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

RAYTHEON AIRCRAFT COMPANY,

Plaintiff,

v.

UNITED STATES of AMERICA,

SERVE: Stephen L Johnson
Administrator
United States Environmental
Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

SERVE: Lieutenant General Carl A. Strock
Commander and Chief of Engineers
United States Army
Corps of Engineers
Headquarters
441 G. Street, NW
Washington, DC 20314

SERVE: Alberto R. Gonzales
Attorney General
of the United States
Department of Justice, Rm. B-103
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

SERVE: Civil Process Clerk
United States Attorney's Office
Eric F. Melgren
United States Attorney
500 State Ave., Suite 360
Kansas City, KS 66101

Defendant.

Case No. 05-2328 JWL

JURY TRIAL DEMANDED

EXHIBIT A

COMPLAINT

Plaintiff, Raytheon Aircraft Company ("RAC"), for its complaint against the United States of America (the "United States") states and alleges as follows:

NATURE OF THE ACTION

1. In Counts I, II, and III of this action, RAC brings claims for contribution, cost recovery, and declaratory judgment with respect to the Tri-County Public Airport Superfund Site (the "TCPA" or "Site") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and federal common law against the United States. As alleged more fully below, the United States is liable to RAC for response costs that RAC has incurred and will continue to incur with respect to TCPA.

2. Alternatively, in Count IV of this action, RAC brings a constitutional challenge to CERCLA, including Sections 106, 107(c)(3) and 113(h) of CERCLA, 42 U.S.C. §§ 9606, 9607(c)(3), 9613(h), seeking a declaratory judgment that the unilateral administrative order ("UAO") regime embodied in CERCLA violates the Due Process Clause of the Fifth Amendment to the United States Constitution when the United States issues a UAO to a potentially responsible party ("PRP") to perform response actions at a facility at which the United States is also liable or potentially liable under CERCLA for response costs.

3. Also in the alternative, in Count V, RAC seeks a declaratory judgment that the actions of the United States, through the issuance of a UAO to RAC on September 30, 2004, wherein the United States Environmental Protection Agency ("EPA") ordered RAC to perform certain remedial activities at the Site violate the Due Process Clause of the Fifth Amendment to the United States Constitution and also CERCLA's procedural and substantive requirements.

PARTIES

4. RAC is a Kansas corporation with its principal place of business in Wichita, Kansas. RAC is the successor-in-interest to Beech Aircraft Company. RAC is a "person" as defined in CERCLA Section 101(21), 42 U.S.C. § 101(21), 42 U.S.C. § 9601(21).

5. The United States is the government comprised of three branches: the Executive, Judicial, and Legislative. The United States is responsible for both the release of hazardous substances from facilities and the administration and enforcement of CERCLA, through the President. Here, the United States Department of Defense, its current and former sub-entities, including the United States Army Corps of Engineers ("USACE") for the War Department and United States Army Air Corps, is responsible for the release of hazardous substances from the Site, and EPA, through delegation from the President, has administered and enforced CERCLA against private entities, including RAC, at the Site. It it the position of the United States that it cannot enforce CERCLA liability against entities of the Executive Branch in court because Article II of the Constitution creates a "unitary executive," and thus a suit by one agency of the Executive Branch against another agency of the Executive Branch does not give rise to a justiciable "case or controversy" under Article III. The United States is a "person" as defined in CERCLA Section 101(21), 42 U.S.C. § 101(21), 42 U.S.C. § 9601(21).

VENUE AND JURISDICTION

6. Subject matter jurisdiction is based upon 28 U.S.C. § 1331 (controversy arising under a federal statute), 28 U.S.C. § 1337 (controversy arising under an Act of Congress regulating commerce), 28 U.S.C. § 2201 (action for declaratory judgment), and 42 U.S.C. § 9613(b) (exclusive original jurisdiction over all controversies arising under CERCLA). There is an actual, existing, and justiciable controversy between RAC and the United States for each

and every count alleged herein. Venue in this action is proper pursuant to 28 U.S.C. § 1391(e) and 42 U.S.C. § 9613(b), because a substantial part of the events or omissions giving rise to the claim occurred in this District, the Plaintiff resides in this District, and the Site is located in this District.

BACKGROUND FOR COUNT I, II, AND III

CERCLA

7. CERCLA provides for the cleanup of a "release" or "threatened release" of a "hazardous substance" into the environment. 42 U.S.C. §§ 9601, et seq. CERCLA makes those who contributed to the release or threatened release liable for the costs of responding to and cleaning up such release.

8. A PRP under CERCLA is a "person" covered by CERCLA that EPA (or another PRP) has identified as potentially responsible or liable for a covered release or threatened release of a "hazardous substance" to the environment. CERCLA Sections 104(a), 107(a), 122(a) & (b). The United States, and any department or agency thereof, can be a PRP. CERCLA Section 101(21).

