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

RAYTHEON AIRCRAFT COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 05-2328 JWL

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL DISMISSAL, OR, IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT

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BRIEF OF *AMICUS CURIAE*
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Amicus Curiae Chamber of Commerce of the United States of America (the "Chamber") hereby submits this Brief in Opposition to Defendant's Motion for Partial Dismissal, or in the alternative, Motion for Partial Summary Judgment.[1]

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America, founded in 1912, is the world's largest not-for-profit business federation, representing an underlying membership of over three million businesses and business organizations of every size, in every business sector, and from every geographic area. Ninety-six percent of the Chamber's members are businesses with less than one hundred employees. As the nation's preeminent business association, the Chamber has an abiding interest in the scope of federal regulatory authority in general, and in environmental regulation in particular. The Chamber regularly advocates its members' views in court on environmental issues of national concern to the business community.

Plaintiff Raytheon Aircraft Company's ("RAC") Complaint presents this Court with a breathtaking example of the type of unbounded governmental authority and overreaching regulatory interpretation that the Chamber has steadfastly opposed. Under Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") (42 U.S.C. § 9606), EPA is empowered to issue unilateral administrative orders ("UAO") compelling parties with any connection to a hazardous waste site not only to initiate, complete,

[1]By way of reference, the Chamber incorporates Plaintiff's Statement of the Facts and Questions Presented. While the Chamber agrees with Plaintiff that Section 107 provides it a right of contribution against the Defendant, the Chamber will focus on the unconstitutionality of the scheme administered by the Defendant.

and pay for the entire cleanup of that site, but also to perform the cleanup precisely as dictated by EPA. In order to exercise this authority, EPA must determine that there "may be an imminent and substantial endangerment to the public health or welfare or the environment," CERCLA § 106(a); 42 U.S.C. § 9606(a). But according to EPA, "imminent and substantial endangerment" is not the high threshold that ordinary English usage would imply. Rather, EPA interprets the "imminent and substantial endangerment" standard into virtual nonexistence: EPA advocates the position that *every* hazardous waste site poses an "imminent and substantial endangerment" sufficient to trigger the agency's authority to issue a UAO.

For its part, the target of a UAO is faced with enormous monetary penalties under 42 U.S.C. § 9606(b)(1) and staggering treble punitive damages under 42 U.S.C. § 9607(c)(3) for noncompliance, without any realistic hope of challenging the UAO in an Article III court. Accordingly, even in decidedly non-emergency situations – where the Agency has been conducting studies of a site or negotiating with involved parties for months or years regarding the appropriate cleanup options – EPA's decision to issue a UAO and trigger the substantial penalties and damages attendant to noncompliance is *not reviewable*. Given the devastating financial consequences and broad interpretation of the CERCLA § 106 scheme, when EPA issues a UAO, the target of the order has no practical choice but to comply and thus face a lengthy and expensive cleanup effort with little hope of reimbursement. The implications of this UAO structure, particularly for the thousands of small-business members of the Chamber, are grave. In many cases, targeted companies have neither the wherewithal to bear the financial burden of a protracted, bet-the-company fight with EPA, nor the resources to comply with a costly and lengthy ordered cleanup and to attempt to recoup their losses after the fact.

Although the most onerous and least equitable of EPA's three CERCLA enforcement

options, UAOs have become EPA's cleanup mechanism of choice at hazardous waste sites. Since 1980, EPA has issued more than *1,500* UAOs directing targeted companies to conduct billions of dollars of removal or remedial actions. *See* EPA Document ADH463, Unilateral Orders Issued Program-to Date as of March 8, 2001 (Mar. 21, 2001). EPA's official policy preference is to issue UAOs rather than pursuing cleanup actions in federal court. *See* Guidance on CERCLA Section 106 Judicial Actions, USEPA, OSWER Directive 9835.7, at 5 (Feb. 24, 1989) ("The [EPA Regional Office] should generally issue a Section 106 administrative order before referring a Section 106 civil judicial case."). Moreover, the Agency uses the powerful threat of financially confiscatory UAOs to extract settlements from parties involved with hazardous waste sites. *See* EPA Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action At Superfund Sites, USEPA at 3 (June 17, 1999) ("Issuance of UAOs to PRPs, with consistent and appropriate enforcement for non-compliance, sends a strong message that will make entering into a settlement for RD/RA work more desirable"); *id.* at 4-10 (potentially responsible parties should be informed "at the beginning of the negotiations (and, if necessary [reminded] when negotiations are faltering) that if negotiations fail and a UAO is issued, the PRPs will be directed to implement the remedy in accordance with a Statement of Work (SOW) drafted by the Agency . . . [and] non-compliance with such UAO will be vigorously pursued").

Contrary to elemental constitutional norms, this power is exercised without any meaningful judicial review. Under CERCLA § 113(h) (42 U.S.C. § 9613(h)), a targeted company is expressly prohibited from seeking judicial review of the validity of a UAO until *after* the cleanup – often taking decades – is completed, or until EPA decides to invoke the jurisdiction of an Article III court by bringing an action to force compliance with the order or seek recovery

of costs. It is precisely this lack of prompt judicial review, coupled with the coercive threat posed by massive fines and punitive damages, that renders EPA's administration of CERCLA's UAO scheme constitutionally flawed.

