Circuit's *Colorado* case is instructive where there are on-going remedial efforts under CERCLA and RCRA. The United States filed a declaratory judgment suit against the State of Colorado concerning a U.S. Army Rocky Mountain Arsenal waste disposal site, which was being remediated under CERCLA by the Army. The United States sought an order from the federal district court that Colorado could not enforce its RCRA

final amended compliance order regarding the site. The federal district court held that Colorado could not enforce its order, and the Tenth Circuit reversed. The Tenth Circuit held that Colorado's order was not a "challenge" under § 9613(h) and also determined that Congress did not intend a CERCLA response action to bar a RCRA enforcement action.

Congress' "expressed purpose" was to enact § 9613(h) "to prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing the EPA's cleanup activities" to the detriment of human health and the environment. *Colorado*, 990 F.2d at 1576. The Tenth Circuit stated in *Colorado*: "While we do not doubt that Colorado's enforcement of the final amended compliance order will 'impact the implementation' of the Army's CERCLA response action, we do not believe that this alone is enough to constitute a challenge to the action as contemplated under § 9613(h)." *Id.* at 1577. A claim does not constitute a "challenge" for purposes of § 9613(h) unless it delays or halts such cleanup activities. *Id.* at 1575-76; *State of New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1249-50 (10th Cir. 2006); *Raytheon*, 2007 U.S. Dist. Lexis 33494 at *5-6. For example, a claim constitutes a "challenge" to an ongoing cleanup if it delays or halts the cleanup by contesting the environmental cleanup methods and standards, or the adequacy of EPA's selected remedy, at the Site. *New Mexico*, 467 F.3d at 1249-50.

The Tenth Circuit stated in *Colorado*:

> § 9613(h) does not bar federal courts from reviewing a CERCLA response action prior to its completion: rather, it bars federal courts from reviewing any "challenges" to CERCLA response actions. This is a critical distinction because an action by Colorado to enforce the final amended compliance order, issued pursuant to its EPA-delegated

> RCRA authority, is not a "challenge" to the Army's CERCLA response action. To hold otherwise would require us to ignore the plain language and structure of both CERCLA and RCRA, and to find that CERCLA implicitly repealed RCRA's enforcement provisions contrary to Congress' expressed intention.

Colorado, 990 F.2d at 1575.

Land O'Lakes' action to enforce the non-liability provisions of this Court's Orders does not "challenge" any cleanup activities since those activities are all completed.

Moreover, RCRA's citizen enforcement suit provision permits any person to commence a civil action against any other person, including the United States, to enforce "any permit, standard, regulation, condition, requirement, prohibition, or **order** which has become effective pursuant to" RCRA. 42 U.S.C. § 6972(a)(1)(A); *Colorado,* 990 F.2d at 1577-78 (emphasis added).[5] Such RCRA citizen enforcement suits "at a site in which a CERCLA response action is underway can be brought prior to the completion of the CERCLA response action." *Id.* Congress "did not intend a CERCLA response action to bar a RCRA enforcement action" under § 6972(a)(1)(A). *Id.* Specifically, Congress provided in RCRA that: "The district court shall have jurisdiction … to enforce the permit, standard, regulation, condition, requirement, prohibition, or **order**, referred to in paragraph (1)(A)…." 42 U.S.C. § 6972(a) (emphasis added). Federal courts "**shall have jurisdiction**" over such RCRA citizen enforcement suits and are authorized "to enforce

[5] The Government contends, without explanation, that Land O'Lakes included an "odd demand" for civil penalties. (Government Mem. at 8-9). However, Land O'Lakes is entitled to recover civil penalties in its RCRA citizen enforcement claim for the Governments' violation of the Final Consent Decree and Closure Order, which became effective pursuant to RCRA. (First Am. Compl., ¶ 95); 42 U.S.C. § 6972(a).

the permit, standard… or **order**….” § 6972(a)(1); *Colorado,* 990 F.2d at 1577-78 (emphasis added).

In *Colorado*, the final amended compliance order was the “order” under § 6972(a)(1)(A) during active CERCLA remediation by the Army; in this case for which there is a completed CERCLA remedy, it is even more clear that the Final Consent Decree and the Closure Order, which became effective pursuant to RCRA prior to the UAO, are such “orders.” Pursuant to the Tenth Circuit’s holding, Land O’Lakes’ citizen enforcement claim under § 6972(a)(1)(A) is not barred.

C. EPA’s June 23, 2015 Cost Demand Letter Is Not a Remedial Activity

The Government points to its "June 19, 2015" cost recovery demand letter to Land O’Lakes, which is in fact dated June 23, 2015 and is shown in Exhibit 3 to this Response,[6] to argue that this letter is enforcement activity under the definitions of removal or remedial action. (Government’s Mem. at 12.)

But the purpose of § 9613(h) is to protect human health and the environment from delays to an on-going remedial action—not to protect the Government’s claim for money. *Colorado,* 990 F.2d at 1575-76; *Raytheon,* 2007 U.S. Dist. Lexis 33494 at *5-6. The Government’s cost recovery demand letter is not a cleanup activity to protect human health or the environment because the clean-up has long since been performed. The Court will note that this demand is for money—no demand is made for performance of any cleanup activity since it has been completed. In EPA’s Five-Year Report in February 2015, EPA

[6] A copy of that 3-page letter is attached as Exhibit 3, without including the approximately 329 pages of cost documentation attached to the letter.

confirmed that the remedy at the Site is protective of human health and the environment and that no follow up actions are required because the UAO directed contamination at the former refinery Site has been addressed. (Response, Ex. 1.)