9. The scope of liability under CERCLA is extremely broad. The persons who are liable for a release or threatened release of a "hazardous substance" include anyone who (1) owns or operates a site where "hazardous substances" have been or may be released; (2) owned or operated the site at the time "hazardous substances" were disposed there; (3) generated "hazardous substances" released at the site or any person who arranged for the disposal or treatment of "hazardous substances" at the site; or (4) transported "hazardous substances" to the site. CERCLA Section 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4). There are hundreds of compounds that qualify as a "hazardous substance" under CERCLA, and there is no

concentration or quantity threshold for a substance to qualify as "hazardous." 40 C.F.R. § 302.4 (EPA rule listing CERCLA hazardous substances). Liability under CERCLA is strict and joint and several.

10. Congress has established a Hazardous Substance Superfund, 26 U.S.C. § 9507, and authorized the use of funds from this Superfund to support EPA's administration and enforcement of CERCLA. Id., 42 U.S.C. § 9611.

11. After EPA determines which entities are to be PRPs for a facility, there are three statutory methods by which EPA may obtain a cleanup. First, EPA may issue a UAO to PRPs requiring them to undertake the cleanup. 42 U.S.C. § 9606(a). Second, EPA, through the Department of Justice ("DOJ") may file suit in federal district court seeking an order compelling a PRP or group of PRPs to undertake a cleanup. Id. Third, EPA may undertake the cleanup itself and, through DOJ, sue the PRPs in federal district court to obtain reimbursement of its response costs. 42 U.S.C. § 9607(a). CERCLA also authorizes the United States to enter into judicially-approved or administrative settlements providing for reimbursement of its response costs or performance of response actions. 42 U.S.C. § 9622.

The United States' Operations at the Site

12. On information and belief, the United States constructed and operated the Site as the Herington Army Airfield ("HAAF") between 1942 and 1946, as a part of the World War II war effort. It processed bombing crews and aircraft, including B-24 and B-29 heavy bombers through HAAF, and prepared the aircraft and crews for deployment abroad.

13. On information and belief, HAAF was located in Morris County and consisted of approximately 1,724 acres located in Sections 31 and 32, Township 15 South, and Sections 5, 6, and 18, Township 16 South, all in Range Six East of the Delavan, Kansas Quadrangle.

14. On information and belief, HAAF facilities included runways, hangars, aircraft maintenance shops, fuel storage tanks, motor pools, barracks, administration buildings, a sewage treatment plant, a landfill, and a spark plug cleaning building.

15. On information and belief, among other functions performed at HAAF, the United States completed newly-manufactured B-29 aircraft that arrived at HAAF directly from Boeing's Wichita plant, (e.g., installed Norden gun sights, and performed extensive aircraft shakedown and maintenance procedures, including engine repair, engine replacement, spark plug degreasing, hydraulic repair, and repainting) and other related maintenance preparing the military aircraft for service.

16. On information and belief, the United States utilized volatile organic compounds ("VOCs") and chlorinated degreasing solvents, including trichloroethylene ("TCE") for aircraft maintenance purposes and for use in fire extinguishers at HAAF during World War II.

17. On information and belief, the United States' civilian and military employees spilled, poured, and released solvents onto the ground at HAAF, and into drains that discharged directly to the environment.

18. On information and belief, in 1948, the United States quitclaimed HAAF to the City of Herington, Kansas ("City") pursuant to the Surplus Property Act of 1944. Pub L. No. 78-457, Ch. 479, 58 Stat. 765.

Beech Aircraft Company's Operations at the Site

19. On information and belief, thereafter, the City renamed the site the Tri-County Public Airport and leased portions of it to commercial tenants, including but not limited to Beech Aircraft Company ("Beech").

20. On approximately August 1, 1950, Beech leased parts of the Site from the City. On information and belief, Beech used portions of its leasehold as a military aircraft refurbishing facility from approximately 1951 to 1955, as a manufacturing facility for the production of wing fuel dispersing tanks, steel wing tank shipping containers from approximately 1955 to January 1960, and to manufacture military aircraft starter generators, from approximately 1950 to 1960, all under contract with the United States directly, or under a subcontract with a United States' contractor.

The United States' Investigation of Environmental Contamination at the Site

21. On information and belief, between 1993 and 1997, the United States conducted investigations at TCPA to determine whether its activities during World War II had caused soil or groundwater contamination. The United States detected TCE and other contaminants at TCPA.

22. In or about October 1997, the United States tested private groundwater wells in the area around TCPA and detected TCE in some of the groundwater samples. That same month, the United States first contacted RAC about contamination at the site and RAC's possible status as a PRP.

23. In 1998, the United States began an expanded site investigation/remedial investigation at TCPA to clarify that the release of TCE had occurred and determine the extent of contamination.

