UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
AT KANSAS CITY

RAYTHEON AIRCRAFT COMPANY, Plaintiff, - against - UNITED STATES OF AMERICA, Defendant.	Case No. 05-2328 JWL

BRIEF OF AMICI CURIAE WASHINGTON LEGAL FOUNDATION AND KANSAS GRAIN AND FEED ASSOCIATION IN OPPOSITION TO DEFENDANT'S MOTION FOR DISMISSAL OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON COUNT V

Laurence H. Tribe
420 Hauser Hall
1575 Massachusetts Ave.
Cambridge, MA 02138
Tel. (617) 495-4621

Jonathan S. Massey
Jonathan S. Massey, P.C.
7504 Oldchester Rd.
Bethesda, MD 20817
Tel. (301) 915-0090

M. Courtney Koger
Kutak Rock LLP
1010 Grand Blvd., Suite 500
Kansas City, MO 64106
Telephone: (816) 960-0090
Facsimile: (816) 960-0041

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, D.C. 20036
Tel. (202) 588-0302

Attorneys for Washington Legal Foundation and Kansas Grain and Feed Association

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1
ARGUMENT 2
I. GOVERNMENTAL SELF-DEALING IS A VIOLATION OF DUE PROCESS 3
II. THE ISSUANCE OF A UAO EFFECTS A DEPRIVATION OF PROPERTY 5
A. UAO IS A BINDING LEGAL ORDER 6
B. THE COERCIVE EFFECT OF A UAO'S ASTRONOMICAL PENALTIES MEANS THAT A PRP HAS NO CHOICE BUT TO COMPLY 7
C. THE SCHEME IMPOSES AN IMPERMISSIBLE PENALTY ON THE EXERCISE OF A PROTECTED RIGHT 11
1. The Right of Access To Courts Is A Fundamental Right 12
2. CERCLA Imposes An Impermissible Penalty On This Right 13
D. THE VERY ISSUANCE OF A UAO VIOLATES A PRP'S LIBERTY 16
III. THE "SUFFICIENT CAUSE" DEFENSE IS CONSTITUTIONALLY INADEQUATE 18
A. THE STAKES ARE TOO HIGH 18
B. THE "SUFFICIENT CAUSE" DEFENSE IS POORLY DEFINED 20
C. THE "SUFFICIENT CAUSE" DEFENSE FAILS TO PROVIDE A CONSTITUTIONALLY ADEQUATE HEARING 21
IV. REIMBURSEMENT OF COSTS DOES NOT CURE THE CONSTITUTIONAL VIOLATION 23
V. THE LOSS OF CONTRIBUTION RIGHTS ALSO VIOLATES DUE PROCESS 24
CONCLUSION 26

TABLE OF AUTHORITIES

Federal Cases

A.W. v. Jersey City Public Schools,
341 F.3d 234 (3d Cir. 2003) 14

Aminoil v. United States,
646 F. Supp. 294 (C.D. Cal 1986) 20

Arkansas Power & Light Co. v. Federal Power Commission,
156 F.2d 821 (D.C. Cir. 1946) 21

Armstrong v. United States,
364 U.S. 40 (1960) 3

Arnett v. Kennedy,
416 U.S. 134 (1974) 7

Atlantic Research Corp. v. United States,
459 F.3d 827 (8th Cir. 2006) 4

Baggett v. Bullitt,
377 U.S. 360 (1964) 14

Baird v. State Bar of Arizona,
401 U.S. 1 (1971) 14

BE&K Constr. Co. v. NLRB,
536 U.S. 516 (2002) 11

Boddie v. Connecticut,
401 U.S. 371 (1971) 12

Brown & Williamson Tobacco Co. v. Engman,
527 F.2d 1115 (2d Cir. 1975) 10

Burns v. Ohio,
360 U.S. 252 (1959) 12

Castano v. Am. Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 19

Chicago & N.W. Ry. v. Nye-Schneider-Fowler Co.,
260 U.S. 35 (1922) 13

Christopher v. Harbury,
536 U.S. 403 (2002) 12

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985) 25

Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust,
508 U.S. 602 (1993) 23

Connecticut v. Doehr,
501 U.S. 1 (1991) 6, 7

Conset Corp. v. Community Services Administration,
655 F.2d 1291 (D.C. Cir. 1981) 17

Contreras-Aragon v. INS,
852 F.2d 1088 (9th Cir. 1988) (en banc) 15

Cooper Industries, Inc. v. Aviall Services, Inc.,
543 U.S. 157 (2004) 4

Dixon v. Alabama Bd. of Educ.,
294 F.2d 150 (5th Cir. 1961) 15

Doe v. United States Department of Justice,
753 F.2d 1092 (D.C. Cir. 1985) 17

Dunn v. Blumstein,
405 U.S. 330 (1972) 16

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 1

Edwards v. California,
314 U.S. 160 (1941) 18

Employers Ins. of Wausau v. Browner,
52 F.3d 656 (7th Cir. 1995) 6, 18

Energy Reserves Group, Inc. v. Kansas Power & Light Co.,
459 U.S. 400 (1983) 3

Ex parte Young,
209 U.S. 123 (1908) 9

Frost & Frost Trucking Co. v. Railroad Comm'n,
271 U.S. 583 (1926) 9

Fuentes v. Shevin,
407 U.S. 67 (1972) 10, 24

Greene v. Lindsey,
456 U.S. 444 (1982) 10

Hill v. Kemp,
478 F.3d 1236 (10th Cir. 2007) 14

Hodel v. Va. Surface Mining & Reclamation Ass'n,
452 U.S. 264 (1981) 11

IMCO, Inc. v. United States,
97 F.3d 1422 (Fed. Cir. 1996) 17

Keyishian v. Board of Regents,
385 U.S. 589 (1967).. 14

Konigsberg v. State Bar,
353 U.S. 252 (1957).. 14

Leslie v. Lacy,
91 F. Supp. 2d 1182 (S.D. Ohio 2000) 7

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982).. 25

Louisiana Pacific Corp. v. Beazer Materials Servs., Inc.,
842 F. Supp. 1243 (E.D. Cal. 1994) 15

M.L.B. v. S.L.J.,
519 U.S. 102 (1996).. 12

Massachusetts v. EPA,
127 S. Ct. 1438 (2007)... 1

Matter of Rhone-Poulenc Rorer Inc.,
51 F.3d 1293 (7th Cir.), cert. denied, 516 U.S. 867 (1995).............................. 19