The Government also points to the case of *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380 (5th Cir. 1989), to argue that 113(h) bars jurisdiction even after a removal or remedial action is complete. But that case is distinguishable. First, the law in the Tenth Circuit is contrary to *Voluntary* from the Fifth Circuit. *Colorado*, 990 F.2d at 1575-79; *Raytheon*, 2007 U.S. Dist. Lexis 33494 at *5-8. Second, the cases cited by *Voluntary* as precedent deal with attempts to seek injunctive relief or to otherwise delay or halt cleanup activities by EPA, which is not sought in the claims by Land O'Lakes. Third, *Voluntary* does not deal with the enforcement of orders entered by a federal court.

In summary, under binding Tenth Circuit law, the claims of Land O'Lakes are not a "challenge" to cleanup activities. The Tenth Circuit has specifically ruled that a RCRA citizen enforcement suit to enforce an order is proper. The arguments by the Government are not applicable or controlling.[7]

[7] In the alternative, even if the Court were to determine that the Section 113(h) bar applies to Land O'Lakes' claims for declaratory relief—which it does not—Land O'Lakes' claims would nonetheless fall within the exception to the jurisdictional bar under Section 113(h)(3). Section 113(h)(3) states that "[a]n action for reimbursement under section 9606(b)(2) of this title" is excepted from the Section 113(h) jurisdictional bar. While the instant action for declaratory relief is admittedly not an "action for reimbursement," Land O'Lakes' pending Petition for Reimbursement before the EAB is an "action for reimbursement." The parties here have requested Land O'Lakes' "action for reimbursement" be stayed by the EAB in light of this action, until this Court resolves Land O'Lakes' claims for declaratory relief. Land O'Lakes submits that the exception under Section 113(h)(3) should apply in this case.

II. THE GOVERNMENT HAS WAIVED SOVEREIGN IMMUNITY

The Government contends that this Court lacks subject matter jurisdiction over this action because the Government has not waived its sovereign immunity. This argument is flawed for at least three reasons. First, this Court retains continuing jurisdiction over this action both under the clear and unambiguous language of the Final Consent Decree and pursuant to its inherent authority to enforce its orders. The Government has thus waived sovereign immunity by commencing the 1984 RCRA enforcement suit and entering into the terms of the Final Consent Decree, which this action seeks to enforce. Second, the Government has waived sovereign immunity as to both Counts I and II of the First Amended Complaint to the extent those counts seek only declaratory and other non-monetary relief. Under the Administrative Procedures Act ("APA"), 5 U.S.C. § 702, the Government has waived sovereign immunity as to all claims for declaratory or injunctive relief. Courts hold that this waiver is not limited to claims arising under the APA. Third, the Government has waived sovereign immunity as to Count II of the First Amended Complaint because the RCRA citizen suit provision of 42 U.S.C. § 6972(a)(1) contains an unequivocal waiver of sovereign immunity, including requests for civil penalties.

A. This Court Retains Jurisdiction over This Matter Both by the Terms of the Final Consent Decree and Closure Order, as well as, Under Its Inherent Authority; the Government's Entry into a Consent Decree Waives Its Sovereign Immunity as to Enforcement of the Decree

To determine jurisdiction, the Court need look no further than the Final Consent Decree itself. The plain language of the Final Consent Decree makes clear that this Court

has jurisdiction over this matter. Article I of the Final Consent Decree states that this Court "has jurisdiction over the subject matter of and the parties to this action." (First Am. Compl., Ex. 1 at 3). Article XX of the Final Consent Decree states that the Court "shall retain jurisdiction of this Final Consent Decree for purposes of ensuring compliance with its terms and conditions." (First Am. Compl., Ex. 1 at 23.) Article XX also states that "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." *Id.*

In addition to the clear and unambiguous language of the Final Consent Decree itself, as well as the language of the Closure Order which clearly shows that it does not dismiss the case or alter the obligations of the Government in the Final Consent Decree, federal courts have the inherent authority to enforce their own consent decrees. "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. This duty arises where the performance of one party threatens to frustrate the purpose of the decree." *Berger v. Heckler*, 771 F.2d 1556, 1568-69 (2d Cir. 1985) (internal quotations omitted); *see also United States v. Volvo Powertrain Corp.*, 854 F. Supp. 2d 60, 71 (D.D.C. 2012) ("[A] district court has the inherent 'authority to exercise its discretion as a court of equity in fashioning a remedy to . . . enforce a consent decree.'") (citing *Cobell v. Norton*, 391 F.3d 251, 257 (D.C. Cir. 2004); *Holland v. N.J. Dep't of Corrections*, 246 F.3d 267, 270 (3d Cir. 2001) ("[A] court does have inherent power to enforce a consent decree in response to a party's non-compliance....")). "[A] consent decree is an order of the court and thus, by

its very nature, vests the court with equitable discretion to enforce the obligations imposed on the parties." *United States v. Local 359, United Seafood Workers*, 55 F.3d 64, 69 (2d Cir.1995). In *Berger, supra*, the Second Circuit Court of Appeals rejected the defendant's argument that the Court lacked subject matter jurisdiction to enforce its decree, noting that "[a] [party] who has obtained the benefits of a consent decree—not the least of which is the termination of the litigation—cannot then be permitted to ignore such affirmative obligations as were imposed by the decree." *Berger*, 771 F.2d at 1568-69.

At least one case relied on by the Government squarely supports Land O'Lakes' argument. In *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994), which is cited at p. 2 of the Government's memorandum, the United States Supreme Court contrasted cases in which a stipulation and order do not reserve jurisdiction in the district court for enforcement, with cases that do contain such a reservation. The Court observed:

> The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist. That, however, was not the case here.