The United States' Enforcement Actions at the Site

24. In response to an Information Request that the United States as EPA issued to the United States as USACE, the USACE summarily denied that the United States polluted TCPA.

25. On March 29, 2000, the United States in its capacity as EPA issued an Administrative Order on Consent ("AOC") In the Matter of Tri-County Public Airport Site, Morris County, Kansas, Raytheon Aircraft Company, Respondent, Docket No. CERCLA-7-2000-0013, pursuant CERCLA Section 122(d). In this AOC, the United States found that RAC may be liable under Section 107(b) of CERCLA and ordered RAC to conduct a removal action to address TCE and TCE degradation products at TCPA. The AOC further required RAC to pay for 100% of the work and 100% reimbursement of oversight costs incurred by the United States. (See the EPA's AOC, attached as Exhibit A).

26. In paragraph 7 of the AOC, EPA acknowledged that the United States used TCPA during World War II to process bombing crews and aircraft which included aircraft and vehicle maintenance.

27. Paragraph 9 of the AOC, stated that Beech, the predecessor to RAC, also used the airport from 1950 to the early 1960's.

28. Paragraph 19 of EPA's AOC noted that the USACE declined to participate in the removal action because it denied that the United States "used TCE at the Site."

29. RAC has incurred response costs for work performed under the AOC, including the United States' oversight costs. The United States, in its capacity as USACE, has contributed nothing.

30. On November 20, 2000, RAC signed an Administrative Order on Consent with KDHE ("KDHE AOC") to perform a Remedial Investigation/Feasibility Study ("RI/FS") of TCPA.

31. RAC has incurred response costs for work performed under the KDHE AOC. The United States has contributed nothing.

The United States' Issuance of the UAO

32. On September 30, 2004, EPA, pursuant to 42 U.S.C. Section 106, issued a UAO to RAC and the City, commanding RAC alone to, *inter alia*, excavate and properly dispose of TCE-contaminated soils from an insular location near Hangar 1 at TCPA where the United States operated a TCE-vapor degreaser, at times twenty-four hours a day, seven days a week.

33. The UAO requires RAC to perform work that may cost RAC, at a minimum, $3,500,000.

34. The work required by the UAO involves a separate and distinct area of the Site from the area of the Site where Beech had its wing tank manufacturing operation.

35. Faced with the risk of the United States' enforcement authority under CERCLA, including, treble damages, i.e., $14,000,000, and $32,500 per day penalties, RAC agreed to perform the work required in the UAO.

COUNT I
Cost Recovery Under CERCLA Section 107

36. RAC repeats and realleges, as is fully set forth herein, each and every statement and allegation contained in paragraphs 1 through 35.

37. The Site is a "facility" as defined in CERCLA Section 101(9), 42 U.S.C. § 9601(9).

38. "Hazardous substances," as defined in CERCLA Section 101(14), 42 U.S.C. § 9601(14), were disposed of at the Site.

39. There have been "releases" or threatened "releases," as defined in CERCLA Section 101(22), 42 U.S.C. § 9601(22), of hazardous substances into the environment at or from the Site.

40. The United States owned and operated the Site at the time hazardous substances were disposed at the Site.

41. RAC has incurred and will continue to incur "response" costs as defined by CERCLA Section 101(25), 42 U.S.C. § 9601(25), as a result of the release and/or threatened release of hazardous substances at the Site. These costs incurred and to be incurred by RAC are and will be consistent with the National Contingency Plan, 40 C.F.R., Part 300, promulgated by the United States, in its capacity as EPA, under the authority of CERCLA Section 105, 42 U.S.C. § 9605.

42. The United States is joint and severally liable to RAC under CERCLA Section 107(a), 42 U.S.C. § 9607(a), for response costs incurred by RAC in connection with the TCPA.

COUNT II
Contribution under CERCLA

43. RAC repeats and realleges, as is fully set forth herein, each and every statement and allegation contained in paragraphs 1 through 42.

44. This Count asserts a claim in contribution under CERCLA for the response costs incurred (or to be incurred) by RAC as a result of the AOCs issued to RAC pursuant to CERCLA Section 122 and the UAO issued by EPA to RAC pursuant to section 106(a) of CERCLA.

45. RAC is entitled to contribution under CERCLA Sections 107 and/or 113(f), 42 U.S.C. §§ 9607 and 9613(f), from the United States as to response costs incurred by RAC in connection with the TCPA.

COUNT III AGAINST DEFENDANTS UNITED STATES
Contribution under Federal Common Law

46. RAC repeats and realleges, as is fully set forth herein, each and every statement and allegation contained in paragraphs 1 through 45.

47. This Count asserts a claim in contribution under federal common law for the response costs incurred (and to be incurred) by RAC as a result of the AOCs issued to RAC by EPA and KDHE and the UAO issued to RAC by EPA.

48. CERCLA, as interpreted, requires that RAC and the United States be jointly and severally liable for the cost of remediating contamination at Site.