Compounding this unconstitutional deprivation with an end run around the statute's clear waiver of sovereign immunity, the United States has deprived other potentially responsible parties from obtaining contribution from the federal government by issuing UAOs at sites where the federal government is a potentially responsible party. This ongoing effort conflicts with the clear legislative intent—reflected in the plain language of the statute—that the United States bear its responsibility for the costs of cleaning up the nation's environment.

Because the members of the Chamber face the very real threat of direct or coerced deprivation of property through EPA's use of UAOs—particularly where EPA insulates the United States from any liability as a potentially responsible party—the Chamber has a great interest in the resolution of this lawsuit. That use, based solely on EPA's overly expansive interpretation of its own UAO authority and unhindered by pre-deprivation judicial review, threatens the vast majority of the Chamber's members involved at CERCLA sites. Accordingly, the Chamber submits this *amicus curiae* brief primarily addressing the constitutional deficiencies inherent in EPA's over expansive interpretation of its UAO authority.

ARGUMENT

This suit presents a genuine issue as to whether EPA's exercise of its UAO power, especially in the absence of an emergency, violates due process. Although CERCLA § 106(a) is meant to apply where there is an "*imminent and substantial endangerment* to the public health or welfare or the environment," EPA, as a consistent practice, has interpreted section 106(a) as

applying in *every* instance, to *every* potentially responsible party, at *every* CERCLA site. In essence, EPA has construed section 106 in such a way that it need *never* seek judicial imprimatur for its decisions regarding liability or cleanup responsibility at a hazardous waste site. This application, reading any threshold finding of substantial and imminent endangerment out of section 106, is flatly inconsistent with fundamental and well-settled principles of due process. Indeed, having administered the CERCLA scheme in a manner that avoids meaningful judicial review, EPA has used the UAO to shield the United States from the very liability that CERCLA intended the United States to incur.

I. CERCLA § 106, As Impermissibly Interpreted By EPA, Permits Indiscriminate Use of the Unilateral Administrative Order Power.

A. Although CERCLA Provides EPA With Enforcement Options Involving Judicial Review and Due Process, EPA "Assiduously Avoids" Judicial Review by Using Constitutionally Suspect Unilateral Administrative Orders.

Under CERCLA, EPA is authorized to "remove or arrange for removal of, and provide for remedial action relating to" a "release or substantial threat of release into the environment" of any hazardous substance. CERCLA § 104(a)(1); 42 U.S.C. § 9604(a)(1). In determining how to do so, EPA has three broad options. First, under CERCLA § 104(a), EPA may choose to spend "Superfund" monies to clean up the site itself. *See* 42 U.S.C. §§ 9604(a), 9611(a); *see also* Frank B. Cross, *Procedural Due Process Under Superfund*, 1986 B.Y.U. L. REV. 919, 921-22 (1986) ("Section 104 of the Act authorizes the federal government, alone or in cooperation with the states, to use Superfund moneys to respond to releases of hazardous wastes."). EPA may then seek reimbursement of the Superfund by filing an action in district court for recovery of those costs from a potentially responsible party ("PRP"). *See* CERCLA § 107(a); 42 U.S.C. § 9607(a). Given the breadth of the category of PRPs and the strict joint and several liability traditionally imposed under CERCLA, EPA's power to seek reimbursement under section 107(a)

is "onerous" and sweeping. Cross, *Procedural Due Process*, 1986 B.Y.U. L. REV. at 922.

The agency's second option is to file an action in federal district court to compel a party to conduct the cleanup *itself*. *See* CERCLA § 106(a); 42 U.S.C. § 9606(a). Thus, under CERCLA § 106(a), EPA may avoid any expenditure from the Superfund and simply seek a court order forcing a PRP to conduct and pay for the cleanup.

EPA rarely bothers with either of these two options, both of which rely on due process and judicial review. In fact, EPA career official Walter E. Mugdan flatly stated in a 1994 article that seeking a judicial order before cleanup is "assiduously avoided." Walter E. Mugdan, *The Use of CERCLA Section 106 Administrative Orders to Secure Remedial Action*, C948 ALI-ABA 113, 117 (1994). "The prevailing view of government enforcement staff, based largely on the bitter experiences of early hazardous waste site litigation, is that this approach is the slowest way to achieve a cleanup, and obviously the one most subject to the inherent uncertainties of the judicial process." *Id.* Instead, EPA overwhelmingly turns to its third statutory option – the UAO – to force a cleanup.

EPA could only succeed in conducting an enforcement program shielded from "the inherent uncertainties of the judicial process" if the agency could free itself from section 106(a)'s requirement that there be an "imminent and substantial endangerment" at a particular site before issuing a UAO. Mugdan, *The Use of CERCLA Section 106 Administrative Orders to Secure Remedial Action*, C948 ALI-ABA at 117, 119. By expansively interpreting the phrase "imminent and substantial endangerment," the agency has effectively granted itself an unlimited ability to issue UAOs in all situations—an ability that runs afoul of constitutional protections.