Memorial Hospital v. Maricopa County,
415 U.S. 259 (1974).. 16

Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.,
501 U.S. 252 (1991).. 7

Missouri Pac. Ry. Co. v. Tucker,
230 U.S. 340 (1913).. 10

Mitchell v. W.T. Grant Co.,
416 U.S. 600 (1974).. 8

Morales v. TWA,
504 U.S. 374 (1992).. 9

Mosrie v. Barry,
718 F.2d 1151 (D.C. Cir. 1983)... 17

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987).. 14

North Carolina v. Pearce,
395 U.S. 711 (1969).. 15

Oklahoma Operating Co. v. Love,
252 U.S. 331 (1920).. 10

Old Dominion Dairy v. Secretary of Defense,
631 F.2d 953 (D.C. Cir. 1980).. 16, 17

Pactiv Corp. v. Chester,
455 F. Supp. 2d 680 (E.D. Mich. 2006)... 11

Parker v. Time Warner,
331 F.3d 13 (2d Cir. 2003) 19, 20

Perry v. United States,
294 U.S. 330 (1935)... 3

Philip Morris Inc. v. Reilly,
113 F. Supp. 2d 129 (D. Mass. 2000) 23

Pickering v. Board of Education,
391 U.S. 563 (1968)... 14

Planned Parenthood of Central New Jersey v. Farmer,
220 F.3d 127 (3d Cir. 2000) 21

R.S.W.W., Inc. v. City of Keego Harbor,
397 F.3d 427 (6th Cir. 2005) 14

Reardon v. United States,
947 F.2d 1509 (1st Cir. 1991) (en banc)... 6, 8

Schware v. Board of Bar Examiners,
353 U.S. 232 (1957)... 14

Shapiro v. Thompson,
394 U.S. 618 (1969)... 16

Sherbert v. Verner,
374 U.S. 398 (1963)... 14

Short v. United States,
344 F.2d 550 (D.C. Cir. 1965).. 15

Smith v. Bennett,
365 U.S. 708 (1961)... 12

Sniadach v. Family Finance Corp. of Bay View,
395 U.S. 337 (1969)... 10

Solid State Circuits, Inc. v. EPA,
812 F.2d 383 (8th Cir. 1987) 21

Speiser v. Randall,
357 U.S. 513 (1958)... 13

Sun Company v. Browning-Ferris, Inc.,
124 F.3d 1187 (10th Cir. 1997) 5

Tennessee v. Lane, 541 U.S. 509 (2004)... 12

Transco Sec., Inc. v. Freeman,
639 F.2d 318 (6th Cir. 1981) 17

United States ex rel. Elksnis v. Gilligan,
256 F.Supp. 244 (S.D.N.Y. 1966) 15

United States Trust Co. of N.Y. v. New Jersey,
431 U.S. 1 (1977) 3

United States v. Atlantic Research Corp.,
127 S.Ct. 2331 (2007) 4, 24

United States v. Carolina Transformer Co.,
978 F.2d 832 (4th Cir. 1992) 8

United States v. Philip Morris Inc.,
314 F.3d 612 (D.C. Cir. 2003) 19

United States v. Pizarro,
717 F.2d 336 (7th Cir. 1983) 14

United States v. Winstar Corp.,
518 U.S. 839 (1996) 3

Wadley So. Ry. Co. v. Georgia,
235 U.S. 651 (1915) 10

Wagner Electric v. Thomas,
612 F. Supp. 736 (D. Kan. 1985) 22

Whitman v. Am. Trucking Assn., Inc.,
531 U.S. 457 (2001) 1

Worcester v. Commissioner,
370 F.2d 713 (1st Cir. 1966) 15

Zotos Int'l, Inc. v. Kennedy,
460 F. Supp. 268 (D.D.C. 1978) 23

Federal Regulations

40 C.F.R. § 300.810(b) 22

Federal Statutes

42 U.S.C. § 9606(b)(2) 24

42 U.S.C. § 9607(c)(3) 8

42 U.S.C. § 9613 5

42 U.S.C. §§9613(k)(1), (k)(2)(B) 22

42 U.S.C. §9607 4

Other Sources

EPA, *Guidance Memorandum on Use and Issuance of Administrative Orders Under Section 106(a) of CERCLA* (OSWER Dir. No. 9833-0, Sept. 8, 1983), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/useiss-sec106-mem.pdf (Last visited June 28, 2007) 9

EPA, *Final Guidance on Administrative Records for Selecting CERCLA Response Actions* (OSWER Dir. No. 9833.3A-1, Dec. 3, 1990), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/adrec-cerra-rpt.pdf (Last visited June 28, 2007) 22

EPA and DOJ, *Use of CERCLA 106 to Address Endangerments That May Also Be Addressed Under Other Environmental Statutes* (Jan. 18, 2001), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/ise-crossmedia.pdf (Last visited June 28, 2007) 8, 22

BARRY M. HARTMAN, JOHN P. KRILL, JR., AND JASON E. OYLER, *EPA Enforcement Orders Found Lacking In Due Process Protections* (WLF Legal Backgrounder, July 25, 2003) 1

WALTER E. MUGDAN, *The Use of CERCLA Section 106 Administrative Orders to Secure Remedial Action*, C948 ALI-ABA 113, 116 (1994) 20

BRIEF AMICI CURIAE OF WASHINGTON LEGAL FOUNDATION AND KANSAS FEED AND GRAIN ASSOCIATION

This brief amici curiae is submitted by the Washington Legal Foundation ("WLF") and the Kansas Grain and Feed Association ("KGFA") in opposition to Defendant's May 29, 2007 Motion For Dismissal Or, In The Alternative, For Summary Judgment On Count V.[1]

STATEMENT OF INTEREST

WLF is a non-profit, public-interest law and policy center based in Washington, D.C., with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending free enterprise principles, individual rights, and a limited and accountable government. WLF regularly appears as amicus curiae in the U.S. Supreme Court and lower federal courts advocating these principles. In particular, WLF has filed amicus curiae briefs in environmental cases raising statutory and constitutional issues. *See, e.g., Massachusetts v. EPA*, 127 S. Ct. 1438 (2007); *Whitman v. Am. Trucking Assn., Inc.*, 531 U.S. 457 (2001); *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). In addition, WLF's Legal Studies Division publishes and distributes policy papers addressing these issues. *See, e.g.*, BARRY M. HARTMAN, JOHN P. KRILL, JR., AND JASON E. OYLER, *EPA Enforcement Orders Found Lacking In Due Process Protections* (WLF Legal Backgrounder, July 25, 2003).