49. RAC has borne more than its equitable share of the cost of remediating the contamination.

50. RAC is entitled under federal common law to contribution from the United States, in its capacity as USACE, as to certain response costs incurred by RAC in connection with the TCPA.

BACKGROUND FOR COUNTS IV and V

Overview of CERCLA's Unilateral Orders Regime

51. CERCLA Section 106 and the related statutory provisions of CERCLA (Sections 107(c)(3) and 113(h)) deprive private persons of property without due process by failing to provide constitutionally adequate procedural safeguards in connection with the issuance of UAOs by EPA, including at facilities where the United States is a PRP. Under these CERCLA provisions, EPA can and does issue UAOs to private persons compelling massive and onerous cleanups of merely potential environmental hazards. At facilities where the United States is a PRP, EPA can and does use its power to issue UAOs to coerce a disproportionate share of remediation costs onto private parties to the benefit of the United States.

52. A person subject to such UAOs receives no opportunity for any kind of prior hearing before the order becomes effective. Such a person can only obtain a hearing before an impartial decisionmaker through non-compliance with the UAO, risking exposure to enormous daily fines and treble damages, or by complying with the UAO and, after many years and spending potentially millions of dollars, awaiting EPA's certification that it has completed all the work required by the UAO. Neither option provides a prompt and meaningful hearing as required by the Due Process clause.

53. A person to whom a UAO is issued, such as RAC, risks exposure to enormous daily fines, and treble damages should it fail to comply with the UAO – even though that person has no timely or meaningful opportunity to seek judicial review regarding the validity of the order. This coercive and fundamentally unfair regime deprives persons of their ability to challenge the propriety of a UAO and coerces them into giving up their statutory right to contribution. In light of the substantial penalties and damages, there is no practical choice but to comply.

54. Moreover, even if the recipient of a UAO complies with the order, there is still no statutory guarantee that a recipient will receive a prompt post-order hearing before an impartial decisionmaker. Instead, the order may be challenged only at the completion of all the work commanded by EPA and only after EPA, in its sole discretion, has certified the completion of that work. This leaves the timing of the hearing, which literally can be delayed for years, solely under the arbitrary control of EPA. In no event does the statute assure a prompt, post-deprivation hearing. Given that the work required by CERCLA UAOs can last a decade or more, the delay inherent in the statutory scheme undermines any meaningful opportunity for review of EPA's choice of cleanup or EPA's determination of the liability of the UAO recipient. Further, because CERCLA only authorizes contribution claims "during or

following" certain judicial actions, by complying with the UAO, the private recipient of a UAO at a facility where the government is also a PRP is deprived of its ability to seek contribution and thus is saddled with a share of liability disproportionate to its contribution to the harm being addressed.

55. The UAO regime thus imposes a classic and unconstitutional Hobson's choice: Either do nothing and risk intolerable penalties or comply, forgo the right to contribution, accept disproportionate liability, and wait indefinitely before having any opportunity to be heard on the legality and rationality of the underlying order. These alternatives do violence to the constitutional norm of due process.

56. EPA can and does use this powerful authority in an unconstitutional manner to impose liability upon a private recipient in an amount disproportionate to its actual responsibility and deprive the private recipient of its statutory right to obtain contribution for the costs of response from the United States. CERCLA Section 113(f)(1) provides a right for PRPs to obtain contribution from other PRPs for response costs they have incurred. The Supreme Court in *Cooper Industries, Inc. v Aviall Services, Inc.* __ U.S. ___, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004), however, interpreted this provision to limit such contribution actions to those filed during or following a civil action under Section 106 or 107(a) of CERCLA. If the issuance of a UAO does not constitute such a civil action, the receipt of a UAO at a site where the United States also is a PRP immediately deprives the recipient of its statutory right to seek contribution from the United States. The recipient can regain these contribution rights only if it does not comply with the UAO and the United States files an action against the UAO recipient to enforce the UAO under Section 106 or 107(a). Through the issuance of UAOs at sites where the United States is a PRP, the United States thus: (a) deprives a private UAO

recipient of its right to seek contribution from the United States, (b) coerces a private UAO recipient to forgo these rights under threat of massive penalties and damages, (c) unilaterally imposes a share of liability upon the private UAO recipient disproportionate to that recipient's contribution to the harm being addressed, and (d) insulates itself from liability by transferring the costs of remediating United States' contamination to private PRPs, all in violation of the Due Process clause.

57. CERCLA's UAO regime sharply departs from the protections afforded under federal administrative statutes governing other agencies. Indeed, the CERCLA regime singularly fails to provide basic procedural safeguards, including an impartial hearing and judicial review at any meaningful time frame, before or after a private recipient's property is taken by the United States.