B. EPA's Expansive Interpretation Of "Imminent and Substantial Endangerment" Effectively Reads Out Any Limitations on Its Ability to Issue Unilateral Administrative Orders.

Section 106, as expansively interpreted by EPA, imposes no real limits on its own power to issue UAOs. EPA has construed Section 106 to cover instances where there is no "imminent and substantial endangerment." *See, e.g.*, *United States v. E.I. DuPont de Nemours & Co.*, 341 F. Supp. 2d 215, 251 (W.D.N.Y. 2004) ("[T]he EPA found that someone *might* be exposed to groundwater contaminated by hazardous substances from Necco Park, which *would* present an imminent and substantial endangerment to their health. This determination justified the issuance of a UAO[.]"); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 196 (W.D. Mo. 1985) (adopting EPA's argument that "imminent and substantial endangerment" exists where carcinogens at a chemical landfill had the "potential" for migration via groundwater, surface water or air). EPA then argues that an endangerment need not be immediate or an emergency for it to be considered "imminent." *See E.I. DuPont*, 341 F. Supp. 2d at 246-47 (citing *Conservation Chem.*, 619 F. Supp. at 193-94); John C. Cruden, *CERCLA Overview*, SE98 ALI-ABA 807, 815 (2000) (Justice Department career official noting that, under CERCLA § 106(a), "[o]nly the risk . . . need be imminent, not the harm itself. Risk may be imminent even if actual harm is months/years away."); EPA/DOJ Memorandum, "Use of CERCLA § 106 to Address Endangerments That May Also Be Addressed Under Other Environmental Statutes" at 4 (Jan. 18, 2001) ("2001 CERCLA 106 Memo") (construing CERCLA § 106(a) to permit unilateral orders in situations were "harm may not be realized for years").[2]

[2] In 1987, EPA's own scientists and managers rated Superfund sites as less threatening to human health than other environmental risk factors, such as radon or pesticides. *See* Environmental Protection Agency, Unfinished Business: A Comparative Assessment of Environmental Problems (February 1987) (EPA/230/2-87/025a) (risks from waste sites ranked below risks from

Similarly, EPA has routinely advanced the view that an "endangerment" may be "substantial" even when there is no proof of actual harm. *See, e.g.*, 2001 CERCLA 106 Memo at 4 (reading CERCLA § 106(a) to allow unilateral orders where the circumstance may "not necessarily [present] an actual harm"); Mugdan, *The Use of CERCLA Section 106 Administrative Orders to Secure Remedial Action*, C948 ALI-ABA at 120 (EPA official writing that "[a]ctual proof of present harm, or harm which will occur in the immediate future, need not be shown by the government in order to satisfy the statutory standard for action") (noting *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980)); Patricia Lindauer, *The CERCLA's Daily Penalty and Treble Damages Provisions: Is Any Cause "Sufficient Cause" to Disobey an EPA Order?*, 11 PACE ENVTL. L. REV. 657, 660-61 (1994). Indeed, EPA has advanced an interpretation of section 106 that, as a matter of law, *any* site at which a release of hazardous substances can be documented poses an "*imminent* and substantial danger." *See United States v. Dickerson*, 660 F. Supp. 227, 231 (M.D. Ga. 1987) (emphasis added).[3]

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indoor radon, pesticides on food, exposure to chemicals in the workplace, and the depletion of stratospheric ozone."); *see also United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 441 (1st Cir. 1990) (Breyer, J.) (affirming district court decision rejecting EPA's recommended cleanup levels for Superfund site in New Hampshire as "amount[ing] to a very high cost for very little extra safety.").

[3]EPA has often relied on the interpretation of identical "imminent and substantial endangerment" language appearing in Section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973, to argue that the threshold for issuing a UAO in CERCLA section 106 is effectively nonexistent. *See, e.g., United States v. Vertac Chem. Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980). This language in RCRA § 7003, however, is the jurisdictional trigger to permit suit before an Article III court, not to avoid judicial review altogether. Importing the interpretation of this RCRA jurisdictional language into CERCLA's unilateral administrative order scheme, as EPA has done, invites constitutional error.

II. This Case Presents a Genuine Issue as to Whether The Unilateral Administrative Order Power, Coercing Deprivation of Property Through Draconian Financial Penalties Without Any Opportunity For Meaningful Pre-Deprivation Review, Especially In The Absence Of An Emergency, Violates Guarantees of Due Process.

The UAO is the preferred EPA tool for one simple reason – the UAO effectively coerces immediate and unconditional capitulation by the targeted party and can be forever shielded from meaningful judicial scrutiny of the agency's actions. By imposing huge penalties on a targeted company without affording that company any opportunity for meaningful judicial review of EPA's actions, EPA's employment of the UAO authority abrogates the due process protections of the Fifth Amendment.

A. The UAO Authority Is Exercised Entirely As An Internal EPA Process, and Results in the Imposition of Massive Monetary Penalties.