KGFA is a voluntary trade association that represents the grain facilities in the state of Kansas. Some members of KGFA own or operate facilities that historically have stored and handled grain that belonged to the United States Department of Agriculture (USDA). In the course of business, KGFA members used carbon tetrachloride as a grain fumigant until it was no longer legal to do so. However, when the EPA and the State of Kansas discovered water quality

[1] WLF and KGFA adopt the Questions Presented, Statement Of The Matter Before The Court and Statement of Facts of plaintiff Raytheon Aircraft Company.

contamination due to the presence of carbon tetrachloride, the Environmental Protection Agency (EPA) sought remediation only from the grain companies and not the USDA. A decision favorable to Raytheon in this case will benefit those KGFA members who may be subject to Unilateral Administrative Orders of the kind involved in this case.

Amici submit this brief because this case raises important due process questions of wide interest to potentially responsible parties ("PRPs") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") across the United States. Indeed, the principles advanced in the Government's motion for dismissal have broad implications even outside the CERCLA context. The crux of the Government's position is that it should be able to force a private party to bear the costs attributable to the Government's own conduct, without affording that party a procedurally adequate opportunity to be heard. The Government's position, if accepted, would turn due process on its head.

ARGUMENT

The Government has raised two principal issues in its motion: (1) whether the mere issuance of a unilateral administrative order ("UAO") triggers a deprivation of property when the order is not "self-executing" and when the PRP (Raytheon) theoretically (a) could have defied the order and pleaded a "sufficient cause" defense against an enforcement action by EPA or (b) could seek reimbursement of its costs, and (2) whether Raytheon's potential loss of the right of contribution due to its compliance with the UAO amounts to a deprivation of "property."

At a deeper level, however, there is only one issue raised by this case: the fundamental unfairness inherent in an attempt by the United States to exploit its unique governmental powers to saddle a private party (Raytheon) with clean-up costs attributable to the Government's activities at the Herington Army Airfield ("the Site") -- and then to deny Raytheon any procedurally adequate forum to raise its claims. The Government has used the UAO to force

Raytheon to clean up the Site, without a constitutionally adequate hearing prior to the deprivation of Raytheon's property, while consistently opposing Raytheon's right to seek contribution from the United States. Therefore, before analyzing the specific legal issues raised by the Government, WLF and KGFA will first address the constitutional question raised by the Government's attempt to use its coercive power to force a private party to clean up the Government's own contamination and then attempt to insulate itself from any action by the private party to obtain a constitutionally adequate hearing on the issues.

I. Governmental Self-Dealing Is A Violation of Due Process.

In a wide range of contexts, the Supreme Court has long expressed constitutional "concern with governmental self-interest by recognizing that 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate [when] the State's self-interest is at stake.'" *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996) (quoting *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977). In *Winstar*, the Court spoke of the "taint" of "a governmental object of self-relief," where the Government "seeks to shift the costs of meeting its legitimate public responsibilities to private parties." *Id.*; *see also Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412-13 & n.14 (1983) (holding that a stricter level of scrutiny applies under the Contract Clause when a State alters its own contractual obligations); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (under the Takings Clause, the Government may not "forc[e] some people alone to bear public burdens which ... should be borne by the public as a whole"); *Perry v. United States*, 294 U.S. 330, 350-51 (1935) (drawing a "clear distinction" between Congress's power over private contracts and "the power of the Congress to alter or repudiate the substance of its own engagements").

Notably, this concern played an important part in the Supreme Court's

recent CERCLA decision in *United States v. Atlantic Research Corp.*, 127 S.Ct. 2331 (2007), which rejected a governmental "squeeze play" just like the gambit attempted by EPA in the instant case. *Atlantic Research* held that CERCLA § 107, 42 U.S.C. §9607, provides a PRP with a cause of action to recover, from other PRPs, costs incurred in voluntarily cleaning up contaminated sites. Like this case, *Atlantic Research* involved a site contaminated by military operations, and the Government itself faced significant liability as a PRP.[2] The Eighth Circuit warned that, without a cost recovery action, a private party undertaking a cleanup where the government is a co-PRP might face "an absurd and unjust outcome" when the Government issued a UAO: "the government could insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action." *Atlantic Research Corp. v. United States*, 459 F.3d 827, 837 (8th Cir. 2006).

The Supreme Court affirmed, recognizing that such a situation would not only be unconscionable and inequitable, but also would fly in the face of Congress' intent that the parties share cleanup costs in proportion to their responsibility. The Court explained that "[t]he Government's reading of the text logically precludes all PRPs, innocent or not, from recovering cleanup costs. Accordingly, accepting the Government's interpretation would reduce the number of potential plaintiffs to almost zero, rendering CERCLA § 107(a)(4)(B) a dead letter." 127 S.Ct. at 2336-37.

The Tenth Circuit has also been sensitive to the need to avoid governmental self-dealing in the CERCLA context. Prior to *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 161 (2004), the Tenth Circuit held that EPA unilateral administrative orders were sufficiently

---

[2] Unlike this case, which involves a UAO, the PRP in *Atlantic Research* performed the cleanup voluntarily. The need for contribution is even greater here because Raytheon has been forced to clean up contamination for which it was not responsible.

coercive to trigger a right of contribution, framed under CERCLA § 113, 42 U.S.C. § 9613, rather than as a cost recovery action pursuant to CERCLA § 107. *See Sun Company v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997). After *Atlantic Research*, CERCLA § 107 cost recovery actions are available to address some of the concerns expressed by the Tenth Circuit in *Sun Company* – although the Government will likely oppose Raytheon's ability to bring a cost recovery action in the instant case.

The overall lesson of these decisions is that Government self-dealing raises constitutional red flags and triggers heightened judicial scrutiny. In this case, the Government's obvious self-interest in saddling Raytheon with excessive liability should raise a strong presumption against the Government's litigation position that Raytheon is not entitled to a fair hearing in which to raise its legal claims.

II. The Issuance Of A UAO Effects A Deprivation of Property.

The Government contends that the issuance of the UAO has not deprived Raytheon of any interest protectable under the Due Process Clause of the Fifth Amendment. But that argument is simply untenable in light of the particular circumstances of this case. The UAO has already deprived Raytheon of approximately $2.5 million, because Raytheon has been forced to expend that sum in order to comply with the order. The deprivation of property in this case is thus straightforward and serves to distinguish this case from all the precedents cited by the Government in its brief.

Even apart from the special circumstances of this case, by its mere pendency, a UAO deprives a PRP of protectable property and liberty interests. The very issuance of a UAO triggers the constitutional right for due process safeguards, for at least four different reasons.

A. UAO Is A Binding Legal Order.

A UAO is a legal order of the government that, on its face, directs a recipient to comply. As the Seventh Circuit has opined, "[t]he statute requires compliance with the clean-up order." *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 664 (7th Cir. 1995). Prior to the issuance of a UAO, a PRP has no legal obligation to clean up a site. On its effective date, a UAO immediately imposes binding obligations and directs the recipient to undertake specific response actions. The fines and penalties to which a PRP becomes subject once a UAO becomes effective *are* self-executing, because they begin to accrue on the order's effective date.