58. RAC has been and is aggrieved by CERCLA's fundamental constitutional deficiencies. EPA has used its authority to issue an onerous UAO in a non-emergency setting against RAC. EPA has used its authority to issue a UAO to RAC where the United States is liable, thus imposing upon RAC response costs in an amount disproportionate to RAC's contribution to the harm being addressed, depriving RAC of its contribution rights and coercing RAC to permanently forgo those rights under the threat of penalties and damages. EPA's authority to issue additional such orders continues to be a serious threat. RAC is and will continue to be deprived of its liberty and property by reason of being forced to comply with these provisions. Accordingly, RAC seeks a declaration by this Court sustaining RAC's basic procedural due process rights guaranteed by the Constitution.

Provisions Relevant to CERCLA's Unilateral Orders Regime

59. As explained in paragraph 12, EPA has three statutory methods for obtaining a cleanup. Two of these methods - EPA conducting the cleanup itself and then, through the DOJ, suing to recover its costs under section 107(a), or EPA, through DOJ, suing under section 106(a) to obtain a judicial order to perform a cleanup - ensure that the PRP is accorded a timely opportunity to be heard by a neutral decisionmaker and protect recipients from bearing a disproportionate share of liability or being deprived of their statutory right to contribution. In both cases, the PRP receives a timely hearing in court without being forced to do the work first and without being subject to fines and penalties. In both cases, because a "civil action" has been filed, a PRP may file a contribution action against the United States pursuant to section 113(f)(1). Neither method insulates the United States from liability for its share of response costs at a facility.

60. By contrast, under Section 106(a) of CERCLA, EPA has the power to issue UAOs compelling the cleanup without a hearing, merely upon a finding that "there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." In that event, EPA "may . . . issu[e] such orders as may be necessary to protect the public health and welfare and the environment." 42 U.S.C. § 9606(a). Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987) (delegating authority to EPA). Under this third method, EPA can abuse its UAO authority, subject to no statutory standard or judicial review, to insulate the United States from liability and to deprive private recipients of their right to contribution. When EPA issues a UAO at a facility where the United States also is a PRP, EPA immediately deprives the UAO recipient of its contribution rights, forces that private PRP to bear a disproportionate

share of liability for response costs, and denies that private PRP a timely or adequate opportunity for a hearing or review upon EPA's liability determinations. As shown hereafter, the private PRP who received a UAO faces a multitude of unconstitutional Hobson's choices.

The Intolerable Consequences Of Noncompliance

61. CERCLA imposes massive penalties for failure to comply with UAOs issued pursuant to Section 106(a). Section 106(b)(1) of CERCLA provides that "[a]ny person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the [EPA] under subsection (a) of this section may. . .be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues." 42 U.S.C. § 9606(b)(1). By regulation, EPA has increased the amount of the potential penalty up to $32,500 for each day of non-compliance. 40 C.F.R. § 19 (Table 1). In addition, Section 107(c)(3) provides for punitive damages equal to three times the cost of the cleanup compelled by the UAO in the event a person fails, "without sufficient cause," to comply with a UAO issued under Section 106(a). Id. § 9607(c)(3). The courts have interpreted this "treble damages" provision to authorize recovery of EPA's actual response costs plus three times those costs plus prejudgment interest, for a total liability of four times the costs of implementing an order, plus interest, in addition to daily civil penalties.

62. CERCLA fails to provide for any impartial hearing in connection with any part of a Section 106(a) UAO, either before or at any meaningful time after its issuance.

CERCLA's Unilateral Orders Regime Operates Without Timely and Meaningful Judicial Review

63. CERCLA Section 113(h) flatly prohibits immediate judicial review of specific UAOs issued under Section 106(a). The statute specifies only two attenuated routes to judicial

review of these orders. Neither provides an opportunity to be heard in a timely or meaningful way, and neither provides a meaningful way to regain one's lost contribution rights.

64. If a UAO recipient refuses to perform the work, then, under Section 106(b) of CERCLA, EPA, through DOJ, may bring an action in federal district court to enforce the order and to impose penalties for its violation. The decision whether and when to bring such an action is, however, left solely to the discretion of EPA and DOJ. Moreover, EPA unilaterally creates the administrative record which governs judicial review of its cleanup decisions. Because EPA maintains total control of the record's content and because there never is a hearing before an impartial decisionmaker to whom the UAO recipient can present evidence, judicial review limited to EPA's administrative record is wholly inadequate and renders that process meaningless particularly because EPA can exclude from the record evidence of the United States' liability.

65. Under this route, the PRP faces an unacceptable risk of fines and penalties. As noted above, CERCLA imposes intolerable penalties for each day of non-compliance with a UAO and quadruple liability for the costs incurred by EPA in carrying out the work required by a UAO if the recipient fails to do so. Moreover, CERCLA gives EPA sole discretion as to whether and when to bring an enforcement action for non-compliance with a UAO. Thus, EPA can arrange for massive penalties to accumulate against a non-complying party by postponing an enforcement action for as long as it likes and until after EPA expends substantial monies to carry out the work required by the order, which sums may be quadrupled. The threat of such massive penalties, combined with CERCLA's preclusion of pre-enforcement review, coerces recipients to comply with UAOs, even though such orders may be invalid.