Kokkonen, 511 U.S. at 381; *see also Floyd v. Ortiz*, 300 F.3d 1223, 1226-27, n.3 (10th Cir. 2002) (Reversing the district court and holding that the district court "retains jurisdiction to enforce consent decrees;" the Court followed *Kokkonen* in its determination that "a district court can retain jurisdiction over a settlement agreement 'if the order of dismissal

shows an intent to retain jurisdiction or incorporates the settlement agreement.');[8] *see also Hendrickson v. United States*, 791 F.3d 354, 358 (2d Cir. 2015) ("[T]o retain ancillary jurisdiction over enforcement of a settlement agreement, *Kokkonen* prescribes that a district court's order of dismissal must either (1) expressly retain jurisdiction over the settlement agreement, or (2) incorporate the terms of the settlement agreement in the order."). Either is sufficient for jurisdiction, but this Court in its Final Consent Decree did both: retained jurisdiction and incorporated the settlement terms in the Decree. The Closure Order did not change or alter the Final Consent Decree (except as to finding and ordering that Hudson's clean-up obligations had been satisfied) and left the Court with continuing jurisdiction to enforce the Orders.

The Government's sovereign immunity argument also ignores that the Final Consent Decree—entered at the conclusion of an enforcement action *commenced by the Government*, and to which the Government is a party—itself constitutes a clear waiver of sovereign immunity. Indeed, federal appellate courts have held that when a sovereign enters into a consent decree, it necessarily waives immunity with respect to a later action for the enforcement of that decree, rejecting the very argument that the Government has raised in the instant litigation. In *Bergmann v. Michigan State Transp. Comm'n.*, 665 F.3d 681 (6th Cir. 2011), for example, the Sixth Circuit Court of Appeals held that the Michigan Department of Transportation waived its sovereign immunity in an action by the plaintiff for enforcement of the consent decree: the Department's decision to engage in litigation

[8] *Floyd* also relies upon Rule 71, Fed. R. Civ. P. Land O'Lakes also relies on Rule 71. (First Am. Compl., ¶ 81.)

and sign a consent decree was a "clear indication" of the Department's intent to waive its sovereign immunity. Indeed, the Department itself recognized that "entering into a consent decree rather than asserting sovereign immunity in the initial suit *usually waives any immunity against later enforcement of the decree*." *Id.* at 683 (emphasis added).

Here, the Government's conduct in the RCRA suit evinces an intent to waive sovereign immunity. It was the Government that instituted the initial RCRA enforcement suit, subjecting itself to the jurisdiction of this Court. It was the Government that voluntarily agreed to enter into a Final Consent Decree, the terms of which state clearly that the Court has subject matter jurisdiction and shall retain subject matter jurisdiction over the action and the parties to enforce the terms of the Final Consent Decree. Since the Court retained jurisdiction in the Final Consent Decree, it also retained jurisdiction to enter the Closure Order regarding the Final Consent Decree and the Closure Order did not dismiss the case. (First Am. Compl., Ex. 1, ¶¶ 35-36.) The Government's sovereign immunity argument is thus squarely contradicted by its conduct in this action and by the language of the Final Consent Decree and Closure Order.

B. The Government Has Waived Sovereign Immunity under the APA § 702 as To Land O'Lakes' Claims for Declaratory and Other Non-Monetary Relief

The Government's sovereign immunity argument is also flawed because Congress waived sovereign immunity with respect to all claims for non-monetary relief in Section 702 of APA. Section 702 provides as follows:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under

> color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. Congress passed Section 702 to "waive sovereign immunity in most suits for nonmonetary relief" because it was "[a]ware of the impact of the doctrine of sovereign immunity on vindication of constitutional and other legal rights." *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1233 (10th Cir. 2005). The Tenth Circuit has held that this waiver is a general waiver of sovereign immunity and is "*not* limited to suits under the [APA]." *Id.* (emphasis added) (citing *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996) ("The APA's waiver of sovereign immunity applies to any suit whether under the APA or not."); *United States v. Murdock Mach. & Engr. Co.*, 81 F.3d 922, 930 n.8 (10th Cir. 1996) (Section 702 is a "general waiver of the government's sovereign immunity from injunctive relief").

Count I of Land O'Lakes' First Amended Complaint seeks, among other forms of declaratory relief, "a declaration of present and future legal obligations and rights of the parties under this Court's Final Consent Decree and Closure Order with respect to EPA's UAO…." (First Am. Compl. ¶ 80.) Count II of the First Amended Complaint alleges that Land O'Lakes is "entitled to this Court's order of past, present and future non-liability at the Site under the Final Consent Decree 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 of costs at the Site." (First Am. Compl., Ex 1, ¶ 93.) These requests for declaratory and other non-monetary relief fall squarely

within the federal government's statutory waiver of sovereign immunity as expressed in Section 702.

While the Tenth Circuit has held that the Section 702 waiver of sovereign immunity does not apply where there is another statute that grants consent to suit and forbids the particular relief which is sought, *see, e.g.*, *Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1080 (10th Cir. 2006), here, there are no federal statutes that both expressly waive the Government's sovereign immunity to Land O'Lakes' claims, and at the same time preclude the relief sought by Land O'Lakes, such that the APA waiver of sovereign immunity would not apply. As discussed in Part C below, the RCRA citizen suit provision contains an express statutory waiver of the Government's sovereign immunity to a civil action for the violation of an "order." *See* 42 U.S.C. § 6972(a)(1)(A). However, nothing in RCRA's waiver of sovereign immunity precludes Land O'Lakes' requests for declaratory and other non-monetary relief as reflected in Counts I and II of the First Amended Complaint.[9]

[9] Nor does the Tucker Act—which waives the United States' sovereign immunity as to breach of contract actions against the government and gives the Federal Court of Claims exclusive jurisdiction over such contract claims—forbid the enforcement of the Final Consent Decree in this action. That is because Land O' Lakes' claims under Counts I and II are not ordinary breach of contract claims, but are instead requests for a declaration of the parties' rights and obligations under *court-issued orders*, i.e., the Final Consent Decree and Closure Order. *See, e.g.*, *Normandy Apartments, Ltd. v. U.S. Dept. of Housing and Urban Dev.*, 554 F.3d 1290 (10th Cir. 2009) (holding that the Tucker Act does not preclude a federal court from taking jurisdiction, and thus the APA waiver applies, when a party asserts that the government's breach of a contract is "contrary to federal regulations, statutes, or the Constitution"); *Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (Consent decrees are hybrids in the sense that, though construed as contracts, they are enforced as orders); *American Petroleum Inst. v. U.S. EPA*, 216 F.3d 50, 69 (D.C. Cir. 2000) (An action to enforce the consent decree must be brought in the district court that issued the decree).