The very pendency of a UAO also has a "here-and-now" effect upon a recipient's financial condition and commitment of resources. For example, a PRP must expend funds and staff resources to address the UAO, whether or not the PRP ultimately decides to comply. Moreover, the UAO is an outstanding potential liability that can have a negative impact on a PRP's stock and bond prices, its credit rating, its ability to sell or buy corporate assets, and the terms on which it is able to borrow money. Hence, the legal burden of the mere pendency of the UAO effects a deprivation of protectable interests in a manner similar to CERCLA's lien provision found unconstitutional in *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (en banc). There, the First Circuit (including then-Chief Judge Breyer) held that a hearing is required before EPA can record a CERCLA lien, even when the lien does not deprive the owner of use or possession of the land. *Id.* at 1518. The court opined that a lien effected a deprivation of property because it potentially "cloud[ed] title, limit[ed] alienability, [and] affect[ed] current and potential mortgages." *Id.*

Similarly, in *Connecticut v. Doehr*, 501 U.S. 1 (1991), the Supreme Court held that a state attachment order violated due process even though it did not deprive plaintiffs of possession or interfere with their physical enjoyment of the property in question. The Court noted that an

attachment "ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." *Id.* at 11. *See also Leslie v. Lacy*, 91 F. Supp. 2d 1182, 1191 (S.D. Ohio 2000) (holding unconstitutional, as a violation of procedural due process, a state statute permitting lienholders to obtain certificates of title for mobile homes after repossessing them, without pre-deprivation notice or a hearing, because "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection") (internal quotation marks and citation omitted).

These effects are very similar to the financial impact of a UAO upon issuance. As the Supreme Court has commented, "the value of a sword of Damocles is that it hangs – not that it drops." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting). The Court has therefore held that the "'here-and-now subservience'" created by such a hanging sword is "sufficient to raise constitutional questions." *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265 n. 13 (1991).

B. The Coercive Effect of A UAO's Astronomical Penalties Means That A PRP Has No Choice But To Comply.

The CERCLA UAO scheme is the essence of "verdict first, trial afterwards." A UAO imposes a Hobson's choice on a PRP: (1) carry out the terms of the order and suffer an immediate (and undeniable) deprivation of property and liberty, or (2) defy the UAO and face penalties of $32,500 per day, plus treble damages. The statute permits EPA to let the fines

accumulate to astronomical levels by letting the clock tick before filing an enforcement action. A year's worth of daily civil penalties for non-compliance alone will total nearly $12 million.[3]

Alternatively, EPA can respond to the defiance of its UAO by opting to conduct the work itself. At the end of the cleanup (potentially years in the future), EPA may then file a cost recovery action, in which it can also seek punitive damages up to three times its costs resulting from a PRP's failure to comply with the UAO. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3). The treble damages provision has been held (by some courts) to authorize total liability of up to *four times* EPA's costs, *in addition to* daily fines (currently at $32,500/day) for the entire period of non-compliance. *See, e.g., United States v. Carolina Transformer Co.*, 978 F.2d 832, 841 (4th Cir. 1992).

In practice, the prospect of such astronomical penalties prevents any responsible PRP from deliberately defying the Government. Certainly, in this case Raytheon had no choice but to comply. Through this fundamentally unfair "squeeze play," a UAO compels the PRP to undergo a substantial deprivation of property without any constitutionally adequate hearing.

EPA is well aware of these coercive effects. The agency has described UAOs as a "unique" weapon for the agency. EPA and DOJ, *Use of CERCLA 106 to Address Endangerments That May Also Be Addressed Under Other Environmental Statutes* at 7 (Jan. 18, 2001), available at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/ise-crossmedia.pdf (Last visited June 28, 2007). "The significant penalties for failure to comply

---

[3] EPA's unfettered discretion over the timing of an enforcement action to collect such staggering penalties is constitutionally indefensible. It violates due process to place UAO recipients "in limbo to await a hearing that might or might not eventually occur." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 618 (1974) (quotation marks omitted). *See Reardon*, 947 F.2d at 1519-20 (post-deprivation review inadequate where "the government may take its own sweet time before suing" and EPA can "throw[] the 'ultimate judicial determination' so far into the future as to render it inadequate").

with a CERCLA order make Section 106 a particularly effective enforcement tool, especially when compared to the penalties for noncompliance available under other [environmental] statutes." *Id.* at 9-10. EPA recognizes that its authority to issue UAOs "is one of the most potent administrative remedies available under any existing environmental statute." EPA, *Guidance Memorandum on Use and Issuance of Administrative Orders Under Section 106(a) of CERCLA* at 2 (OSWER Dir. No. 9833-0, Sept. 8, 1983), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/useiss-sec106-mem.pdf (Last visited June 28, 2007).

The Supreme Court has held that the coercive effect of governmental orders can work a deprivation of property – even if the orders purport not to be self-executing. In *Ex parte Young*, 209 U.S. 123, 148 (1908), for example, the Court held that a state statutory scheme prohibiting railroads from charging excessive rates effected a deprivation of property, even though the scheme operated through administrative orders that were not self-executing. The orders were enforced in a subsequent judicial contempt proceeding if the railroad failed to comply. Nevertheless, the Court held that the prospect of substantial penalties effected a deprivation of property for purposes of due process.

The courts have recognized the coercive effect of governmental orders in a wide range of contexts. In *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593 (1926), for example, the Court struck down a state law conditioning use of the public highways on a private carrier's agreement to abide by certain terms and conditions of doing business: "In reality, the carrier is given no choice, except a choice between the rock and the whirlpool -- an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." In *Morales v. TWA*, 504 U.S. 374, 381 (1992), the Court

opined that, when party is faced with "a Hobson's choice" because of significant penalties, "there is no adequate remedy at law." In *Wadley So. Ry. Co. v. Georgia*, 235 U.S. 651, 661 (1915), the Court found that the right to judicial review is "merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." In *Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 350 (1913), the Court held that a $500 penalty for violation of oil shipment rates precludes judicial review and violates due process. *See also Brown & Williamson Tobacco Co. v. Engman*, 527 F.2d 1115, 1119 (2d Cir. 1975) ("one has a due process right to contest the validity of a legislative or administrative order affecting his affairs without necessarily having to face ruinous penalties if the suit is lost").

