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

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

MEMORANDUM IN SUPPORT OF DEFENDANT UNITED STATES' MOTION FOR PARTIAL DISMISSAL, OR, IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT

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EXHIBIT B

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GLOSSARY

AOCs	Administrative Orders on Consent
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675
DoD	Department of Defense
KDHE	Kansas Department of Health and Environment
NCP	National Contingency Plan
PRPs	potentially responsible parties
ROD	Record of Decision
SARA	Superfund Amendments and Reauthorization Act of 1986
TCE	trichloroethylene
UAO	Unilateral Administrative Order
USACE	United States Army Corps of Engineers

MEMORANDUM IN SUPPORT OF DEFENDANT UNITED STATES' MOTION FOR PARTIAL DISMISSAL, OR, IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant United States of America ("United States") hereby moves this Court to dismiss Counts I and III, as well as parts of Count II, of the complaint filed in this matter by Plaintiff Raytheon Aircraft Co. ("Raytheon") for failure to state a claim. In addition, the United States hereby moves this Court to dismiss Counts IV and V for lack of jurisdiction, or in the alternative, for summary judgment. Counts I - III of the complaint seek cost recovery for moneys spent by Raytheon in addressing contamination at a facility it formerly operated. Counts IV and V seek a declaration that certain provisions of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, are unconstitutional. With the exception of a portion of Count II, all of these claims should be dismissed.[1/]

INTRODUCTION/NATURE OF THE CASE

The complaint in this matter involves the former Herington Army Airfield near Herington, Kansas, subsequently known as the Tri-County Public Airport (the "Site"). Raytheon, pursuant to two Administrative Orders on Consent ("AOCs") and one Unilateral

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[1/] The United States denies any liability under Count II or any other portion of the complaint. As to the claim stated in Count II for contribution for monies spent in compliance with certain Administrative Orders on Consent, the United States does not contest in this motion that Raytheon has properly stated a claim. Because Raytheon is not entitled to recovery on that claim, however, the United States will move for summary judgment as to those remaining issues at the appropriate time.

Administrative Order ("UAO"),[2] has performed and is continuing to perform response actions relating to trichloroethylene ("TCE") contamination at the Site. Raytheon alleges that the United States shares liability for the costs relating to the cleanup of this contamination as a result of the Army's use of the Site as an air base during World War II. The United States has consistently denied any such liability and EPA has not found evidence to indicate that the Army – or any other entity of the United States[3] – ever used TCE at the facility.

As will be discussed in greater detail, CERCLA was passed in 1980 to deal with past, present, and future releases of hazardous substances. The statute gives the President the authority to respond to releases of such substances, or to require others to respond, through various mechanisms.[4] Section 106 allows the President to issue orders to liable parties requiring them to undertake cleanup. 42 U.S.C. § 9606. Section 107 identifies the types of parties who may be liable and allows certain parties, including the United States, to sue any such liable person to recover costs of responding to a release of hazardous substances. Id. § 9607. Section 113(f), added when the statute was amended in 1986, provides a cause of action for contribution by one liable party against another. Id. § 9613(f).

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[2] One of the AOCs was issued by EPA, the other by the Kansas Department of Health and Environment ("KDHE"). The UAO was issued by EPA.

[3] The United States Army Corps of Engineers ("USACE") is now responsible for the conduct of Defense Environmental Restoration Program actions, as appropriate, at Formerly Used Defense Sites, including the Site. 10 U.S.C. §§ 2700-2710, and authority delegated in DoD Instruction Number 4715.7, paragraphs 5.8 and 5.8.1 (April 26, 1996), and Army Resolution 200-1, paragraph 1-25.e (Feb. 21, 1997).

[4] The President has delegated authority to EPA and other federal agencies, including the Department of Defense ("DoD"), to take actions under various sections of CERCLA. See Exec. Order No. 12,580, 3 C.F.R., p. 193 (1987 Comp.) and Exec. Order No. 13,016, 3 C.F.R., p. 214 (1996 Comp.) .