A UAO issued by EPA must contain specific findings about the particular site, the nature of the contamination at the site, the claim of an alleged imminent and substantial endangerment, and other elements for imposing liability on the recipients of the order. *See* Model Unilateral Administrative Order for Remedial Design and Remedial Action Under Section 106 of CERCLA, EPA Office of Enforcement and Compliance Assurance, OSWER Directive No. 9833.0-2(b) (Mar. 30, 1990) ("Model UAO"). The order then directs the recipient to undertake all of the specific response actions at the site, as detailed in the UAO.

EPA derives all of the factual and legal bases internally – without the benefit of any adjudicatory hearing. Then, relying solely on its own internal studies and deliberations, EPA assembles an "administrative record" expressly designed to support its selection of a particular response action. *See* CERCLA §§ 113(k)(1), (k)(2)(B); 40 C.F.R. § 300.810(a). But in the absence of an adjudicatory hearing, EPA has unfettered discretion to include in the record whatever it chooses from its internal documents – including whatever documents and evidence it

deems supportive of its decision while omitting any and all other documents. The final product is contained within a Record of Decision ("ROD"), which reflects EPA's final cleanup decision. *See* 40 C.F.R. § 300.430(a)(5).

Within a relatively short designated time frame after the "effective date" of the UAO, the target must provide EPA with written notice of its unequivocal intention "to comply with all terms of th[e] Order." Model UAO at ¶ 29. The UAO becomes legally binding on its effective date, and a target who fails "unequivocally [to] commit" to perform all of the work selected by EPA "shall be deemed to have violated this Order and to have failed or refused to comply with this Order." *Id.*

Violation of a UAO carries with it tremendous costs. CERCLA § 106(b)(1) provides that a person who violates a UAO may be liable for as much as $32,500 for *each day* of the violation. Thus, if a targeted company is not ready to agree to adhere absolutely to a UAO, EPA is empowered to seek massive daily fines for each day the company refuses to acquiesce. Moreover, EPA may delay bringing an enforcement action for as many as five years or more, thus permitting penalties to accrue every day for those five years. In short, a person declining to comply with a UAO could face statutory fines of approximately $60,000,000 and (absent complete capitulation to the commands of the UAO) would be entirely powerless to halt their continuing accrual until EPA decided to file suit.

Incredibly, such massive fines are not the largest penalty that can be imposed upon a non-complying party. If EPA decides to undertake the ordered cleanup itself, it can then file a cost-recovery action seeking its costs plus punitive damages of up to three times those costs. *See* CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3); *see, e.g.*, *United States v. Carolina Transformer Co.*, 978 F.2d 832, 841 (4th Cir. 1992); *United States v. Parsons*, 936 F.2d 526, 529 (11th Cir.

1991).[4] This punitive sanction will be imposed unless the targeted company can establish – years later and based solely upon EPA's hand-picked record – that its failure to adhere to the UAO was with "sufficient cause." *Parsons*, 936 F.2d at 527.[5]

B. The Threat of Massive Monetary Penalties Coerces Targeted Companies Into Immediate Compliance With UAOs, Resulting In An Immediate Deprivation of Property.

The United States makes much of the notion that UAOs are not "self-executing" in arguing that they do not result in a deprivation of property. *See* United States Br. at 16. But even before a target company undertakes to comply with the UAO, it must set aside the appropriate reserves on its balance sheet to prepare for the ordered clean-up. *See* Jeff A. Jones, Note, *Financial Disclosure Requirements for Hazardous Waste Liabilities*, 24 COLUM. J. ENVTL. L. 137, 154 (1999) (American Institute of Certified Public Accountants recognizes that once a UAO is issued, a target should not delay in recognizing the costs of a future removal action).

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[4] Since 1988, EPA has issued more than 150 UAOs with an "estimated response value" ("ERV") in excess of $15 million each, and 100 UAOs with an ERV of more than $20 million each. See EPA Document ADH463, Unilateral Orders Issued Program-to Date as of March 8, 2001 (Mar. 21, 2001). One UAO is estimated to require $200 million of work. *Id.* And EPA's estimated cost of implementing its proposed plan for General Electric's cleanup of the Hudson River is $460 million. *See* EPA, Superfund Proposed Plan: Hudson River PCBs Superfund Site at 26 (Dec. 2000). Thus, if GE were issued a UAO concerning the Hudson River and did not agree immediately to comply in all respects, and EPA were to mount the cleanup itself, the total liability for punitive damages and daily penalties could amount to well over $2 billion.

[5] The United States makes much of the presence of a "sufficient cause" defense, permitting a targeted company to avoid massive penalties if it can establish that it had sufficient cause for noncompliance with the UAO. *See* United States Br. at 41, 47-8. However, this defense has been construed by the agency and reviewing courts as extraordinarily narrow in light of the breadth of CERCLA liability and the presumption of propriety that adheres to EPA action. *See, e.g., Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 392 (8th Cir. 1987). Moreover, the sheer magnitude of the continually accruing penalties effectively prevents target companies, even those with "sufficient cause," from exercising their legal rights to challenge EPA's order by noncompliance. *See Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, 666 (1915); *United States v. Pac. Coast European Conference*, 451 F.2d 712, 715 (9th Cir. 1971).

Setting aside large reserves for these environmental liabilities clearly impacts the financial condition of a company as soon as a UAO is issued.