Hence, whether an order purports to be "self-executing" is not dispositive of the constitutional analysis. In *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 336 (1920), the Court struck down the orders of a state corporation commission freezing the prices a laundry could charge, even though a defendant could defy the rate order and seek review through a plenary judicial proceeding. In *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), the Court held unconstitutional a state replevin statute that was not self-executing but that simply authorized the seizure of property, which did not actually occur until the plaintiff took the order to a sheriff. *See also Greene v. Lindsey*, 456 U.S. 444 (1982) (eviction orders violated due process rights of public housing tenants; the orders themselves constituted the deprivation, even though they had to be carried out by public housing officers); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 338-39 (1969) (Wisconsin garnishment procedure unconstitutional even though order itself simply "set[] in motion" a procedure that ultimately froze wages).

In *Pactiv Corp. v. Chester*, 455 F. Supp. 2d 680 (E.D. Mich. 2006), the district court used similar reasoning to hold that a state environmental cleanup order triggered the right to due process protections. The court explained that the recipient "has been ordered to plan [to undertake response actions]," "it has received notice of its liability for civil penalties, and the liability is growing by the day." *Id.* at 686. "[T]he agency has ordered Plaintiff to do something, and the amount of fines to which it may be subject is controlled by the agency, because Plaintiff is not statutorily entitled to any hearing until the government decides to sue it." *Id.* The court found that the issuance of demand letters by Defendants implicated constitutionally cognizable property interests under *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-300 (1981), which involved a summary administrative order requiring a mine operator to cease operations. *See* 455 F. Supp. 2d at 688 ("I cannot say at this time [that Pactiv] could prove no facts that would allow it to show an interest under the *Hodel* standard.").

C. The Scheme Imposes An Impermissible Penalty On The Exercise of A Protected Right.

The CERCLA scheme is unconstitutional for another reason: it imposes substantial penalties on PRPs who seek to assert their rights in court. The ability to petition the judiciary for the redress of grievances is one of "the most precious of the liberties safeguarded by the Bill of Rights." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 526 (2002). But the issuance of a UAO impermissibly burdens a PRP's choice to assert its constitutional right to a judicial review. The price of a PRP's saying "no" to EPA is the risk of substantial penalties, which rapidly accumulate to highly coercive levels while the agency decides whether to bring an enforcement action. The price imposed by the UAO, therefore, represents an unlawful burden on a PRP's rights, in violation of the doctrine of unconstitutional conditions.

1. The Right of Access To Courts Is A Fundamental Right.

In *Tennessee v. Lane*, 541 U.S. 509 (2004), the Supreme Court opined that "the right of access to the courts" is "protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 523. Although that case involved physical access to a courthouse by disabled individuals, the Supreme Court made clear that the principle extended beyond the context of physical barriers to justice. The Court explained, in broad terms, that due process requires the states to afford civil litigants "a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings." *Id.* (citation omitted); *see also id.* at 531 (relying on "the constitutional right of access to the courts"); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (using right of access to strike down divorce filing fee); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (invalidating record fee in parental rights termination action); *Smith v. Bennett*, 365 U.S. 708 (1961) (striking down filing fee for habeas petitions); *Burns v. Ohio*, 360 U.S. 252 (1959) (voiding filing fee for direct appeal in criminal case).

In *Christopher v. Harbury*, 536 U.S. 403 (2002), the Supreme Court reiterated that "[d]ecisions of this Court have grounded the right of access to courts in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses." *Id.* at 415 n.12. The Court further held that the right of access to court protects a plaintiff against governmental action that "frustrates" a plaintiff's ability to pursue litigation. *See id.* at 413 (citing "systemic official action [that] frustrates a plaintiff or plaintiff class in preparing and filing suits"; "the essence of the access claim is that official action is presently denying an opportunity to litigate").

Similarly, the Supreme Court has held that financial penalties can violate the right of access to the courts. In *Chicago & N.W. Ry. v. Nye-Schneider-Fowler Co.*, 260 U.S. 35, 46-48

(1922), for example, the Court invalidated a state law authorizing state appellate courts to award attorney's fees on appeals involving loss or damage to freight, if the plaintiffs secured judgment for more than the amount initially tendered by the railroad defendants, as applied to cases in which unjust and excessive claims were reduced on appeal. Even though the ultimate size of the fee was within the control of the state courts, and even though the penalty was not imposed until after the appeal was concluded, the Supreme Court opined that "[p]enalties imposed on one party for the privilege of appeal to the courts, deterring him from vindication of his rights, have been held invalid under the Fourteenth Amendment." *Id.* at 47.

The right of access to courts is therefore a fundamental right.

2. CERCLA Imposes An Impermissible Penalty On This Right.

According to the Government, the recipient of a UAO can assert its right of access to the courts, and secure review of the order, only by defying the UAO and risking ruinous penalties. Such a scheme violates the doctrine of unconstitutional conditions, which forbids the Government from imposing a penalty on the exercise of a protected right. The genesis of this doctrine is *Speiser v. Randall*, 357 U.S. 513, 518 (1958), where the Supreme Court held that California's decision to deny a property tax exemption to veterans who refused to declare that they would not advocate the overthrow of the government constituted an impermissible burden on a protected right. The Court concluded that the denial of the tax exemption, while nominally only a withheld benefit, in fact exerted an impermissibly coercive effect on constitutionally protected freedoms. See 357 U.S. at 519 (noting that "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of *coercing* the claimants to refrain from the proscribed speech") (emphasis added).

The purpose of the unconstitutional conditions doctrine is to take account of the practical realities faced by those dealing with the government. Thus, like the *Ex parte Young* line of

cases, coercion is the touchstone for application of the doctrine, regardless of whether the government action is labeled a "penalty" or a "withheld benefit." *See Hill v. Kemp*, 478 F.3d 1236, 1260 n.30 (10th Cir. 2007) (unconstitutional conditions doctrine aims to prevent government "penalize[ing]" and "coercing") (internal quotation marks and citation omitted); *A.W. v. Jersey City Public Schools*, 341 F.3d 234, 243 (3d Cir. 2003) ("coercion arguments are considered in discussion of unconstitutional conditions"); *United States v. Pizarro*, 717 F.2d 336, 348 (7th Cir. 1983) ("[T]he doctrine of unconstitutional conditions . . . precludes the government from coercing the waiver of a constitutional right either by conditioning the exercise of one fundamental right on the waiver of another, or *by attaching conditions which penalize the exercise of a right protected by the Constitution*.") (emphasis added).

The doctrine has been applied in a wide variety of cases, including welfare benefits,[4] unemployment compensation,[5] public employment,[6] bar admissions,[7] and building permits.[8] The unconstitutional conditions doctrine also applies in the procedural due process context. *See R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 434 (6th Cir. 2005) (the unconstitutional

---

[4] *See Shapiro v. Thompson*, 394 U.S. 618 (1969).