Raytheon seeks a declaration from this Court that the United States is liable for response costs. Raytheon brings its claims pursuant to CERCLA sections 107 and 113, as well as federal common law. *See* Complaint, Counts I, II, and III. Except for a portion of Count II, however, none of these counts states a claim for which relief can be granted. Raytheon cannot bring a stand-alone cost recovery claim under CERCLA section 107 because Raytheon itself is a liable party; thus, its claim is for contribution, and is governed by section 113, not section 107 standing alone. Therefore, Count I must be dismissed. See infra at 23-27. CERCLA section 113 does provide a right of contribution, but the Supreme Court has held that cause of action is limited. In Cooper Indusries v. Aviall, 125 S. Ct. 577 (2004) ("Aviall"), the Court held that the plain language of CERCLA requires that a claim for contribution under section 113(f) may be brought only "during or following any civil action under" section 106 or 107, or where a party "has resolved its liability to the United States or a State." See 42 U.S.C. §9613(f), Aviall, 125 S. Ct. at 581-84. Thus, the Court held that where those conditions have not been fulfilled, there is no claim for contribution under section 113(f). Aviall, 125 S. Ct. at 583-84. By entering into two Administrative Orders on Consent for portions of the clean up, Raytheon resolved its liability to the United States or the State of Kansas[5] as to that work and this complaint states a claim for contribution as to costs incurred in performing those portions of the work.[6] As to the remainder of the clean-up, however, Raytheon declined the opportunity to enter an AOC, compelling the United States to issue a Unilateral Administrative Order. Such an order does not constitute a

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[5] For purposes of this motion, the United States will not contest that entry into the Kansas AOC is sufficient resolution of Raytheon's liability for purposes of section 113(f)(3)(B).

[6] As noted, the United States nevertheless denies any liability for that claim.

resolution of liability with the United States, nor is it a civil action pursuant to CERCLA section 106 or § 107. As to those costs, therefore, pursuant to the Supreme Court's decision in Aviall, Raytheon has failed to state a contribution claim under CERCLA section 113(f) for costs incurred or to be incurred in complying with the UAO. See infra at 27-28.

Nor has Raytheon stated a claim under federal common law. When CERCLA was enacted in 1980, it did not include an express cause of action for contribution. Various courts, however, determined that such a cause of action was implied in the statute. See Aviall, 125 S. Ct. at 581 (discussing cases finding implied right of contribution and calling them into question). In 1986, when CERCLA was amended, Congress added express contribution remedies in section 113(f). Thus, even if the prior decisions were correct, Section 113(f) *replaced* any federal common law of contribution, created by those cases or otherwise, under CERCLA. It is settled law that once Congress has addressed an issue by creating a cause of action, courts may not expand that right through federal common law. Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 95 n.34 (1981). Because Congress has specifically provided a limited right of contribution under CERCLA, courts are not at liberty to provide for any expanded right of contribution and Count III must be dismissed. See infra at 28-30.

Raytheon's complaint also seeks a declaration that CERCLA's Unilateral Administrative Order provision violates the due process protections of the United States Constitution. See Complaint, Count IV. This Court has no jurisdiction over this claim, however, because CERCLA section 113(h) prohibits judicial review of a section 106 order until EPA seeks to enforce it. 42 U.S.C. § 9613(h). Thus, this Count must be dismissed for lack of jurisdiction.

Even if there were jurisdiction, however, the United States would be entitled to summary judgment on this Count. To prevail on a facial challenge, Raytheon must establish that there is *no* set of circumstances under which the challenged statutory provisions would be constitutional. United States v. Salerno, 481 U.S. 739, 745 (1987); West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1367 (10th Cir. 2000). This is a standard Raytheon cannot meet. Even setting the Salerno standard aside, however, Raytheon cannot show any constitutional infirmity in the CERCLA provisions at issue. At bottom, Raytheon's facial challenge rests on a fundamental misconception about section 106 clean-up orders. These orders are not self-executing and, therefore, if a party disputes the scope or validity of such an order and chooses not to comply with it, EPA must file a civil action in federal court if it wishes to compel compliance or seek penalties. 42 U.S.C. §§ 9606(b)(1), 9607(c)(3). A party cannot be forced to comply with an administrative order, and no civil penalties or punitive damages can be imposed, before the recipient of the order has a hearing before an Article III judge on its challenges to the clean-up order. 42 U.S.C. § 9696(b)(1); see also 42 U.S.C. § 9607(c)(3). The recipient of a section 106 order thus cannot be deprived of any protected interest until it has an opportunity for a hearing that more than satisfies the requirements of due process. Indeed, even if a party chooses to forego that opportunity and comply with a section 106 order, CERCLA allows that party to petition EPA for cost reimbursement after completing its work under the order. 42 U.S.C. § 9606(b)(2). Claims similar to Raytheon's have thus been soundly rejected by every federal court of appeals to which they have been presented. See, e.g., Employers Ins. of Wausau v. Browner, 52 F.3d 656, 660, 664 (7th Cir. 1995) (characterizing due process challenges to CERCLA as "baseless" and "misdirected"); see also infra at 31-54. This Court should similarly

reject Raytheon's facial challenge to CERCLA, and grant summary judgment for the United States.