Target companies are also affected immediately by the most coercive aspect of UAOs: the very real threat of accrual of massive statutory penalties and punitive damages that forces a targeted company to spend vast sums of money to initiate cleanup activities in compliance with the UAO. Particularly where the target is a small business or a company with limited resources to absorb the substantial burden of a long-delayed challenge to the order, EPA's use of UAO authority works an immediate and overwhelming coerced deprivation of property. This coercion is effective precisely because there is no meaningful avenue of judicial review for a party to challenge the issuance of such an order.[6]

Given the magnitude of the penalties faced by a target not complying with a UAO, it is not surprising that most targets choose not to "bet the company" on an eventual post-facto challenge to the issuance of the UAO. At least one EPA official has acknowledged that the UAOs carry with them "[e]xtraordinarily severe sanctions for non-compliance." Mugdan, *The Use of CERCLA Section 106 Administrative Orders*, C948 ALI-ABA at 122. And EPA is not shy about employing those sanctions:

> Settlements of non-compliance enforcement actions, and judgments awarded by courts after litigation of such cases, have generally yielded large penalties, far in excess of the costs the defendant would have sustained had it complied. Penalty assessments have ranged into the multi-million dollar levels; the courts have demonstrated that they are willing to assess not only civil penalties, but the

[6] This aspect of the EPA UAO authority represents a classic "Hobson's Choice," with the UAO target offered such unpalatable options for exercising its rights that it chooses to comply with a potentially invalid order rather than mount any legal defense. That the deprivation of property is "voluntary" in the sense that the target chooses to give up its property now rather than risk an exponentially greater deprivation in the future does not make the coercive aspect of the UAO power any less a deprivation of property for Due Process purposes.

> potentially enormous treble damages under § 107(c)(3) which may be CERCLA's most potent enforcement sanction. *EPA believes that the deterrent effect established by these cases have contributed to the reasonably high rate of compliance with its administrative orders.*

Id. at 128 (emphasis added); *see also id.* n.2 (listing various multi-million dollar penalties assessed against non-complying UAO targets). Put another way, "[t]he penalties make any defense a high stakes game with geometric exposure potential." Randy M. Mott, *Surviving the Superfund Nuclear Weapon: Defense of Administrative Orders*, 377 PLI/Lit 7, 28 (1989).

In its Motion, the United States emphasizes that penalties *may* be imposed if the PRP declines to adhere to the UAO without "sufficient cause" (in the case of the fines and the punitive damages). United States Br. at 41, 47-8. But this purported defense offers cold comfort, given the broad sweep of CERCLA liability. *See* Mott, *Surviving the Superfund Nuclear Weapon*, 377 PLI/Lit at 22 ("one must . . . be conscious of the enormous history of liability litigation under CERCLA and the results of that litigation which generally favor establishment of liability"). Moreover, the term "sufficient cause" is not defined in CERCLA, and the courts have not definitively interpreted its meaning. EPA, however, has consistently maintained that "sufficient cause" is very narrow, meaning only that the targeted company has a "reasonable and good faith belief that it was: (1) not a liable party to whom the order should have issued; (2) that the actions required in the order were inconsistent with the National Contingency Plan ("NCP"); or (3) that EPA acted arbitrarily and capriciously in issuing the order." Lindauer, 11 PACE ENVTL. L. REV. at 664 (citing *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 390 (8th Cir. 1987) and other cases). Of course, items two and three will have to be proven with reference to a record developed by EPA itself.

Accordingly, if a PRP chooses not to comply with the UAO, there is very little that will

prevent the imposition of crippling daily fines and punitive damages – especially given the easily met CERCLA liability standard and lack of a viable "sufficient cause" defense. As such, the "choice" that a UAO presents to a PRP is entirely illusory. Given the potentially ruinous penalties and fines, "it is safe to conclude that a recipient of an EPA cleanup order has little choice but to comply. Only if the [potentially responsible party] is absolutely certain that he is not a responsible party under CERCLA, or that he has a defense to CERCLA liability, should he dare to disobey." Lindauer, 11 PACE ENVTL. L. REV. at 670 (footnote omitted).

C. The Deprivation of Property Resulting From EPA's Coercive Use of UAOs Even In Non-Emergency Situations Is Accomplished Without Constitutionally Mandated Due Process.

It is beyond dispute that a UAO recipient is forced to expend potentially huge sums to comply with the order or face ruinous penalties without any process whatsoever. *See* Carol E. Dinkins & C. David Nutt, *CERCLA Section 106 Administrative Orders: EPA Begins to Make Law and a Track Record*, C534 ALI-ABA 335, 338 (1990) ("What makes § 106 administrative orders so imposing is the fact that (1) virtually no pre-enforcement review of the order exists and (2) the penalties for noncompliance are potentially enormous."). In short, EPA, and not the targeted company facing expenditures for cleanup, determines whether and when there will be judicial involvement. *Id.* at 340 ("EPA may delay pursuit of these judicially-reviewable actions until site cleanup is complete, thereby avoiding . . . court intervention. Thus, PRPs may be unable to seek judicial review for several years following issuance of the order, even though potential penalties for noncompliance would continue to mount."). And, any delay by EPA in seeking judicial enforcement of a UAO, of course, results in the further accrual of daily fines under 42 U.S.C. § 9606(b)(1).