[5] *Sherbert v. Verner*, 374 U.S. 398 (1963) (striking down unemployment compensation law denying benefits to a Seventh Day Adventist who refused to work on Saturdays).

[6] *See, e.g,, Pickering v. Board of Education*, 391 U.S. 563 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

[7] *See, e.g., Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

[8] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (state may not condition building permit on the property owner's grant of a public easement).

conditions doctrine "should equally apply to prohibit the government from conditioning benefits on a citizen's agreement to surrender due process rights").[9]

The potential for staggering fines and damages for defiance of a UAO constitutes an impermissible burden on a PRP's invocation of the right to due process. By way of analogy, in the criminal context, the Supreme Court has made clear that a defendant may not be penalized for invoking the right to the judicial process in the form of an appeal. "[T]he imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal . . . would be . . . a violation of due process of law. . . . A defendant's exercise of a right of appeal must be free and unfettered." *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969).[10]

The penalties imposed on a PRP are impermissible regardless of whether they actually succeed in preventing the party from challenging the order in question. A penalty on the exercise of a protected right is forbidden even if that penalty does not actually change the

---

[9] *See also Contreras-Aragon v. INS*, 852 F.2d 1088, 1095 (9th Cir. 1988) (en banc) ("We would drastically depart from these [due process] principles were we to sanction a policy which effectively forced an alien to choose between exercising an award of voluntary departure and pursuing judicial review."); *Dixon v. Alabama Bd. of Educ.*, 294 F.2d 150, 156 (5th Cir. 1961) ("the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process") (citing Supreme Court cases); *Louisiana Pacific Corp. v. Beazer Materials Servs., Inc.*, 842 F. Supp. 1243, 1252-53 (E.D. Cal. 1994) (EPA's conditioning of CERCLA consent decree on PRP's agreement to daily stipulated penalties for non-compliance and limited fight to judicial review gives rise to due process concerns requiting analysis of government interest).

[10] *See also Worcester v. Commissioner*, 370 F.2d 713, 718 (1st Cir. 1966) ("The court was without fight to bargain thus with the defendant, or to put a price on an appeal" by offering to reduce sentence to probation if defendant would forgo appeal of conviction; "it is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice."); *Short v. United States*, 344 F.2d 550, 552 (D.C. Cir. 1965) ("Punishment could not be increased to penalize a defendant for exercising his right of appeal"); *United States ex rel. Elksnis v. Gilligan*, 256 F.Supp. 244, 254 (S.D.N.Y. 1966) ("A defendant needs no reminder that if he rejects the proposal, stands upon his fight to trial and is convicted, he faces a significantly longer sentence. One facing a prison term, whether of longer or shorter duration, is easily influenced to accept what appears the more preferable choice.").

behavior of the persons subject to it. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), for example, the Court held that a state rule imposing a one-year residency requirement for welfare payments violated the federal right to travel across state boundaries. *Id.* at 629. Notably, the Court did not insist on proof that the state rule actually deterred interstate travel; to the contrary, in extending the logic of Shapiro to a durational residency requirement for voter registration, the Court explained that "Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. In Shapiro we explicitly stated that the compelling-state-interest test would be triggered by 'any classification which serves to penalize the exercise of that right [to travel].'" *Dunn v. Blumstein*, 405 U.S. 330, 339-340 (1972) (citation omitted). The constitutional violation stemmed simply from the fact that the residency rule penalized those who exercised their right to travel, even if it did not change their behavior. *See also Memorial Hospital v. Maricopa County*, 415 U.S. 259, 257-258 (1974).

Therefore, a UAO by its very issuance constitutes an impermissible penalty on the exercise of a PRP's protected constitutional due process right under the unconstitutional conditions doctrine.

D. The Very Issuance Of A UAO Violates A PRP's Liberty.

The mere issuance of a UAO also deprives the recipient of a constitutionally protected liberty interest, regardless of whether the recipient chooses to comply with the order. The UAO represents an administrative determination of a party's responsibility for a particular response action and, therefore, constitutes the type of governmental stigmatization that courts have recognized as an abridgment of a party's constitutionally protected "liberty."

In *Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953, 962 (D.C. Cir. 1980), for example, the D.C. Circuit held that the Defense Department's administrative determination that a

dairy lacked "integrity" deprived the dairy of a cognizable liberty interest without due process, even though the court acknowledged that the dairy corporation "had no 'property' interest in the contract awards" that were jeopardized by the finding. *Id.* at 961. The D.C. Circuit held that, "where a person's good name, reputation, honor, or integrity is at stake because of what the Government is doing to him, notice and an opportunity to be heard are essential." *Id.* at 964 (citation and internal quotation marks omitted). The court noted that an administrative "determination was made that Old Dominion 'lacked integrity,' and that determination was communicated through official Government channels and would likely continue to be communicated every time Old Dominion bid for a contract." *Id.* at 963.

Similarly, in *Transco Sec., Inc. v. Freeman*, 639 F.2d 318, 321 (6th Cir. 1981), the Sixth Circuit held that a corporation suspended by the General Services Administration from bidding on government contracts had stated a claim for the deprivation of its liberty when the suspension was effected without adequate notice and a hearing. The Sixth Circuit premised its ruling on the corporation's liberty (rather than property) interest: "While the deprivation of the right to bid on government contracts is not a property interest (procurement statutes are for the benefit of the government, not bidders), the bidder's liberty interest is affected when that denial is based on charges of fraud and dishonesty." *Id.* at 321.[11]

[11] *See also Conset Corp. v. Community Services Administration*, 655 F.2d 1291, 1297 (D.C. Cir. 1981) ("charges calling into question [corporation's] integrity, honesty or business reputation" effected deprivation of liberty); *Mosrie v. Barry*, 718 F.2d 1151, 1161 (D.C. Cir. 1983) (liberty deprived by government-imposed stigma that "severely impaired [corporation's] ability to take advantage of a legal right, such as a right to be considered for government contracts or employment"); *Doe v. United States Department of Justice*, 753 F.2d 1092, 111 (D.C. Cir. 1985) (government defamation resulting in a "[l]oss of present or future government employment" implicates a liberty interest). *See also IMCO, Inc. v. United States*, 97 F.3d 1422, 1427 (Fed. Cir. 1996) (acknowledging that a contractor has a liberty interest in avoiding damage to its reputation and business caused by a stigmatizing suspension).

The same reasoning is applicable here. A UAO reflects an administrative determination that a PRP is responsible for conditions at a site, that the PRP is legally obligated under CERCLA to implement a response action, and that the PRP is responsible for the cleanup costs. These determinations are every bit as stigmatizing as the government's declaration that the dairy in *Old Dominion* "lacked integrity."