Finally, Raytheon seeks a declaration that the UAO issued to it in connection with the Site is unconstitutional and in violation of the statute. *See* Complaint, Count V. As with Count IV, however, CERCLA section 113(h) deprives this Court of jurisdiction over this claim. 42 U.S.C. § 9613(h). Even if jurisdiction were available, however, Raytheon's claim would have no merit. Raytheon claims that by issuing a UAO, EPA has violated Raytheon's due process rights and "deprived [Raytheon] of its statutory right to seek contribution" from the United States. Complaint ¶ 86. Raytheon has not been deprived of its due process rights for the same reasons that the UAO program as a whole does not deprive parties of due process: Raytheon has not been deprived of any property interest, nor can it be until after a hearing in federal district court. Nor has the United States deprived Raytheon of its statutory rights to contribution. Instead, Raytheon was offered the opportunity to enter into an Administrative Order on Consent, and which would have given Raytheon a cause of action for contribution, but Raytheon itself chose not to avail itself of that opportunity. Nor does the UAO violate any statutory requirements of CERCLA. Raytheon has alleged that, by issuing a UAO, the United States has insulated itself from liability in violation of the statute. Yet the statute itself, in section 106, gives the United States the authority to issue such orders and Raytheon has not alleged that the United States has violated any requirement of section 106 in exercising that authority. Therefore, Count V should be dismissed for lack of jurisdiction, or, in the alternative, the United States should be granted summary judgment on this count.

STATUTORY AND REGULATORY BACKGROUND

Congress enacted CERCLA in 1980, in response to serious public health threats posed by abandoned or inactive hazardous waste disposal facilities. See generally United States v. Bestfoods, 524 U.S. 51, 55 (1998); Morrison Enters. v. McShares, Inc., 302 F.3d 1127, 1132 (10th Cir. 2002). Congress concluded that existing laws prospectively regulating hazardous waste disposal were "clearly inadequate to deal with th[e] massive problem" and that special legislation was needed to "initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites."[7]

Congress therefore designed CERCLA both to address the limitations of prior law and to remedy the harmful effects of past, present, and future disposal practices. CERCLA's primary objectives are to ensure "the prompt clean-up of hazardous waste sites," In re Bell Petroleum Servs., Inc., 3 F.3d 889, 894 (5th Cir. 1993), and to place the cost of that cleanup "on those responsible for . . . the hazardous condition." Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 936 (8th Cir. 1995) (citation omitted). To effectuate these purposes, Congress established a framework for responding to releases and threatened releases of hazardous substances. Central to that framework is EPA's authority to address contaminated sites without waiting for judicial review of issues relating to liability or the adequacy of the cleanup remedy. Boarhead Corp. v. Erickson, 923 F.2d 1011, 1019 (3d Cir. 1991) (Congress designed CERCLA to provide EPA

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[7] H.R. Rep. No. 96-1016, Pt. 1, at 17-18, 22 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120-21, 6125; S. Rep. No. 96-848, at 8, 11-12, 22, 62 (1980), reprinted in 1 A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, at 305, 315, 318-19, 329, 369 (Comm. Print 1983) (same).

with "the authority and the funds necessary to respond expeditiously to serious hazards without being stopped in its tracks by legal entanglement before or during the hazard clean-up.").

CERCLA gives EPA several options for cleaning up contaminated sites. The option that is the focus of this lawsuit is the issuance of an administrative order under section 106(a) requiring the recipient to undertake clean-up actions at a site. 42 U.S.C. § 9606(a). To understand the context in which CERCLA section 106 clean-up orders are issued, we provide below an overview of who may be liable under CERCLA, how a clean-up action is selected, how that action is implemented, and how parties that conduct clean-up actions can, in appropriate circumstances, obtain reimbursement of their clean-up costs.

I. WHO MAY BE LIABLE UNDER CERCLA.

CERCLA Section 107(a)(4)(A) authorizes the United States, as well as other entities and persons, to seek recovery of response costs through a "cost recovery" suit against four categories of "covered persons," referred to as "potentially responsible parties" or "PRPs." These four categories of PRPs are:

(1) owners and operators of facilities at which hazardous substances are located;

(2) past owners and operators of such facilities at the time hazardous substances were disposed of;

(3) persons who arranged for disposal or treatment of hazardous substances; and

(4) certain transporters of hazardous substances to the site.