There is no question that this regulatory structure works an extraordinary deprivation of

property within the meaning of the Fifth Amendment. First, as noted above, a UAO works a deprivation of property and liberty through the coercion of the penalty and treble-damages provisions. These provisions operate to compel a recipient into complying with the UAO (through means of an unconstitutional "Hobson's choice"), effectively forcing a "consented" deprivation and waiver of the right to judicial review. Second, a UAO immediately imposes binding cleanup obligations and liabilities upon a recipient, with penalties accruing daily for every day that the recipient fails to comply. Finally, a UAO operates as a deprivation of property because it is the product of factual findings (*i.e.*, *adjudicative* findings) about a specific party (the UAO recipient). Indeed, it is well established that adjudicative findings in the context of an administrative order against a specific party involve deprivations of property raising due process requirements. *See Hannah v. Larche*, 363 U.S. 420, 442 (1960) (where an agency makes adjudicative determinations, it is "imperative" that the agency "use the procedures which have traditionally been associated with the judicial process"); *Londoner v. City & County of Denver*, 210 U.S. 373 (1908) (due process rights implicated where city assessed against land of specific property owner).

Given that a UAO operates as a deprivation of property, the Fifth Amendment mandates that, in non-emergency situations, the EPA provide due process *before* the deprivation occurs – *i.e.*, before the UAO is issued. As the Supreme Court has ruled repeatedly, "individuals must receive notice and an opportunity to be heard *before* the Government deprives them of property." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993) (emphasis added). The only exception to this "general rule" arises in "'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'" *Id.* at 53 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (quoting *Boddie v. Connecticut*, 401

U.S. 371, 379 (1971))).

Application of the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), demonstrates that in non-emergency situations EPA must conduct a pre-deprivation hearing before issuing a UAO. Under *Mathews*, once a property or liberty interest is implicated by government action, a court must determine what process is due by using a three-factor balancing test. Specifically, a court must balance (1) the private interest affected by the government's action; (2) the risk of erroneous deprivation of that interest through the procedures used, as well as the accuracy-enhancing value of additional procedural safeguards; and (3) the government's interests at stake, including the administrative burden that additional procedures would impose. 424 U.S. at 334. This balancing test involves fact-intensive issues that must be further explored in discovery.

Examining each of these factors confirms the need for a pre-deprivation hearing. First, EPA greatly affects the private interests of the target as soon as it issues a UAO. The United States argues, at length, that no deprivation occurs upon the issuance of a UAO. United States Br. at 40-43. But at what point target companies are deprived of their property is an issue that should be developed in discovery. As explained above, the immediate financial consequences of a UAO are significant. Not only must the target company spend millions of dollars and many hours of labor in complying with the order, but it must also set aside adequate reserves for the clean-up immediately. Taking large reserves and disclosing environmental liabilities to investors clearly shape the financial condition of a company as soon as a UAO is issued.

Second, the risk of error in issuing an *ex parte* UAO is considerable. EPA sets annual performance goals, creating a strong incentive for EPA to bring UAOs and increasing the possibility of error. *See* EPA, Superfund Program Implementation Manual, FY06/07, Appendix

C: Enforcement. A pre-deprivation hearing would lessen the risk of EPA error in establishing liability or in choosing response actions.

Finally, an examination of EPA's options in cleaning up a contaminated site demonstrates that the risk of error and the severity of the target company's deprivation outweigh any interest EPA may have in avoiding a hearing. As noted above, EPA has a number of other choices in conducting clean-ups and has little reason to impose a UAO instead of using the other, less draconian, choices. Because most Superfund cleanups address long-term issues and require years to plan and implement, *see* House Subcomm. on Investigations and Oversight of the Comm. on Public Works and Transportation, Administration of the Federal Superfund Program, H.R. Doc. No. 35, 103d Cong., 1st Sess. 6 (1993) ("The Congressional Budget Office estimates that 15 years or more is needed from discovery to the completion of cleanup construction for the average Superfund site."), a hearing would not unreasonably delay the removal or remedial action and would serve to stem errors before they metastasize. Therefore, a hearing of some kind before the issuance of a UAO and its attendant deprivation of property is clearly mandated by the Fifth Amendment. *See, e.g., James Daniel Good Real Prop.*, 510 U.S. at 53-62 (ruling that *ex parte* seizure of property violated due process where there was no pre-deprivation hearing and "exigent circumstances" did not exist); *Connecticut v. Doehr*, 501 U.S. 1, 11-12, 16 (1991) (invalidating state law authorizing pre-judgment attachment of real estate prior to hearing (despite the lack of any actual interference with the property owner's use or possession of the property) given the lack of any exigent circumstances mandating a delay in such a hearing).