66. Further, only through non-compliance with a UAO and subjecting itself to the intolerable penalties and damages for non-compliance can the recipient hope to avoid the imposition of a share of liability for response costs disproportionate to its responsibility for the harm at a facility and regain its statutory right to pursue an action in contribution under Section 113(f)(1) against the United States. Courts have held that there is strict, joint and several liability under CERCLA. Only through a claim in contribution can a PRP seek to obtain an equitable allocation of liability. A UAO unreasonably and through the threat of intolerable penalties and damages deprives a recipient of the right to contribution. Noncompliance with a UAO, moreover, does not guarantee the availability of such contribution rights. The statutory right to contribution (and the avoidance of disproportionate liability) can be regained only if and when DOJ, at EPA's request, files a civil judicial action to enforce the UAO. Thus, the recipient of a UAO is forced to choose between attempting to gain its rights to contribution to reduce its share of liability for response costs and subjecting itself to massive penalties and damages, on the one hand, or avoiding massive penalties damages and forgoing its right to contribution, on the other hand. This is not a real choice. This unduly coercive and unconstitutional choice is addressed in Count IV.

67. Although CERCLA Sections 106(b)(1) and 107(c)(3) purport to provide a "sufficient cause" defense to these penalties, this safeguard is illusory. According to EPA, the party who receives an order bears the burden of showing, based solely on the administrative record assembled by EPA, that EPA's order is arbitrary, capricious, or otherwise not in accordance with law. It is not clear that a court would find non-compliance on the grounds that the order deprives the recipient of its contribution rights to be a "sufficient cause." Moreover, there is little judicial or EPA guidance on what constitutes "sufficient cause" for

noncompliance with a UAO. Given the nebulous character of the "sufficient cause" defense itself and the absence of a fair record on which to have the issued UAO reviewed, this regime ensures that no rational and responsible PRP will take the enormous risk in not complying with an EPA UAO. The sufficient cause defense fails to prevent or diminish the unconstitutional and arbitrary denial of the statutory right to contribution which EPA can impose through the issuance of a UAO. Accordingly, this route denies PRPs meaningful, timely judicial review of the order and only an illusory hope of regaining one's lost contribution rights.

68. Section 106(b)(2) of CERCLA provides a second purported avenue of review: "any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition [EPA] for reimbursement from the fund for reasonable costs of such action . . . " on the ground that the UAO is invalid. 42 U.S.C. § 9606(b)(2)(A) (emphasis added). EPA will entertain such a petition on its merits only if it determines that the PRP has fully completed the work required by the UAO to EPA's satisfaction. EPA, however, retains full discretion to determine whether and when a PRP has completed response actions required by a UAO.

69. If, in response to a reimbursement petition that EPA, in its sole discretion, deems ripe for its consideration and decision, EPA refuses to reimburse the petitioner's response costs, then – and only then – may the petitioner institute a civil action against EPA in federal district court to attempt to collect its costs under the petition. Id. 42 U.S.C. § 9606(b)(2)(B). Under CERCLA as construed by EPA, a petitioner is required to establish, based solely on the administrative record compiled exclusively by EPA, either that EPA's selected remedy was arbitrary and capricious or not in accordance with law or the recipient was not liable, in order to prevail in the reimbursement proceeding. See 42 U.S.C. § 9606(b)(2)(C) and (D).

70. In addition to these deficiencies, the right to seek reimbursement does not provide a means to avoid the imposition of a share of liability for response costs disproportionate to the recipient's contribution to the harm or to regain the recipient's lost contribution rights. By the terms of the statute, the only issues that can be raised through such a petition (including court review of EPA's disposition of a petition) are whether the recipient was properly determined to be liable or whether the action ordered by EPA is arbitrary or capricious.

71. By indefinitely postponing judicial review of the validity of a Section 106(a) order until after completion of the work as required by EPA, and by imposing other virtually impossible procedural and substantive hurdles to successful assertion of such claims, this second route under CERCLA denies complying parties meaningful, timely judicial review of the validity of UAOs. It provides no means to preserve the recipient's lost contribution rights.

72. EPA wields unfettered authority to issue a UAO to one PRP while ignoring other PRPs, even PRPs with greater responsibility for environmental harm. Thus, CERCLA authorizes EPA to select arbitrarily one PRP to bear the entire burden of remediating contamination caused by many. This power is particularly abusive where the United States itself is a PRP, since a UAO issued to other parties can be used to insulate the United States from claims for contribution and ultimately liability under CERCLA. CERCLA never explicitly affords the unfortunately-chosen PRP any opportunity to challenge EPA's de facto liability allocation determination made behind closed doors with no threat of any independent judicial review. CERCLA imposes no restraints at all upon EPA's abusive exercise of this constitutionally-offensive power.