42 U.S.C. § 9607(a)(1)-(4).[8]

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[8] Congress has broadly defined the pertinent statutory terms used in section 107 – including "facility," "hazardous substance," "owner or operator," "person," "release," "transport," and

A PRP can escape liability for response costs only if it can establish that it qualifies for one of the enumerated defenses in Section 107(b), 42 U.S.C. § 9607(b), or some other narrowly defined exclusion from liability[9]. Section 107(b) specifies the defenses to liability and provides that a PRP will not be liable if it can establish that the release of hazardous substances

> [was] caused solely by – (1) an act of God; (2) an act of war; (3) an act or omission of a third party, other . . . than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes . . . that (a) he exercised due care with respect to the hazardous substance concerned . . . and (b) he took precautions against foreseeable acts or omissions of any such third party . . . .

Id.

Assuming that a PRP cannot avail itself of one of the enumerated defenses or exclusions to liability, Section 107(a) specifically provides that the United States, individual States, and Indian tribes are entitled to recover from PRPs "all costs of removal or remedial action incurred" that are "not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). In addition, Section 107 provides that PRPs "shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). Several courts of appeals have concluded that persons who are not themselves liable may clean up contaminated property and then invoke this provision to seek reimbursement, i.e., cost recovery, from the same four categories of PRPs that are subject to

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"disposal" – to reach a wide range of entities and activities. See 42 U.S.C. § 9601(9), (14), (20)-(22), (26), (29).

[9] See, e.g., 42 U.S.C. §§ 9607(n) (liabilities of fiduciaries and certain exclusions), 9607(q) (contiguous properties), 9607(r) (bona fide prospective purchasers).

government cleanup actions.[10] However, prior to the Supreme Court's decision in Aviall, ten courts of appeals, including the Tenth Circuit, had concluded that a person who falls within one of those four categories and, thus, is itself a PRP, cannot rely on Section 107(a) to seek joint and several liability from another jointly liable party; rather, a party that is itself a PRP is limited to seeking *contribution* from other jointly liable parties pursuant to Section 113(f). See Morrison Enters v. McShares, Inc., 302 F.3d at 1133 ("this Circuit has previously held that where one PRP sues another PRP for reimbuirsement of cleanup costs imposed as a result of a previous lawsuit or administrative order by the EPA, the plaintiff PRP must proceed under the contribution provisions of § 9613(f) and is barred from proceeding under § 9607(a)"); Sun Co., Inc. v. Browning-Ferris, Inc., 124 F.3d 1187, 1190-91 (10th Cir. 1997); Bancamerica Commercial Corp. v. Mosher Steel of Kansas, 100 F.3d 792, 800 (10th Cir.) as amended, 103 F.3d 80 (1996); United States v. Colorado & E. R.R., 50 F.3d 1530, 1534-36 (10th Cir. 1995). [11]

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[10] See In re Reading Co., 115 F.3d 1111, 1120 (3d Cir. 1997); Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F.3d 1235, 1242-43 (7th Cir. 1997); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496 (11th Cir. 1996); United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 100 (1st Cir. 1994); Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994).

[11] See also Bedford Affiliates v. Sills, 156 F.3d 416, 423-25 (2d Cir. 1998); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 356 (6th Cir. 1998); Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., 142 F.3d 769, 776 (4th Cir. 1998); Dico, Inc. v. Amoco Oil Co., 340 F.3d 525, 530-31 (8th Cir. 2003); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301 (9th Cir. 1997); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1121-23 (3d Cir. 1997) ("Halliburton"); Redwing Carriers, 94 F.3d at 1496; United Techs. Corp., 33 F.3d at 103; Akzo, 30 F.3d at 764. In addition, the Fifth Circuit, although it does not appear to have directly addressed this issue, also has recognized that "[w]hen one liable party sues another to recover its equitable share of the response costs, the action is one for contribution, which is specifically recognized under CERCLA." Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989). But see Consolidated Edison Co. v. UGI Utilities, Inc., 423 F.3d 90, 102 (2d Cir. 2005) (allowing a PRP who had not been adjudged liable in any administrative or judicial proceeding to bring a cause of action pursuant to § 107, but declining

Congress enacted Section 113(f) in 1986 as part of the SARA amendments to address specifically when a PRP may seek contribution from other PRPs. See 42 U.S.C. § 9613(f)(1). Section 113(f)(1) provides in pertinent part that "[a]ny person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]." Id. Based on this language, the Supreme Court determined in Aviall that a party may not bring a contribution claim under Section 113(f)(1) in the absence of a preexisting civil action against that party to undertake or pay for the cleanup. 125 S. Ct. at 580.