Accordingly, Section 702 of the APA constitutes a clear waiver of the Government's sovereign immunity with respect to Land O'Lakes' claims for non-monetary relief in Counts I and II of the First Amended Complaint.[10]

C. RCRA Waives the Government's Sovereign Immunity to RCRA Citizen Suits

In addition to the Government's waivers of sovereign immunity under the plain language of the Final Consent Decree and Section 702 of the APA, the statutory text of RCRA itself contains a clear waiver with respect to citizen suits against the United States.

Section 6972(a), entitled "Citizen Suits," states as follows:

> 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; ....
>
> The district court **shall have jurisdiction**, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or **order**, referred to in paragraph (1)(a)….

42 U.S.C. § 6972(a)(1)(A), (a) (emphasis added). The statutory term "person" is defined in turn at RCRA Section 6903(15), as follows:

[10] Because the Court may evaluate its subject matter jurisdiction *sua sponte* at any time, Land O'Lakes believes it is unnecessary to amend the First Amended Complaint to specifically allege Section 702 of the APA as a jurisdictional basis for this action. Should the Court prefer that Land O' Lakes specifically allege Section 702 as a jurisdictional basis, however, Land O' Lakes will promptly seek leave to amend the First Amended Complaint to include that allegation.

> (15) The term 'person' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and **shall include each department, agency, and instrumentality of the United States.**

42 U.S.C. § 6903(15) (emphasis added).

This statutory language reflects a clear and unequivocal waiver of the federal government's sovereign immunity to citizen suit claims under RCRA, including requests for civil penalties. Indeed, the definition of "person" in Section 6903(15) reflects a 1992 amendment to RCRA[11] that followed the United States Supreme Court's decision in *United States Dept. of Energy v. Ohio*, 503 U.S. 607 (1992), which had held that the RCRA citizen suit provision did not waive sovereign immunity based on a pre-amendment definition of the term "person." The pre-amendment definition, while including states and other governmental entities, did not include the United States, and the Court held that this limitation necessarily excluded the United States from the RCRA citizen suit provision. *Id.* at 617-18. Thus, the FFCA amendment, enacted in response to *Ohio*, removed any doubt that the RCRA citizen suit provision is indeed a waiver of the federal government's sovereign immunity.[12] *See, e.g.*, *City of Jacksonville v. Dept. of Navy*, 348 F.3d 1307, 1319 (11th Cir. 2003).

[11] The amendment was part of the Federal Facility Compliance Act of 1992 ("FFCA"), Pub. L. No. 102-386, 1992 U.S.C.C.A.N. (106 Stat.) 1505, codified at 42 U.S.C. § 6961.

[12] *See, e.g.*, Gregory J. May, *U.S. Dep't of Energy v. Ohio & the Federal Facility Compliance Act of 1992*, 4 Vill. Envtl. L.J. 363, 383-84 (1993) ("FFCA also abrogates immunity for the federal government to claims brought under the RCRA citizen suit sections by modifying the RCRA definition of 'person' to include all departments and

This Court should reject the Government's argument that it has not waived sovereign immunity with respect to Count II of Land O'Lakes' First Amended Complaint.

CONCLUSION

For each of the reasons stated herein, the Government's motion to dismiss should be denied.

Respectfully submitted,

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agencies of the United States. Both waivers appear to be sufficiently clear so as to withstand the Court's intensive inquiry.").

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2015, I electronically transmitted the foregoing document 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:

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Attorneys for Defendant United States of America

/s/ *Mark D. Coldiron*
MARK D. COLDIRON

EXHIBIT 1

Exhibit 1
Key Paragraphs in the First Amended Complaint

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.

[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.).

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).

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.
>
> 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.

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.

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

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

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.

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).

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.

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).

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).

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.

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.

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[4] 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 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.

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.

First Amended Complaint, Par. 2-5, 9, 11, 13-16, 20-22, 24, 25, 27, 28, 30, 34-36, 41, 42, 49-55, 93.

[4] 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. Final Consent Decree, Section XXI.

EXHIBIT 2

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

Prepared by

Oklahoma Department of Environmental Quality
Oklahoma City, Oklahoma

and

U.S. Environmental Protection Agency
Region 6
Dallas, Texas

February 2015

Exhibit 2

CONCURRENCES:

First Five-Year Review Report
Hudson Refinery Superfund Site
EPA ID No. OKD082471988

Laura Stankosky — 2-5-2015
Laura Stankosky
U.S. EPA, Region 6
Remedial Project Manager

Michael G. Hebert — 2-12-2015
Michael Hebert — Date
U.S. EPA, Region 6
Acting Chief, LA, OK, NM Section, Superfund Remedial Branch

John Meyer — 2-17-15
John Meyer
U.S. EPA, Region 6
Acting Associate Director, Superfund Remedial Branch

cpz — 2-18-15
George Malone, III
U.S. EPA, Region 6
Attorney, Office of Regional Counsel

02/20/15
Mark A. Peycke
U.S. EPA, Region 6
Chief, Superfund Branch, Office of Regional Counsel

2/27/15
Pamela Philips
U.S. EPA, Region 6
Associate Director, Superfund Division

Determinations

The remedy at the Hudson Refinery Superfund Site is protective of human health and the environment. Contamination at the former refinery has been addressed. Both short and long term protectiveness of the remedial action will be assured by continuing to monitor the Site ground water and maintaining the institutional controls to address the potential contamination remaining at greater than two feet in depth.