73. In sum, CERCLA's UAO regime is replete with unacceptable alternatives. If a recipient does not comply with a UAO, it can regain its contribution rights, but face massive

fines and penalties with no guarantee of either a prompt hearing or a fair one. If a recipient bows to the commands of federal bureaucrats, it will be forced to expend an enormous effort and sums of money doing the federal government's bidding, take on a share of cleanup costs disproportionate to its contribution to the harm, forgo its contribution rights, and still not have a prompt or fair hearing on whether the government has acted arbitrarily or illegally. A single Hobson's choice violates the Constitution; layers of Hobson's choices make a mockery of it.

RAC Has Been And Will Be Aggrieved By CERCLA's Unilateral Orders Regime

74. When EPA issues a UAO to a PRP, it does so without a prior hearing, notwithstanding the absence of any urgency that might justify summary action. In each case, the PRP is coerced to expend its resources and forgo its contribution rights. In each case, the federal government commandeers the PRP's personnel, to undertake and complete the federally-mandated activity.

75. RAC has been the victim of and is threatened with this UAO regime. On September 30, 2004, the United States issued RAC and the City a UAO, commanding RAC to spend millions of dollars performing a "non-time critical, non-emergency" response action at the Site. This UAO was issued to RAC and the City despite the fact that the United State itself is liable and primarily responsible for conditions at the Site to be addressed by the UAO. In so doing, the United States has unilaterally imposed upon RAC costs far disproportionate to RAC's fair share of liability, deprived RAC of its contribution rights to avoid this unilateral imposition of liability, coerced RAC into forgoing those rights forever under the threat of massive penalties and damages, and insulated itself from contribution claims. RAC was never provided a hearing or opportunity to preserve its contribution rights or seek contribution from the United States.

76. The United States threatens to require RAC to perform additional work at areas of the Site not addressed under prior AOCs and the September 30, 2004 UAO. Under its current scheme, the United States can and will continue to issue UAOs to RAC to perform multi-million dollar activities all in violation of RAC's constitutional Due Process rights.

COUNT IV
Violation Of The Constitution –
Denial Of Procedural Due Process

77. RAC repeats and realleges, as is fully set forth herein, each and every statement and allegation contained in paragraphs 1 through 76.

78. The Fifth Amendment to the United States Constitution provides that "no person shall be deprived of life, liberty, or property without due process of law." Prior to government deprivation of a person's liberty or property, procedural due process requires notice and a hearing before a neutral decisionmaker, except in a genuine emergency or other extraordinary circumstance making a pre-deprivation hearing infeasible. Even where extraordinary circumstances may justify summary deprivation of liberty or property, the Constitution requires, at a minimum, a prompt, meaningful post-deprivation hearing before a neutral decisionmaker.

79. CERCLA's UAO regime violates these essential procedural due process requirements. At a facility where the United States is a PRP, a UAO deprives the recipient of its right to seek contribution from the United States. A UAO also deprives the recipient of other property and liberty interests.

80. The UAO regime does not provide a hearing, much less an impartial one, on a UAO prior to its issuance, and it does not provide any guarantee for a timely and meaningful post-deprivation hearing and judicial review. It provides no real means of regaining lost

contribution rights. This is because CERCLA gives EPA enormous discretion to determine whether and when a UAO recipient that complies may obtain such review and because CERCLA alternatively authorizes large, cumulative punitive liabilities if the recipient does not promptly comply with a UAO.

81. EPA has exercised and will continue to exercise vast discretion in issuing coercive and burdensome orders, often in a highly arbitrary manner, without any meaningful statutory standards or procedural or judicial safeguards to limit its power. Where an administrative authority possesses such sweeping powers to impose deprivations of liberty and property, there is an especially compelling need for procedural safeguards to ensure that the exercise of those powers is lawful and not arbitrary. This is especially true where EPA issues a UAO at a facility where the United States is a PRP, as the UAO can be used to insulate the United States from claims for contribution. CERCLA's total failure to provide any such safeguards constitutes a profound violation of due process.

82. This lack of due process afforded by CERCLA's UAO regime contrasts sharply with the regulatory statutes authorizing summary action by other agencies. It is certainly not unreasonable to permit RAC and other PRPs to be heard before non-emergency orders are released. The two other enforcement methods in CERCLA grant the PRP a timely judicial hearing before an order is enforced. Thus, the burden on EPA of requiring it to provide sufficient process would be minimal.

83. Accordingly, the UAO provisions of CERCLA work together to deprive the UAO recipients of the due process of law guaranteed by the Fifth Amendment to the Constitution.

