

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

IN RE:

Hudson Refinery  
Superfund Site  
Cushing, Oklahoma,

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)

Petition No. 15-01  
CERCLA 106(b)

EPA Region 6 Docket No.  
CERCLA-06-16-08

**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**

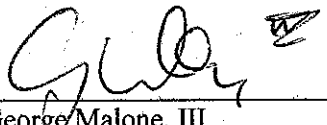
In accordance with the Board's September 18, 2015, Order, the following document was filed on behalf of the United States in the Western District Court litigation:

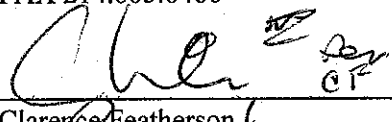
Attachment 1 – Reply In Support of Defendant United States' Motion to Dismiss.

Dated this 21st day of January 2016.

Respectfully submitted:

By:

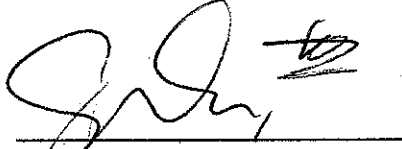
  
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CERTIFICATE OF SERVICE

I hereby certify that on the 21<sup>st</sup> of January 2016, I served a true and correct copy of the above Notice by mailing a copy via electronic or first class United States Mail to:

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## INTRODUCTION

Defendant, the United States of America, moved to dismiss Plaintiff Land O'Lakes, Inc.'s ("Land O'Lakes") First Amended Complaint ("the Complaint") for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). The Complaint seeks a declaratory judgment that Land O'Lakes is not liable under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601-75. Land O'Lakes' claims are barred by CERCLA Section 113(h) because they seek review under CERCLA 106(a) of EPA enforcement activities concerning a remedial action at the Site before EPA has filed a cost recovery action under CERCLA Section 107. As the statutory language, legislative history of CERCLA and a majority of courts make abundantly clear, CERCLA Section 113(h) bars challenges to EPA's response actions and related enforcement activities unless and until EPA files an action for cost recovery under CERCLA Section 107.<sup>1</sup> See 42 U.S.C. § 9613(h). Land O'Lakes' opposed the Motion to Dismiss based on several meritless arguments that do not address or cure the fundamental flaw in its claims: that they are barred by Section 113(h) because EPA has not filed an action for cost recovery under Section 107 of CERCLA.

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<sup>1</sup> CERCLA Section 113(h) bars jurisdiction over challenges to EPA removal or remedial action under Section 104, or to EPA orders issued under Section 106, except under five narrowly-specified circumstances. See 42 U.S.C. 9613(h)(1)-(5). None of these circumstances is currently present here; however, the June 2015 EPA letter that prompted Land O'Lakes Complaint sought payment of response costs. The remainder of this brief, therefore, refers to a cost recovery action under Section 107 as the most likely triggering event for judicial review. See 42 U.S.C. 9613(h)(2).

Accordingly, this Court should reject Land O'Lakes' arguments and dismiss the Complaint.

## ARGUMENT

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

Land O'Lakes argues in opposition to the United States' Motion to Dismiss that Section 113(h) of CERCLA does not apply to claims concerning completed cleanup activities and inaccurately asserts that cleanup activities at the Site are complete. Land O'Lakes' Response to Defendant's Motion to Dismiss, 9-11 (ECF 28) (Dec. 18, 2015) ("Response"). Indeed, the cleanup work at the Site is *not* complete because the groundwater cleanup standards have not been met, as admitted by Land O'Lakes in its Complaint. *See* First Amended Complaint ¶ 53 (ECF No. 22) (Sept. 1, 2015) ("Complaint"). Land O'Lakes argues that its claims do not "challenge" a removal or remedial action at the Site but, instead, seek only to enforce a 1987 Consent Decree entered in *United States v. Hudson Refining, Inc., et al.*, Case no. 84-2027-A. This Consent Decree, however, resolved claims *only* under Section 3008(a) and (g) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(a) and (g). It did not address any CERCLA claims at all and Land O'Lakes *was not even a party* to it. *See* Response at 11-15; Complaint ¶ 3; 1987 Final Consent Decree, ECF No. 22-1, at 2; and 1994 Closure Order, ECF 22-2, at 2. Land O'Lakes' argument does not support a finding that the United States has waived sovereign immunity for Land O'Lakes' premature pursuit of a CERCLA liability determination in contravention of CERCLA Section 113(h)'s jurisdictional bar.