The United States has argued that the requisite judicial review can be accomplished by way of a petition for reimbursement by a PRP complying with a UAO. United States Br. at 17-18. But obviously, this avenue does not constitute the *pre*-deprivation judicial review mandated

by the long line of Supreme Court authorities cited above. And, given that cleanups may take many years (if not decades), and given that EPA and the potentially responsible party may disagree on whether the cleanup has been "completed," the possibility of a prompt, meaningful post-deprivation hearing is distant indeed – *even on the most basic question of whether the potentially responsible party is liable at all. See* 42 U.S.C. § 9606(b)(2)(A).

Thus, a purported PRP with only minimal involvement at a hazardous waste site may be coerced into agreeing to comply with a UAO, then forced to spend millions of dollars cleaning up a site, and yet not be entitled to even the opportunity for reimbursement or a hearing until many years later. If the PRP refuses to comply, and EPA then cleans up the site, the hearing will not occur until EPA decides to file suit. And all during this period, the PRP is penalized *every day*, and may also face punitive damages in the amount of three times EPA's costs in cleaning up the site. Moreover, as discussed above, the PRP is forced to make a choice – whether to comply or not – with multi-million (or potentially billion) dollar implications, all without resort to an Article III court. Plainly, this tortured procedure – undertaken as a matter of course by EPA at hundreds of hazardous waste sites around the country – fails the Supreme Court's well-established requirement of a *pre*-deprivation hearing absent exigent circumstances.

III. EPA's Practice of Using UAOs at Sites Where the United States is a Potentially Responsible Party Undermines CERCLA's Waiver of Sovereign Immunity

Having developed an unconstitutional method for issuing UAOs in non-emergency situations, the United States has exploited it to protect itself from assertions of liability for the costs of cleanup at federal installations across the country. Detailed by RAC in its brief, the United States in this case has issued a UAO to RAC without providing any meaningful review and then asserted in court that RAC can not seek contribution from the United States even though the United States is responsible for the release of hazardous substances at the heart of the

UAO issued to RAC. Because this effort contravenes CERCLA's clear waiver of sovereign immunity, this Court should hold that the United States is barred by that waiver from issuing UAOs where the United States is a potentially responsible party for the cleanup in question.

A. The Federal Government has Incurred Liability as a Potentially Responsible Party at Numerous Installations across the Country.

It is no secret that the federal government has been one of the nation's worst polluters, largely as a result of military activity such as that present in this case. *See* J.B. Wolverton, *Sovereign Immunity and National Priorities: Enforcing Federal Facilities' Compliance with Environmental Statutes,* 15 Harv. Envtl. L. Rev. 565, 565 (1991) ("Much of the worst pollution in the United States emanates from facilities owned and operated by the federal government."); *Cleaning Up Federal Facilities: Controversy Over an Environmental Peace Dividend*, 23 Env't Rep. (BNA) 2659, 2660 (noting that over 20,000 federal installations have reported environmental contamination); Gen. Accounting Office, *Groundwater Contamination: DOD Uses and Develops a Range of Remediation Technologies to Clean Up Military Sites* 1 (No. 05-666, June 2005) (DOD "has identified close to 6,000 sites at its active, closing, and formerly used defense facilities where the groundwater has been so contaminated by past defense activities and the improper disposal of hazardous wastes that cleanup (remediation) of the side is required."); Gen. Accounting Office, *Environmental Contamination: DOD Has Taken Steps to Improve Cleanup Coordination at Former Defense Sites but Clearer Guidance is Needed to Ensure Consistency* 1 (No. 03-146, March, 2003); Gen. Accounting Office, *Superfund Program: Current Status and Future Fiscal Challenges* (GAO-03-850) (2003) (noting that, at the end of fiscal year 2002, 158 of the 1,233 sites included on CERCLA's National Priorities List--a listing of the Nation's most-contaminated sites--were owned or operated by the United States). The estimated liabilities are staggering: the federal government faced $ 307 billion in environmental

liabilities at the end of fiscal year 2001. *See* Gen. Accounting Office, *Long-Term Commitments: Improving the Budgetary Focus on Environmental Liabilities* (GAO-03-219) (2003).

B. United States' Construction of the Statute and its Issuance of UAOs Shields It from Liability

Nevertheless, the United States has adopted a litigation and enforcement posture which undermines efforts to clean up federal facilities while placing the cost of any cleanup on private parties. First, the United States has argued that UAOs do not constitute "civil actions" under Section 113 so as to permit a PRP to seek contribution from other PRPs, such as the federal government. United States Br. at 3-4 (citing *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S.Ct. 577 (2004)). Second, largely relying on pre-*Cooper Industries* caselaw, the United States has argued that Section 107 cost recovery actions are unavailable to parties, such as targets of UAOs, who are themselves PRPs. United States Br. at 23-27 & n.18. Third, the United States has argued that Section 113(h) precludes judicial review of any UAO unless EPA seeks to enforce the order. United States Br. at 31. In combination with EPA's practice of issuing UAOs to private parties for environmental contamination where the federal government is itself a PRP, these litigation positions ensure that private parties are saddled with billions of dollars of unearned liability for which they have no meaningful recourse.[7] *See generally* Sophia Strong, *Aviall Services v. Cooper Industries: Implications for the United States' Liability under CERCLA, the "Superfund Law"*, 56 Hastings L. J. 193 (2004).