84. These problems are exacerbated when EPA uses its UAO authority at facilities where the United States also is a PRP. EPA can and does use the UAO provisions to impose

an inequitable share of response costs upon private recipients without providing those recipients a hearing or opportunity to defend themselves. EPA can and does use the UAO provisions to deprive private recipients of their contribution rights. It coerces private recipients to comply with the UAO, relinquish their rights to contribution, and accept a disproportionate share of response costs under the threat of substantial and onerous penalties and damages. UAOs can and have been used arbitrarily by EPA to shield the United State from any judicial determination of its liability. EPA's abusive exercise of this constitutionally offensive power to select parties for disproportionate liability and protect other parties from bearing any share of liability, is subject to no statutory standards or judicial review. Accordingly, the United States', in its capacity as EPA, exercise of the CERCLA UAO authority at facilities where the United States also is a PRP, violates due process.

COUNT V
Actions Constituting Violation of the Constitution and CERCLA

85. RAC repeats and realleges, as is fully set forth herein, each and every statement and allegation contained in paragraphs 1 through 84.

86. The United States' actions in issuing the UAO to RAC on September 30, 2004, violate RAC's procedural due process rights guaranteed by the Fifth Amendment. The issuance of the UAO imposes upon RAC a share of liability for response costs disproportionate to RAC's contribution to the harm being addressed under the UAO. The issuance of the UAO also deprives RAC of its statutory right to seek contribution from the United States pursuant to section 113(f)(1). The risk of substantial penalties and damages forces RAC to forgo regaining its lost contribution rights. RAC is never provided a hearing or opportunity to challenge the United States' actions in imposing this deprivation of its contribution rights.

87. The United States' actions in issuing the UAO to RAC on September 30, 2004 also violate the substantive and procedural requirements of CERCLA. CERCLA Section 120(a)(1) provides that the United States is to be subject to CERCLA "in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity." By using its UAO authority, the United States has insulated itself from liability and avoided responsibility for its fair and equitable share of the response costs at the Site. Instead, the UAO seeks to impose upon RAC full responsibility for the response costs at the Site. Thus, the United States has violated Section 120(a)(1) of CERCLA by not subjecting itself to the same procedural and substantive requirements of CERCLA.

88. In addition, by depriving RAC of the right to seek contribution from the United States, the United States has unilaterally awarded itself protection from contribution claims. Such "contribution protection," however, is only to be granted under the limited circumstances and after following the procedures provided in CERCLA Section 113(f)(2). CERCLA Section 113(f)(2) authorizes the granting of "contribution protection" only to those persons who enter into settlements with the United States or a State and only when the procedural safeguards governing administrative or judicially approved settlements are satisfied. By effectively providing itself with contribution protection, but without following these statutory procedures and without entering into a judicial or administrative settlement, the United States has violated these procedural and substantive requirements.

89. Accordingly, through the issuance of the UAO to RAC on September 30, 2004, the United States has violated RAC's Fifth Amendment Due Process rights and the substantive and procedural standards set out in CERCLA for determining liability and awarding protection from suits seeking contribution.

RELIEF SOUGHT

WHEREFORE, RAC respectfully requests the Court to render judgment in its favor and to grant it the following relief:

A. to impose liability against the United States under CERCLA Section 107(a), 42 U.S.C. § 9607(a), for response costs incurred by RAC in connection with the TCPA, with interest from the date of expenditure;

B. to impose liability against the United States and the City for contribution and to order the United States to pay to RAC its equitable share of response costs incurred by RAC in connection with the TPCA, with interest from the date of expenditure;

C. to declare the United States liable to RAC for response costs incurred and to be incurred by RAC in connection with the TCPA Site, with such declaratory judgment to be binding in this action and in any future action by or against the United States under CERCLA Sections 107 or 113, 42 U.S.C. §§ 9607 or 9613, in connection with the TCPA.

D. to enter judgment declaring that the authority granted the United States to issue unilateral administrative orders pursuant to Section 106 of CERCLA, including at facilities at which the United States itself is liable or potentially liable, violates the Due Process Clause of the Fifth Amendment;

E. to enter judgment declaring that the United States' issuance of a unilateral administrative order to RAC pursuant to Section 106 of CERCLA violates RAC's due process guaranteed by the Fifth Amendment;

F. to enter judgment declaring that the United States' issuance of a unilateral administrative order to RAC pursuant to Section 106 of CERCLA violates the procedural and

substantive requirements of CERCLA 120(a)(1) and/or 113(f)(2), 42 U.S.C. §§ 9620(a)(1), 9613(f)(2);

G. to grant RAC reimbursement from the United States for costs RAC incurs complying the UAO, with interest from the date of expenditure.

H. to impose liability upon the United States for RAC's costs in this action, including expert witness and reasonable attorneys' fees;

I. to grant RAC such other relief as the Court deems necessary or appropriate for a just adjudication in this action.

Date: July 28, 2005

Respectfully submitted,

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