Sanctioning Land O'Lakes' claims here would force EPA to engage in piecemeal litigation fending off declaratory judgment actions by PRPs in courts throughout the country, lead to inefficient uses of agency resources, and detract from the Agency's ability to apportion its enforcement resources as it deems most appropriate. *See Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1390 (5<sup>th</sup> Cir. 1989).

For the reasons discussed below, Section 113(h) bars subject matter jurisdiction over Land O'Lakes' claims. Land O'Lakes' arguments ignore the clear specific language of Section 113(h), the definitions of key terms in CERCLA Section 101(25), CERCLA's legislative history, and the relevant cases that have already rejected such arguments.

**A. Section 113(h) of CERCLA Bars Subject Matter Jurisdiction Over Land O'Lakes' Claims.**

Land O'Lakes' arguments that Section 113(h) does not apply to claims concerning completed cleanup activities, and that it only seeks to enforce the 1987 RCRA Consent Decree, ignore the specific language and definitions of terms in Sections 101(25) and 113(h) of CERCLA, 42 U.S.C. §§ 9601(25) and 9613(h), CERCLA's legislative history, and pertinent case law. Section 113(h), which was enacted as part of the Superfund Amendments and Reauthorization Act ("SARA") in 1986, "codified earlier case law limitations on 'pre-enforcement' review of remedial and removal actions." *Voluntary Purchasing*, 889 F.2d 1387-88. Section 113(h) provides that this Court does not 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 Section 9606(a) of this title." *Id.* at 1387, n.12. "[T]he terms 'removal' and 'remedial action,'" as used in

Section 113(h), include “enforcement activities related thereto.” 42 U.S.C. § 9601(25). Thus, Section 113(h) bars review of Land O’Lakes challenge to EPA’s enforcement activities until EPA files an action for cost recovery under Section 107 of CERCLA.

EPA’s 2009 UAO and its June 19, 2015, demand letter—the actions that Land O’Lakes challenges—are enforcement activities related to a remedial action. Land O’Lakes’ Complaint asks this Court to review its challenge to EPA’s enforcement activity related to the remedial action before EPA has filed a civil cost recovery action under Section 107. *See* Complaint, ¶¶ 77, 78, and 80. This is just the type of review that Section 113(h) bars. *See* 42 U.S.C. §§ 9601(25) and 9613(h); *Voluntary Purchasing*, 889 F.2d. at 1382 n.4, 1387-91; *B.R. MacKay & Sons v. United States*, 633 F. Supp. 1290, 1292 (D. Utah 1986) (decided prior to SARA).

Land O’Lakes argues that 113(h) does not bar challenges to CERCLA enforcement activities concerning completed cleanup actions even while admitting in its Complaint that the cleanup at the Site is not complete. *See* Complaint ¶ 53. But, Land O’Lakes does not address Section 101(25) of CERCLA, which specifically provides that the terms “removal” and “remedial” action includes “enforcement activities related thereto.” *See* Response, ECF No. 28. To support this argument, Land O’Lakes relies on *Raytheon Aircraft Co. v. United States*, an unpublished opinion from the District of Kansas. No. 05-2328, 2007 WL 1299184 (D. Kan. May 3, 2007). But, *Raytheon* was wrongly decided because the court did not cite Section 101(25) or discuss how this Section defines the terms “removal” and “remedial” action under CERCLA to include related enforcement activities. Further, *Raytheon*’s claims in that case were remarkably

different from Land O'Lakes claims here. Unlike in *Raytheon*, the cleanup at the Site is not complete. See Complaint ¶ 53. And, Raytheon was not seeking a declaration of non-liability like Land O'Lakes. Rather, Raytheon was challenging the constitutionality of EPA's CERCLA administrative order. Thus, the United States respectfully submits that this court should not follow the unpublished *Raytheon* decision because it is wrongly decided and inapposite in the instant context.