Pam Phillips, Acting
Carl E. Edlund
Director
Superfund Division, Region 6
U.S. Environmental Protection Agency

2/27/15
Date

Executive Summary

The Hudson Refinery Superfund Site (Site) is located in the City of Cushing in Payne County, Oklahoma. The approximately 200-acre Site is located on the west side of the City of Cushing. The Site is bisected by State Highway (SH) 33 with approximately 165 acres north of SH 33 (North Refinery) and approximately 35 acres south of SH 33 (South Refinery).

EPA signed the Record of Decision (ROD) for the Site on November 23, 2007. The selected remedy included excavation and off-site disposal of contaminated soil and sediments, monitoring groundwater, and institutional controls. The Site achieved construction completion with the signing of the Preliminary Close Out Report on November 23, 2010. The trigger for this five-year review was the site mobilization and the actual start of construction on February 28, 2010.

The assessment of this five-year review found that the remedy was constructed in accordance with the requirements of the ROD, as amended by an Explanation of Significant Difference (ESD), signed November 19, 2010. The ESD was issued to document significant differences to the remedy described in the ROD and to also document some minor changes. No follow up actions are required as a results of this five-year review. The remedy at the Hudson Refinery Superfund Site is protective of human health and the environment. Contamination at the former refinery has been addressed. Both short and long term protectiveness of the remedial action will be assured by continuing to monitor the Site ground water and maintaining that the institutional controls to address the potential contamination remaining at greater than two feet in depth.

EXHIBIT 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

JUN 23 2015

DEMAND FOR PAYMENT
URGENT LEGAL MATTER - PROMPT REPLY NECESSARY
CERTIFIED MAIL NUMBER: 7014 0150 0000 2452 9361
RETURN RECEIPT REQUESTED

Byron Starns
Counsel for Land O'Lakes Inc.
Stinson Leonard Street LLP
150 South Fifth Street, Suite 2300
Minneapolis, Minnesota 55402

Re: Demand for Reimbursement of Costs Expended
at the Hudson Refinery Superfund Site in Cushing, Payne County, Oklahoma

Dear Mr. Starns:

The United States Environmental Protection Agency (EPA) previously issued a Unilateral Administrative Order to your client, Land O'Lakes Inc., to perform the Remedial Design and Remedial Action at the Hudson Refinery Superfund Site located in Cushing, Payne County, Oklahoma. The EPA informed Land O'Lakes that they may be liable for money expended by the EPA for response actions at this Site under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA, commonly known as the federal "Superfund" law). The EPA also offered Land O'Lakes the opportunity to take voluntary action necessary to abate the release or threat of release of hazardous substances from the Site or to reimburse the EPA for response actions taken.

Explanation of Potential Liability

Under Section 107(a) of CERCLA, Potentially Responsible Parties (PRPs) may be held liable for all costs incurred by the EPA (including interest) in responding to any release or threatened release of hazardous substances at the Site, unless the PRP can demonstrate divisibility or assert one of the statutory defenses. PRPs include current and former owners and operators of the Site, as well as persons who arranged for treatment and/or disposal of any hazardous substances found at the Site, and persons who accepted hazardous substances for transport and selected the site to which the hazardous substances were delivered.

As noted in the February 19, 2008, Special Notice issued to Land O'Lakes, the EPA believes that it may be liable under Section 107(a) of CERCLA with respect to the Site, as the successor to Midland Cooperatives, a former owner/operator of this Site.

To date, the EPA has taken several response actions at the Site under the authority of the Superfund Program. Below is a brief description of the actions taken at the Site:

Exhibit 3

- Site Investigation in order to gain a basic understanding of any risks posed to human health and the environment by releases or threatened releases from the Site.

- An Emergency Removal Action, conducted to reduce any immediate threat to the environment or human health. The removal activities focused on the South Refinery and included asbestos containing material (ACM) abatement, investigation of radiation sources, demolition of structurally unsafe buildings, removal of tetra-ethyl lead, addressing hydrofluoric acid liquid, vapors, and scale, and disposal of wastes containing CERCLA hazardous substances, amongst other activities approved under the action memorandum signed on April 4, 1999.

- An Engineering Evaluation/Cost Analysis, followed by a non-Time Critical Removal Action, conducted to remove the remaining refining structures, friable ACM, residual sludges, collection basins, sumps, and collection ponds, amongst other activities approved under the action memorandum signed September 25, 2001.

- A Remedial Investigation and Feasibility Study (RI/FS) to identify the Site characteristics, to define the nature and extent of soil, air, surface water, and groundwater contamination, the risks posed by the Site and to evaluate different cleanup options for the Site followed by the Record of Decision signed on November 23, 2007.

- Oversight of the Remedial Design and Remedial Action performed by Land O'Lakes under the UAO to design and implement the EPA approved cleanup action for the Site.

- Activities to monitor, operate and maintain the cleanup action after the cleanup is completed.

Demand for Reimbursement of Costs

In accordance with Section 104 of CERCLA, the EPA has already taken certain response actions, which are listed above, and incurred certain costs in response to conditions at the Site. The EPA is seeking to recover from Land O'Lakes its response costs and all interest authorized to be recovered under Section 107(a) of CERCLA. To date, the approximate total response costs identified through February 28, 2015, for the Site are $23,424,243.76 and $4,818,215.45 in interest. Under Section 107(a) of CERCLA, the EPA hereby makes a demand for payment from Land O'Lakes for the above amount plus all interest authorized to be recovered under Section 107(a). A summary of these costs is enclosed.