III. The "Sufficient Cause" Defense Is Constitutionally Inadequate.

The Government tries to salvage the CERCLA scheme by pointing to the "sufficient cause" defense, which it maintains allows a PRP to defy a UAO and secure judicial review before penalties are assessed. But the sufficient cause defense is not constitutionally adequate. It amounts to nothing more than "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

A. The Stakes Are Too High.

The "sufficient cause" defense is inadequate to save the statutory scheme because it forces UAO recipients to wager millions of dollars (or more) on the altogether speculative proposition that a court will ultimately conclude – long after the critical decision must be made – that, many years earlier, the PRPs had "sufficient cause" for refusing to comply in the first instance. This places a PRP under irresistible pressure to settle. As then-Chief Judge Posner has observed, "there is a risk that the court will not find that the party acted reasonably, and this risk places pressure on the party to comply even if it has serious doubts whether the order is valid. For if it loses it may end up bearing much more than just the response costs for which the EPA sued." *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 661 (7th Cir. 1995) (citation omitted).

Courts in similar contexts have recognized that a party in such a position has no real choice, and that the mere possibility of astronomical liability warrants extraordinary judicial relief. In *United States v. Philip Morris Inc.*, 314 F.3d 612 (D.C. Cir. 2003), for example, the court of appeals granted a stay of a district court order pending appeal because "[sanctions] may be of such severity that a reasonable party would not risk incurring them, even in order to preserve a clearly meritorious privilege claim." *Id.* at 620. In *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996), the Fifth Circuit decertified a nationwide class of tobacco smokers out of fear that the defendants would be forced to capitulate by the risk of a massive verdict: "[i]n addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail." In *Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995), Judge Posner granted mandamus for the same reason, where a class action presented a defendant with the unacceptable risk of billions of dollars in potential liability.

The Second Circuit recognized the same problem of coercion in *Parker v. Time Warner*, 331 F.3d 13 (2d Cir. 2003), which involved a putative class action under the Cable Act seeking "hundreds of millions of dollars of statutory damages." *Id.* at 19 n.2. The Second Circuit acknowledged a "legitimate concern that the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class, may raise due process issues." *Id.* at 22. "It may be that the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purpose of both statutory damages and class actions. If so, such a distortion could create a potentially enormous aggregate

recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements." *Id*.

In light of the staggering potential penalties and treble damages, the stakes are simply too high for the "sufficient cause" defense to be constitutionally adequate.

B. The "Sufficient Cause" Defense Is Poorly Defined.

The meaning of the "sufficient cause" defense and the manner in which it can be presented are so amorphous and undeveloped that it cannot provide reliable protection. Because of the oppressive nature of UAOs, deliberate defiance is so rare that there is little guidance as to what constitutes sufficient cause, who has the burden of proof, how EPA and the courts would evaluate proffered defenses, or the likelihood that the court will agree with a PRP that it had sufficient cause for non-compliance. Therefore, review under the "sufficient cause" defense is not constitutionally adequate.

"EPA takes the . . . position that if a respondent fails to identify its concerns with an order at the time of issuance, then it cannot make out a good faith 'sufficient cause' defense." WALTER E. MUGDAN, *The Use of CERCLA Section 106 Administrative Orders to Secure Remedial Action*, C948 ALI-ABA 113, 116 (1994). In *Aminoil v. United States*, 646 F. Supp. 294, 298 (C.D. Cal 1986), the court opined that "the risk of an erroneous deprivation [of property] would be substantial if an objective standard were used in determining the 'reasonableness' of [the PRP's] position. What may be considered reasonable by one court may be found unreasonable by another. The use of an objective reasonableness standard might make the risk of being exposed to treble damages . . . too extreme to allow a challenge [to] the EPA's order." The difficulty is compounded by the many ambiguities, omissions, and conflicts within CERCLA and EPA's own policies and guidance documents. EPA has been justly criticized for "fail[ing] to promulgate regulations or to issue position statements that could allow a party to

weigh in advance the probability that the clean-up order is valid or applicable." *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 392 (8th Cir. 1987).

The sufficient cause defense simply cannot provide a constitutionally adequate remedy for the deficiencies in the CERCLA scheme. Courts have long acknowledged that individuals should not be penalized for their inability to predict how a court might rule on a particular issue – especially where that issue turns on the application of an imprecise or unsettled legal standard. *E.g., Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127, 137-38 (3d Cir. 2000) ("[i]t is constitutionally impermissible to force a physician to guess at the meaning of" ambiguous terms in an abortion statute and thereby "risk losing his or her professional license and receiving a heavy fine if he or she guesses wrong"); *Arkansas Power & Light Co. v. Federal Power Commission*, 156 F.2d 821, 832 (D.C. Cir. 1946) (it is impermissible to require a person "who is uncertain as to his legal status to gamble for stakes in the form of substantial penalties should his guess be wrong"), *rev'd on other grounds*, 330 U.S. 802 (1947).

C. The "Sufficient Cause" Defense Fails To Provide A Constitutionally Adequate Hearing.

The sufficient cause defense does not meet constitutional standards for another reason: it does not provide a constitutionally adequate hearing. There is *never* — either prior to or after the issuance of a UAO — a hearing at which the agency bears the burden of persuading an impartial decision-maker that the administrative order was properly issued under applicable law. The agency is judged solely on the basis of the record it has self-servingly compiled. As EPA itself has explained, even if a PRP ultimately secures judicial review, a court

> must uphold the Agency's decision in selecting a response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law. This explicit standard of judicial review, the most deferential to Agency action, is another reason Section 106 is such a powerful [enforcement] authority.

EPA and DOJ, *Use of CERCLA 106 to Address Endangerments That May Also Be Addressed Under Other Environmental Statutes* at 11 (Jan. 18, 2001), available at http://www.epa.gov/-compliance/resources/policies/cleanup/superfund/ise-crossmedia.pdf (Last visited June 28, 2007).

Moreover, the PRP must proceed in court solely on the basis of the administrative record compiled by EPA. CERCLA §§ 113(k)(1), (k)(2)(B), 42 U.S.C. §§9613(k)(1), (k)(2)(B). EPA is not required under the Section 106 regime to include *all* documents related to its challenged response action; rather, it is permitted to withhold from the public any documents it alone determines to be irrelevant to its decision.[12] In fact, this is exactly what EPA did in Raytheon's case by excluding critical documents from the administrative record.[13] EPA is thus able to skew the contents of the record at will. Indeed, EPA's own internal documents state that "[c]ourts will not allow a party challenging a decision to use discovery, hearings, or additional fact finding to look beyond the lead agency's administrative record, except in very limited circumstances." EPA, *Final Guidance on Administrative Records for Selecting CERCLA Response Actions* at 4 (OSWER Dir. No. 9833.3A-1, Dec. 3, 1990), available at http://www.epa.gov/compliance-/resources/policies/cleanup/superfund/adrec-cerra-rpt.pdf (Last Visited June 28, 2007). Such review is manifestly inadequate to protect the rights of PRPs. *See Wagner Electric v. Thomas*, 612 F. Supp. 736, 747 (D. Kan. 1985) ("To limit a reviewing court to the administrative record,

---

[12] *See* 40 C.F.R. § 300.810(b) ("The lead agency is not required to include documents in the administrative record file which do not form a basis for the selection of the response action. Such documents include but are not limited to draft documents, internal memoranda, and day-to-day notes of staff unless such documents contain information that forms the basis of selection of the response action and the information is not included in any other document in the administrative record file.")