Land O'Lakes also relies on several other cases that do not address the impact of the definition in Section 101(25) on Section 113(h) and are otherwise distinguishable. See *United States v. State of Colorado*, 990 F.2d 1565 (10th Cir. 1993); *Aztec Minerals Corp. v. EPA*, No. 98-1380, 1999 WL 969270 (10th Cir. Oct. 25, 1999).<sup>2</sup> The *Colorado*

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<sup>2</sup> Land O'Lakes also cited two other cases that addressed factual situations that were very different from this case. Response, at 11-12, citing *Coffey v. Freeport-McMoran Copper & Gold, Inc.*, 623 F. Supp. 2d 1257, 1272-73 (W.D. Okla.), *aff'd* 581 F.3d 1240 (10th Cir. 2009); and *State of New Mexico v. General Elec. Co.*, 467 F. 3d 1223, 1249-50 (10th Cir. 2006). In *Coffey*, the court held that "a cleanup initiated solely under State authority, even if agreed to be conducted consistent with 'CERCLA standards' and with the threat of EPA enforcement lurking in the background, does not constitute a 'CERCLA cleanup;'" thus, the court lacked jurisdiction over plaintiffs' challenge to that cleanup. *Id.* The Court merely commented in dicta that *if* the challenge had been to a cleanup conducted under CERCLA, the existence of jurisdiction would depend on further determination under Section 113(h) of whether the cleanup was ongoing. *Id.* at 1273-74.

In *New Mexico*, the State of New Mexico brought an action for damages against two PRPs on grounds that the cleanup of groundwater they were performing in Albuquerque's South Valley, which was EPA's selected CERCLA remedy for the South Valley, was inadequate. The Tenth Circuit dismissed the State's claim concerning the inadequacy of the EPA's selected remedy for lack jurisdiction under Section 113(h). 467 F.3d 1250. The State, which was not a PRP, brought its claim while the remedial actions were being performed. Thus, the Court had no occasion to consider the application of Section 113(h) in a situation where a cleanup allegedly has been completed but an EPA cost recovery action under Section 107 has not yet been brought. *Id.*

case involved facts and claims that are very different from those in the instant case. *Colorado* did not involve a *private party* seeking to avoid CERCLA liability. Rather, it involved a dispute between the United States and the State of Colorado over the Army's cleanup of a federal CERCLA facility in Colorado.<sup>3</sup> Colorado sought to impose more stringent cleanup requirements than proposed by the Army. *Colorado*, 990 F.2d at 1569-74. Although the Court held that Colorado's compliance order under its EPA-delegated hazardous waste program was not a "challenge" to the Army's CERCLA response action, the fact that the remedial action was ongoing was completely irrelevant to the court's determination that subject matter jurisdiction was not barred by Section 113(h). *Id.* at 1575-79.

Land O'Lakes' reliance on *Aztec Minerals* is similarly misplaced. In *Aztec Minerals*, the plaintiffs, who owned a Site that had been contaminated by a bankrupt mining company, sued EPA challenging a CERCLA administrative order EPA issued to obtain access to the site during the cleanup activities. *Id.* at \* 1. That case did not involve a private party's attempt to avoid liability and did not consider whether Section 113(h) barred pre-enforcement review of a person's CERCLA liability in such circumstances. *Id.* at \*\*1-2.

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<sup>3</sup> The court determined that the site, as a federal facility, was subject to regulation under RCRA and Colorado's EPA-authorized state RCRA program. The court stated that the district court, by holding that Section 113(h) barred Colorado from enforcing its hazardous waste program, effectively modified the Army's obligations and liabilities under the state RCRA program contrary to CERCLA's savings provision, 42 U.S.C. § 9652(d), and preempted Colorado from imposing additional requirements with respect to the release of hazardous substances contrary to Section 9614(a) of CERCLA, 42 U.S.C. § 9614(a) (relationship to other laws). *Colorado*, 990 F.2d at 1575-76.

**B. This Court's 1987 Consent Decree and 1994 Closure Order in the *United States v. Hudson Refining* RCRA Case Do Not Provide a Basis for Subject Matter Jurisdiction in This CERCLA Case.**

To circumvent the specific limitations under CERCLA Section 113(h) that bar pre-enforcement review of its challenge to EPA's enforcement actions, Land O'Lakes devotes a significant portion of its brief to arguing the unexceptional proposition that a court retains jurisdiction to enforce its own orders. In so doing, Land O'Lakes asks this Court to use the non-liability provisions of the 1987 Consent Decree and the 1994 Closure Order entered by this Court in *United States v. Hudson Refining* under Section 3008(a) and (g) of RCRA, to declare that Land O'Lakes is not liable under CERCLA in this case. *See* Complaint ¶¶ 3, 41-55, 76-96; 1987 Final Consent Decree, ECF No. 22-1, at 2; ECF 22-2, at 2; Response, at 11-14. Land O'Lakes argues that the terms of these RCRA orders indicate that this Court has retained jurisdiction over them, and that the United States has waived sovereign immunity concerning the orders. Response, at 11-14, 16-20.