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[7] In fact, as related by Lockheed Martin in an *amicus* brief to the *Cooper Industries* Court, much of the United States' litigation strategy can be understood as "an apparent effort to minimize its [own] exposure under CERCLA [by] advocat[ing] conflicting legal theories" in a series of cases pre-*Cooper Industries* and as *amicus* in *Cooper Industries* itself. Brief of *Amicus Curiae* Lockheed Martin Corp., *Cooper Indus., Inc. v. Aviall Servs.*, Inc., 124 S.Ct. 981 (2004) (No. 02-1192), 2004 U.S. S. Ct. Briefs LEXIS 291, at 47 (U.S. Apr. 8, 2004).

C. CERCLA's Waiver of Sovereign Immunity Forbids the United States from Employing an End-Run around Its Effort to Ensure the Cleanup of Federal Facilities

Recognizing the federal government's history of environmental pollution and seeking to restore the environmental health of current and former federal facilities, Congress waived sovereign immunity to liability for the United States as a PRP under CERCLA. In particular, section 120(a)(1) provides:

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, *this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity*, including liability under section 9607 of this title.

42 U.S.C. § 9620(a)(1) (emphasis added). The lower courts have held that this waiver of sovereign immunity placed the government and private parties on an equal footing. *See, e.g.*, *FMC Corp. v. Dep't of Commerce*, 29 F.3d 833, 840 (3d Cir. 1994) ("[W]hen the government engages in activities that would make a private party liable if the private party engaged in those types of activities, then the government is also liable.").

As this case underscores, the United States has not enforced the statute so as to place itself on an equal footing with private parties. Indeed, it has sought to do the opposite. By deciding whether to issue UAOs or employ one of the other enforcement options, the United States controls whether it can be sued for contribution as a PRP under Section 113(f). Naturally, no private party enjoys such a right to insulate itself. And, in practice, hewing closely to its conception of the unitary executive, the United States has made it exceedingly difficult for the EPA to issue UAOs to other federal agencies or departments. *See* Chris M. Amantea & Stephen C. Jones, *The Growth of Environmental Issues in Government Contracting*, 43 Am. U. L. Rev. 1585, 1587, 1603-04 (1994) (lamenting the targeting of government contractors by EPA while

the United States relies on the "unitary executive" theory to preclude the issuance of UAOs to responsible federal agencies). In so doing, the United States has maintained that "federal courts are not the proper forums for resolving disputes between federal executive agencies" and that such disputes "should be resolved internally." *Id.* at 1603.

But this enforcement posture conflicts with the statutory waiver of sovereign immunity. It is well-established that the legislature retains the capacity to waive sovereign immunity from liability. *See United States v. Williams*, 514 U.S. 527, 614 (1995). EPA's enforcement practice, while not formally reasserting sovereign immunity in face of CERCLA's explicit waiver, all but extinguishes any hope for recovery from the United States by a separate potentially responsible party. Therefore, the United States' effort to use its *procedural* advantage to insulate itself from liability should be rejected by this Court.[8] This Court should hold that the United States is barred by the statutory waiver of sovereign immunity from issuing UAOs where the United States itself is a potentially responsible party. Otherwise, the United States will find it hard to resist the temptation of passing along its costs of cleanup at thousands of properties across the country to private parties.

CONCLUSION

This case clearly presents a genuine issue as to whether EPA is systemically running afoul of the due process protections of the Fifth Amendment by exercising its UAO power in

[8] In its motion, the United States argues, citing *Cooper Industries*, that "the United States [is not] in any different position than any private party [because b]y declining to enter an AOC and instead compelling EPA to issue an UAO, RAC has given up its rights to contribution against any potentially liable private parties, not just against the United States." United States Br. at 56. This contention ignores the United States' contribution to this "manifestly unjust" situation, *Viacom v. United States*, No. 05-0468, 2005 U.S. Dist. LEXIS 16877, at 15 (D.D.C. Jul. 19, 2005). Had the United States chosen a different enforcement option, RAC would have had a right to contribution, as the United States concedes.

non-emergency situations and to protect the United States from incurring liability as a potentially responsible party. EPA's unilateral order authority under CERCLA is unchecked by effective judicial review – either pre- or post-deprivation. Given CERCLA's broad liability scheme, this power has had an extraordinary impact upon American businesses, as they – time and again – have been coerced into complying with even the most dubious of EPA's UAOs for fear of ruinous fines and punitive damages. Any scheme that permits such unchecked power is flatly at odds with the Fifth Amendment's Due Process Clause. Given EPA's asserted authority to apply UAOs in non-emergency situations, however, the constitutional defects in its enforcement structure are significantly magnified. After withholding meaningful judicial review from targets of UAOs, EPA then uses them to shield the United States from liability—in direct contravention of CERCLA's clear waiver of sovereign immunity.

For this reason, the Court should deny the United States' Motion for Partial Dismissal, or in the alternative, Motion for Partial Summary Judgment and permit this case to proceed.

Respectfully Submitted,

February 24, 2006

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 24th day of February, 2006, the above and foregoing document was electronically filed with the Court by using the CM/ECF system, thus sending electronic notice to the following attorneys registered for ECF filing:

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