[13] *See* Raytheon Aircraft Company's March 30, 2006, Motion To Supplement The Administrative Record filed in *In the Matter of: Tri-County Airport Site*, CERCLA § 106(b) Petition No. 06-01.

at least where no administrative hearing is required, would surely not be a 'meaningful manner' of affording aggrieved parties an opportunity to be heard.").

Section 106, in other words, borrows the deferential Administrative Procedures Act ("APA") standard of review for use in a wholly inapposite context. EPA makes particularized factual findings applicable to parties who have potential liability, but it simply dispenses with the very adjudicatory hearings on the basis of which deferential review occurs. The availability of post-hoc judicial review under a deferential "arbitrary and capricious" standard, limited to a record controlled by EPA, eliminates any ability of the "sufficient cause" defense to serve as a constitutionally adequate backstop. The prospect of a "sufficient cause" defense, years after the fact, cannot cure the absence of a fair and timely hearing prior to the cleanup. "[E]ven appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator" at the initial fact finding or "trial" stage. *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 618 (1993).[14]

IV. Reimbursement of Costs Does Not Cure The Constitutional Violation.

As an alternative to the "sufficient cause" defense, the Government proposes that a PRP could comply with the UAO, carry out the work itself, and then file a petition with EPA seeking reimbursement of costs. But a PRP may not proceed with a cost recovery petition until EPA determines that the cleanup is complete. Cleanup can take a decade or more, pushing this

[14] *See also Zotos Int'l, Inc. v. Kennedy*, 460 F. Supp. 268, 278-79 (D.D.C. 1978) ("The Administrative Procedure Act guarantees judicial review of final administrative decisions as a matter of course; the scope of review is confined to whether the decision was 'arbitrary and capricious,' and this option in no way substitutes for adequate notice and an opportunity to participate before administrative action becomes final.") *Philip Morris Inc. v. Reilly*, 113 F. Supp. 2d 129, 148 (D. Mass. 2000) ("The availability of judicial review after the fact does not make up for the lack of an opportunity to be heard in a manner that may influence the administrative determination before it becomes final . . ."), *aff'd*, 312 F.3d 24 (1st Cir. 2002) (en banc).

opportunity too far off into the future to be considered timely. Further, to establish a claim for reimbursement, a PRP must show, on the record assembled by EPA, either that the PRP was not liable or that the ordered response action was arbitrary and capricious or not in accord with law. CERCLA § 106(b)(2), 42 U.S.C. § 9606(b)(2). As noted, this deferential standard is inadequate to protect a PRP. Unsurprisingly, only a handful of petitions for reimbursement have ever been granted.

Moreover, being ordered to undertake a cleanup pursuant to an unconstitutional statute itself entails a deprivation of liberty and property, which reimbursement long after-the-fact cannot possibly cure. The Supreme Court "has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972) (citation omitted and alteration in original). Limiting a PRP to a belated compensation claim in such circumstances would be akin to holding that a criminal defendant could challenge a sentence of many years of community service only after performing the sentenced labor.

V. The Loss Of Contribution Rights Also Violates Due Process.

The Government argues that a PRP is not "deprived" of the right of contribution when EPA issues a UAO. The Government contends that there is only a qualified statutory right to contribution, available only under certain circumstances.

Even if the Government were correct that the right to contribution was wholly a creature of statute, and even if the Government's analysis survived the Supreme Court's recent decision in *United States v. Atlantic Research Corp.*, 127 S.Ct. 2331 (2007) – two very dubious propositions – the Government's conclusion nonetheless does not follow from its premises.

Even assuming, arguendo, that the right to CERCLA contribution were solely statutory, it does not follow that EPA is free to extinguish that right at will by using a UAO to compel a PRP to conduct a cleanup. Indeed, the Government's argument would create the anomalous situation

where EPA could, by issuing a UAO rather than commencing a civil action, effectively deny the PRP the ability to make a meaningful contribution claim. In practical terms, EPA would be able, through unaccountable and unreviewed administrative action, to extinguish the substantive right of contribution. This power raises constitutional difficulties under the principle that administrative procedures may not be permitted to deprive a party of a legislatively-conferred property right. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (negligent dismissal of employment termination claim by administrative agency, due to agency's failure to hold fact-finding hearing within 120-day statutory period, violated procedural due process); see also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (government may not impose procedural requirements which abridge substantive property rights, because "[t]he categories of substance and procedure are distinct.").

The argument has particular force in the instant case, which involves two parts of the executive branch working together. The U.S. military is a PRP responsible for much, if not all, of the contamination now at issue at the Site. For EPA to cut off contribution rights to protect the U.S. government raises the very concerns about governmental self-dealing that the Supreme Court has repeatedly expressed in a wide range of contexts. *See* Part I, *supra*.

CONCLUSION

Defendant's Motion For Dismissal Or, In The Alternative, For Summary Judgment On Count V should be denied.

Respectfully submitted,

s/ M. Courtney Koger

M. Courtney Koger KS# 15271
Kutak Rock LLP
1010 Grand Blvd., Suite 500
Kansas City, Missouri 64106
Telephone: (816) 960-0090
Facsimile: (816) 960-0041

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, D.C. 20036
Tel. (202) 588-0302

Laurence H. Tribe
420 Hauser Hall
1575 Massachusetts Ave.
Cambridge, MA 02138
Tel. (617) 495-4621

Jonathan S. Massey (D.C. 457593)
Jonathan S. Massey, P.C.
7504 Oldchester Rd.
Bethesda, MD 20817
Tel. (301) 915-0990

Attorneys for Washington Legal Foundation and Kansas Grain and Feed Association

June 29, 2007

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2007, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

Beverlee J. Roper
Stephen J. Torline
Blackwell Sanders
4801 Main, Suite 1000
Kansas City, Missouri 64112

Natalia Sorgente, Esq.
Scott J. Jordan
Heather Gange
Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

s/M. Courtney Koger
Attorney