Some or all of the costs associated with this notice may be covered by current or past insurance policies issued to Land O'Lakes. Most insurance policies will require that the company timely notify their carrier(s) of a claim against them. Coverage depends on many factors, such as the language of the particular policy and state law.

Please send a written response to this cost recovery demand, within thirty (30) days, to:

Kevin Shade, Enforcement Officer
U.S. EPA Superfund Division (6SF-TE)
1445 Ross Avenue, Suite 1200
Dallas, Texas 75238

and

George Malone, Assistant Regional Counsel
U.S. EPA Regional Counsel (6RC-S)
1445 Ross Avenue, Suite 1200
Dallas, Texas 75238

If a response from you is not received within 30 days, the EPA will assume that Land O'Lakes has declined to reimburse the Superfund for the Site expenditures, and pursuant to CERCLA, the EPA may pursue civil litigation.

Also, please note that, because the EPA has a potential claim against Land O'Lakes, it must include EPA as a creditor if it files for bankruptcy. The EPA reserves the right to file a proof of claim or an application for reimbursement of administrative expenses.

Please give these matters your immediate attention. If you have any questions regarding this letter, please contact George Malone, Assistant Regional Counsel, at 214-665-8030 or malone.george@epa.gov, or Kevin Shade, Enforcement Officer, at 214-665-2708 or shade.kevin@epa.gov. Thank you for your prompt attention to this matter.

Sincerely,

Pam Phillips, Acting

Carl E. Edlund, P.E.
Director
Superfund Division

Enclosure

EXHIBIT 4

BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

IN RE:	
Hudson Refinery Superfund Site Cushing, Oklahoma,	Petition No. 15-01 CERCLA 106(b)
	EPA Region 6 Docket No. CERCLA-06-16-08
Land O' Lakes, Inc.,	
Petitioner	
Petition for Reimbursement Under CERCLA Section 106(b) and for Relief for Constitutional Violations	

AGREED MOTION TO STAY PROCEEDINGS AND TO EXTEND TIME FOR THE PETITIONER TO RETAIN AN EXPERT AND FILE A SUPPLEMENTAL AFFIDAVIT

I. Introduction

The Respondent, the United States Environmental Protection Agency, Region 6 ("EPA" or the "Region"), by and through its Office of Regional Counsel, hereby moves the Environmental Appeals Board ("Board") to stay all further proceedings related to the Petition for Reimbursement under CERCLA Section 106(b) and for Relief for Constitutional Violations ("Petition") filed on August 18, 2015, by Land O' Lakes, Inc. ("Petitioner"), until liability issues are resolved either by settlement or litigation in federal district court. The Petition was filed in connection with the CERCLA Section 106(a) Administrative Order No. CERCLA-06-16-08 ("Administrative Order") issued to the Petitioner by EPA Region 6.[1] The Administrative Order was issued on January 6, 2009, and required the Petitioner to conduct a remedial design and remedial action at the Hudson Oil Refinery Superfund Site, Cushing, Oklahoma ("Site"). With the filing of the Petition, Petitioner also filed on August 18, 2015, its Motion for Additional Time to Retain Substitute Expert Witness and File Supplemental Expert Witness Affidavit ("Motion for Additional Time").

[1] In accordance with the consultation more fully described below, the Petitioner and the Respondent agree that further proceedings in this matter should be stayed until liability issues are resolved either by settlement or litigation in federal district court, and the Petitioner should be allowed additional time to retain a substitute oil refinery expert witness and file a supplemental affidavit.

Exhibit 4

II. Litigation in the United States District Court for the Western District of Oklahoma

On June 23, 2015, Land O' Lakes, Inc. ("Petitioner") filed a complaint, and served a notice of intent to sue for citizen-suit claims against the United States, both asserting it has no liability for costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607. The complaint filed by the Petitioner in federal district court seeks a declaratory judgment under 28 U.S.C. §§ 2201, 2202, and 42 U.S.C. § 9613(g)(2), and contends that the Petitioner is not liable for response costs incurred under CERCLA. *See Land O' Lakes v. United States,* No. 5:15-cv-0683-R (D. Okla. filed June 23, 2015). On August 17, 2015, the District Court for the Western District of Oklahoma granted an extension of time through and until September 23, 2015, for the United States to respond to the Petitioner's complaint. On September 1, 2015, the Petitioner filed a First Amended Complaint in the District Court for the Western District of Oklahoma.

III. The Stay and Extension of Time

Due to the litigation cited above, the Petitioner and the Respondent respectfully agree to stay further consideration, in its entirety, of the Petition before the Board. The Petitioner and the Respondent agree that the stay of all further proceedings related to the Petition remain in effect until liability issues are resolved either by settlement or litigation in federal district court, whichever comes first. The Petitioner and the Respondent also agree that Petitioner's Motion for Additional Time should be granted and that Petitioner should have an extension of time to retain a substitute oil refinery expert witness and submit a supplemental affidavit by the retained substitute oil refinery expert. The Petitioner and the Respondent both agree to extend time up to October 1, 2015, for the Petitioner to retain a substitute oil refinery expert witness, and up to January 18, 2016, to submit a supplemental expert affidavit. The Parties to this action reached the above agreements after consultation from September 8-10, 2015. Legal counsel for the Petitioner consented to this motion by email.