But, Land O'Lakes glosses over the fact that these RCRA orders—which do not reference CERCLA and to which Land O'Lakes was not a party—do not provide an exception to the jurisdictional bar in Section 113(h). Section 113(h) contains a “blunt withdrawal” of the jurisdiction of federal courts that applies once the United States has begun its removal action. *See Cannon v. Gates*, 538 F.3d 1328, 1335 (10th Cir. 2008) *citing APWU v. Potter*, 343 F.3d 619, 624 (2d Cir. 2003). Section 113(h) provides five specific exceptions to this withdrawal of jurisdiction, none of which authorize pre-enforcement review of CERCLA liability based on orders entered under section 3008 of

RCRA. *See* 42 U.S.C. § 9613(h)(1)-(5). Thus, Section 113(h) bars subject matter jurisdiction over Land O'Lakes' claims unless and until EPA files a cost recovery claim under Section 107 of CERCLA. At that time, Land O'Lakes could pursue these claims as defenses to liability under CERCLA. *See B.R. MacKay & Sons*, 633 F. Supp. at 1297.

**C. The United States Has Not Waived Sovereign Immunity Concerning Land O'Lakes' Claims Under the APA or RCRA.**

**1. APA Section 702's Waiver of Sovereign Immunity Is Inapplicable.**

Land O'Lakes argues that the United States has waived sovereign immunity under Section 702 of the Administrative Procedure Act ("APA") concerning its claims to the extent they seek only declaratory or non-monetary relief. Response, 20-23. Land O'Lakes ignores the fact that Section 702 itself provides that "[n]othing herein ... confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. As the Supreme Court explained in *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, this exception "prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes." 132 S. Ct. 2199, 2204-05 (2012).

When it enacted the APA's waiver of immunity and included this "important carve-out," *id.* at 2204, Congress made clear that Section 702 was "not intended to permit suit in circumstances where statutes forbid or limit the relief sought," that is, where "Congress has consented to suit and the remedy provided is intended to be the exclusive remedy." H.R. Rep. No. 94-1656, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6133. "[W]hen Congress has dealt in particularity with a claim and [has] intended a



specified remedy' – including its exceptions – to be exclusive, that is the end of the matter; the APA does not undo the judgment." 132 S. Ct. at 2205 (*quoting Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286, n.22 (1983)).

In *Voluntary Purchasing*, the Fifth Circuit rejected Land O'Lakes' APA argument in the context of claims barred by Section 113(h) of CERCLA. 889 F.2d at 1390-91. In holding that Plaintiff could not rely on the APA as the basis for jurisdiction in light of Section 113(h)'s ban on jurisdiction, the court reasoned that "sanctioning VPG's declaratory judgment actions could lead to inefficient uses of EPA resources and would certainly detract from the EPA's ability to apportion its enforcement resources as it deems most appropriate. These results would be incompatible with the design of CERCLA and the discretion granted to the EPA in carrying out the statute." *Id.* (footnotes omitted).

Thus, Land O'Lakes' APA argument should be rejected.

**2. RCRA's Citizen Suits Provision Does Not Grant Jurisdiction over Land O'Lakes' Claims.**

Land O'Lakes argues that the United States waived sovereign immunity under Section of 7002(a) of RCRA, the RCRA Citizen Suits provision, 42 U.S.C. § 6972(a). As a result, Land O'Lakes argues, this Court has subject matter jurisdiction over its claims. Land O'Lakes' argument ignores the fact that 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). Thus, this Court likewise should reject Land O’Lakes RCRA Citizen Suit argument.

### 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

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**CERTIFICATE OF SERVICE**

I hereby certify that true and accurate copies of the foregoing Reply in Support of Defendant's Motion to Dismiss were served by electronic filing through PACER upon all counsel of record on January 21, 2016.

/s/ John E. Sullivan  
John E. Sullivan