Dated this 15th day of September 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 Featherson

Clarence Featherson
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 15th of September, 2015, I served a true and correct copy of the above Motion by email and 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
Attorney for Respondent

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	EPA Region 6 Docket No. 06-16-08 Petition No. 15-01 CERCLA 106(b)

[PROPOSED] ORDER GRANTING AGREED MOTIONS (a) TO STAY AND (b) TO EXTEND TIME FOR PETITIONER TO FILE SUPPLEMENTAL EXPERT AFFIDAVIT

Upon consideration of Respondent United States Environmental Protection Agency's Motion to Stay Proceedings, to which Petitioner's counsel has agreed; and consideration of Petitioner's Motion to Extend Time for the Petitioner to Retain an Expert and File Supplemental Affidavit, to which Respondent's counsel has agreed, it is hereby

ORDERED that Respondent's motion is granted, and all further proceedings related to this Petition are stayed until liability issues are resolved either by settlement or litigation in federal district court, whichever comes first; and it is further

ORDERED that Petitioner's motion is granted, and Petitioner shall have extensions of time: (a) through and until October 1, 2015 to retain a substitute oil refinery expert witness; and (b) through and until January 18, 2016 to submit a supplemental expert affidavit.

Dated: _____, 2015

ENVIRONMENTAL APPEALS BOARD

By: _____
Environmental Appeals Judge

12390782.2

EXHIBIT 5

LEXSEE

Analysis
As of: Dec 17, 2015

Raytheon Aircraft Company, Plaintiff, v. United States of America, Defendant.

Case No. 05-2328-JWL

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

2007 U.S. Dist. LEXIS 33494; 37 ELR 20100; 65 ERC (BNA) 1566

May 3, 2007, Decided
May 3, 2007, Filed

PRIOR HISTORY: Raytheon Aircraft Co. v. United States, 435 F. Supp. 2d 1136, 2006 U.S. Dist. LEXIS 34316 (D. Kan., 2006)

CORE TERMS: cleanup, remedial action, futility, removal, reconsideration, as-applied, remedial, interfere, constitutional challenge, claims asserted, subject matter jurisdiction, jurisdiction to review, single claim, entry of judgment, exercise jurisdiction, responsible parties, slowing down, summary judgment, remediation, enumerated, asserting, reinstate, analyzing, lawsuits, futile

COUNSEL: [*1] For Raytheon Aircraft Company, Plaintiff: Beverlee J. Roper, Daryl G. Ward, Stephen J. Torline, LEAD ATTORNEYS, Blackwell Sanders Peper Martin LLP- KC, Kansas City, MO.

For USA, Defendant: Heather E. Gange, Jonathan P. Porier, Natalia Sorgente, Scott J. Jordan, LEAD ATTORNEYS, U.S. Department of Justice - Environmental Defense Section, Washington, DC.

For Kansas Department of Health and Environment, Interested Party: Yvonne C. Anderson, LEAD ATTORNEY, Topeka, KS.

For Chamber of Commerce of the United States of America, Amicus: M. Courtney Koger, LEAD ATTORNEY, Kutak Rock LLP -- Kansas City, Kansas City, MO.

JUDGES: John W. Lungstrum, United States District Judge.

OPINION BY: John W. Lungstrum

OPINION

MEMORANDUM AND ORDER

Plaintiff Raytheon Aircraft Company filed suit against the United States of America under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) asserting, among other things, an as-applied constitutional challenge to the unilateral administrative order (UAO) issued by the EPA against Raytheon directing Raytheon to perform cleanup activities at Tri-County Public Airport (the "Site"). In May 2006, the court dismissed this claim [*2] for lack of subject matter jurisdiction pursuant to CERCLA section 113(h) on the grounds that cleanup at the Site was not yet complete. *See Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136 (D. Kan. 2006). In September 2006, the EPA, having determined that Raytheon satisfied its cleanup obligations required by the UAO, issued a Notice of Completion to Raytheon. Raytheon now moves the court to reconsider its May 2006 order and to reinstate Raytheon's as-applied constitutional challenge, asserting that the jurisdictional bar to its claim no longer exists. As will be explained, the motion is granted.

Applicable Standard

Raytheon's motion for reconsideration is brought pursuant to Federal Rule of Civil Procedure 54(b). Pursuant to that rule, a "court's disposition of a single claim in a suit involving multiple claims is subject to reconsideration until the entry of judgment on all of the claims, absent an explicit direction for the entry of judgment on

the single claim." *First Am. Kickapoo Operations, LLC v. Multimedia Games, Inc.*, 412 F.3d 1166, 1170 (10th Cir. 2005) (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) [*3] ("[E]very order short of a final decree is subject to reopening at the discretion of the district judge."); *Paramount Pictures Corp. v. Thompson Theatres, Inc.*, 621 F.2d 1088, 1090 (10th Cir. 1980) ("[T]he court retains the power to alter rulings until final judgment is entered on a cause."). Raytheon's motion, then, seeks to invoke the court's "general discretionary authority to review and revise interlocutory rulings prior to entry of final judgment." *See* *Wagoner v. Wagoner*, 938 F.2d 1120, 1122 n.1 (10th Cir. 1991). In analyzing Raytheon's motion, then, the court is not bound by the stricter standards for considering a Rule 59(e) or Rule 60(b) motion. *See* *Trujillo v. Board of Educ. of Albuquerque Pub. Schs.*, 212 Fed. Appx. 760, 2007 U.S. App. LEXIS 827, 2007 WL 80698, at *3-4 (10th Cir. Jan. 12, 2007); *Raytheon Constructors Inc. v. ASARCO, Inc.*, 368 F.3d 1214, 1217, 95 Fed. Appx. 1214 (10th Cir. 2003). [1]

1 In any event, the United States does not dispute that Rule 54(b) is the appropriate procedural vehicle for Raytheon's motion, nor does it contend that Raytheon's specific request fails to meet the standard for reconsideration under Rule 54(b).

[*4] *Discussion*

In May 2006, the court dismissed Raytheon's as-applied constitutional challenge for lack of subject matter jurisdiction on the grounds that cleanup at the Site was not yet complete. *See* *New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006) (pursuant to section 113(h), challenges to the EPA's removal and/or remedial activities are precluded until such activities are completed). It is undisputed that the EPA has since issued Raytheon a Notice of Completion. According to Raytheon, then, the limitations to jurisdiction contained in section 113(h) no longer apply such that the court may now exercise jurisdiction over Raytheon's claim. The EPA, in response, contends that the court lacks jurisdiction over the claim despite the issuance of the Notice of Completion.

As explained in the court's May 2006 order, section 113(h), with certain enumerated exceptions, "provides that no federal court shall have jurisdiction to review any challenges to removal or remedial action selected by the EPA under §§ 9604 or 9606(a)." *United States v. City & County of Denver*, 100 F.3d 1509, 1513-14 (10th Cir. 1996). Federal courts, including [*5] the Tenth Circuit, have consistently interpreted this provision as denying federal courts jurisdiction over claims asserted by potentially responsible parties concerning ongoing removal or remedial activities. *See* *New Mexico v. General Elec. Co.*, 467 F.3d 1223, 1249 (10th Cir. 2006) (section 113(h) "protects the execution of a CERCLA plan *during its pendency* from lawsuits that might interfere with the expeditious cleanup effort" (emphasis in original)); *Broward Gardens Tenants Ass'n v. U.S. E.P.A.*, 311 F.3d 1066, 1072 (11th Cir. 2002) (collecting cases). The rationale underlying this interpretation is that the claim has the effect of slowing down or preventing cleanup activities and, thus, constitutes a "challenge" to the cleanup. *See* *Broward Gardens*, 311 F.3d at 1072 ("A suit challenges a remedial action within the meaning of section 113(h) if it interferes with the implementation of a CERCLA remedy. . . . [A] suit interferes with, and thus challenges, a cleanup, . . if the relief requested will impact the remedial action selected."); *United States v. State of Colorado*, 990 F.2d 1565, 1576 (10th Cir. 1993) (section 113(h) [*6] was enacted "to prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing the EPA's cleanup activities") (quotation omitted).

Thus, a claim asserted by a potentially responsible party concerning removal or remedial activities that have been completed do not constitute a "challenge" for purposes of section 113(h) because the claim will not delay the cleanup or otherwise interfere with the cleanup. *See* *State of Colorado*, 990 F.2d at 1576 (action that did not seek to delay cleanup did not constitute a "challenge" to the CERCLA remedial action for purposes of section 113(h)). In other words, section 113(h) does not apply to claims concerning completed remedial activities because those claims do not interfere with cleanup activities and, thus, do not "challenge" the response or remedial actions. *See* *New Mexico v. General Elec. Co.*, 467 F.3d at 1250 (claims concerning remediation activities may be addressed at the conclusion of the remediation); *Aztec Minerals Corp. v. U.S. E.P.A.*, 1999 U.S. App. LEXIS 26916, 1999 WL 969270, at *3 (10th Cir. Oct. 25, 1999) ("clear import" of section 113(h) [*7] is that challenges to the EPA's removal or remedial activities are "precluded until such activities are completed"); *see also* *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 674 (8th Cir. 1998) (jurisdiction is denied to federal courts under section 113(h) "only if a removal or remedial action is 'challenged' by plaintiffs"); *accord* *State of Colorado*, 990 F.2d at 1575 (section 113(h) only bars federal courts from reviewing "challenges" to CERCLA response actions).

The United States does not dispute that cleanup at the Site has been completed and that the EPA has issued a Notice of Completion to Raytheon. Nonetheless, the United States urges that the court cannot exercise jurisdiction over Raytheon's as-applied challenge because the

2007 U.S. Dist. LEXIS 33494, *; 37 ELR 20100;
65 ERC (BNA) 1566

claim does not fall within any of the five enumerated exceptions to section 113(h). This argument misses the mark. Because the remedial action has been completed, section 113(h) simply does not apply to Raytheon's claim and, thus, the exceptions to section 113(h) are never implicated. *See Employers Ins. of Wausau v. Bush*, 791 F. Supp. 1314, 1321 (N.D. Ill. 1992) (section 113(h) does not limit jurisdiction [*8] to review completed remedial or removal actions; where cleanup is complete, section 113(h) "is simply inapplicable" and it is irrelevant whether claims fall within exceptions).

The United States contends that the court should not reinstate Raytheon's claim even if the court has jurisdiction over the claim. According to the United States, reinstating the claim would be futile because the EPA's actions in connection with the UAO comport with all relevant constitutional and statutory requirements. The court, however, declines to address the United States' "futility" argument at this juncture for two reasons. First, the United States has not explained how its futility argument is pertinent to the limited issue presented by Raytheon's motion for reconsideration or, stated another way, why futility would be a valid basis to deny Raytheon's motion for reconsideration. Significantly, the United States does not challenge Raytheon's use of Rule 54(b) as the procedural vehicle for its motion and does not contend that the court should construe Raytheon's motion as one for leave to file an amended complaint (a context in which futility can be an appropriate response by the non-moving party). Second, [*9] the United States does not suggest what standard the court should apply in analyzing its futility argument. While the United States' use of the term "futile" certainly suggests a standard equivalent to a 12(b)(6) standard, the United States' futility argument is based in part on citations to evidence in the record which, in turn, suggests a Rule 56 standard. Indeed, the United States, in its motion to dismiss or for partial summary judgment, initially sought summary judgment on the merits of Raytheon's as-applied constitutional challenge. However, the United States does not now refer the court to that earlier argument (an argument which was much more detailed than the argument presently advanced by the United States). For these reasons, the court declines to entertain the United States' futility argument. Of course, the United States may file a dispositive motion concerning Raytheon's as-applied challenge at any time up to the deadline established for filing such motions.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiff Raytheon Aircraft Company's motion for reconsideration (doc. 124) is granted and the Count V of Raytheon's complaint is hereby reinstated.

IT IS SO ORDERED.

[*10] Dated this 3<rd> day of May, 2007, at Kansas City, Kansas.

s/ John W. Lungstrum

United States District Judge