In addition, CERCLA Section 113(f)(3)(B) provides:

> [a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in [Section 113(f)(2)].

42 U.S.C. § 9613(f)(3)(B). As the Supreme Court explained, under section 113(f)(1) "contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action." 125 S. Ct. at 583. Section 113(f)(3)(B), however, "permits contribution actions after settlement ." Id.

II. THE SELECTION OF A CERCLA CLEAN-UP ACTION.

CERCLA contemplates two types of environmental clean-up actions: "removal" and "remedial" actions. "Removal actions" include a variety of actions taken to study, clean up and otherwise "prevent, minimize, or mitigate damage to the public health or welfare or to the environment." 42 U.S.C. § 9601(23). "Remedial actions" are those that are "consistent with [a]

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to overrule Bedford Affiliates). See infra at n.20.

permanent remedy" to the contamination problem and "taken instead of or in addition to removal actions." Id. § 9601(24). Removal and remedial actions encompass a broad range of activities, including, for example, enforcement activities, site investigation, monitoring and evaluation, testing, and actions taken to prevent or abate the release or threatened release of hazardous substances from a site. Id. § 9601(23) & (24). Collectively, these actions are called "response actions." Id. § 9601(25).

Because each hazardous waste site poses different problems and risks, the sequence of clean-up actions necessarily will differ by site. Throughout the clean-up process, however, there is generally a great deal of back and forth between EPA and the public, including those who may be liable for the cleanup. There is greater opportunity for public participation, of course, in connection with remedial actions, since they are intended to provided a permanent remedy and often are longer in development. The level of participation in a removal action will vary by the urgency of the situation. Nevertheless, even in removal actions where on-site removal activity is to begin in less than six months, EPA is required to publish a notice of availability of the administrative record, to provide a period of not less than 30 days for public comment on the administrative record, and prepare a written response to any comments received. 40 C.F.R. § 300.415(n)(2). In removal actions with a planning period of more than six months before on-site removal activity is to begin, as was the case here, EPA is required to conduct an engineering evaluation/cost analysis to assess removal alternatives and is required to make that assessment available for public comment. Id. §§ 300.415(b)(4), 300.415(n)(4). Moreover, where PRPs are known, EPA is required to make an initial effort, to the extent practicable, to determine whether those PRPs are willing or able to perform the necessary removal action "promptly and properly."

Id. § 300.415(a)(2). See also 40 C.F.R. §§ 300.810, 300.820 (setting forth the requirements for the administrative record for removal actions).

For remedial actions, the exchange between EPA and potentially responsible parties often begins when EPA notifies them, usually by letter, of the need for clean-up action at a site. See 42 U.S.C. § 9613(k)(2)(D). This exchange continues when EPA seeks information from PRPs regarding the site, allowing PRPs to respond with any other information that they believe is relevant for purposes of assessing CERCLA liability or determining how the site should be cleaned up. Id. § 9604(e). In addition, before a site can listed on the National Priorities List ("NPL"), a list of sites that pose the greatest danger to public health, welfare or the environment,[12] EPA must engage in notice-and-comment rulemaking, and a final listing decision is subject to judicial review in the Court of Appeals for the District of Columbia Circuit. 42 U.S.C. § 9605; 40 C.F.R. § 300.425; see Washington State Dep't of Transp. v. EPA, 917 F.2d 1309, 1311 (D.C. Cir. 1990).

The selection and performance of a remedial action are governed by the National Contingency Plan ("NCP"), a set of regulations that identifies the methods for investigating hazardous substance contamination and the criteria for determining appropriate response actions. 42 U.S.C. § 9605; 40 C.F.R. Pt. 300.400-440; see Ohio v. EPA, 997 F.2d 1520 (D.C. Cir. 1993) (upholding EPA's 1990 revisions to the NCP). These regulations provide numerous

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[12] Sites are ranked for listing on the NPL based on the relative risk to human health and the environment. Linemaster Switch Corp. v. EPA, 938 F.2d 1299, 1301-02 (D.C. Cir. 1991) (discussing EPA methodology for listing site on NPL); 40 C.F.R. § 300.425(c) (identifying methods for determining eligibility for NPL); 40 C.F.R. § 300.420 (providing for preliminary assessment and site investigation). For non-federally owned sites listed on the NPL, EPA is the lead federal agency. 40 C.F.R. §§ 300.120(a)(2), 300.175(b)(4), 300.425(b).

opportunities for public involvement. A first step for sites on the NPL is the preparation of a Remedial Investigation and Feasibility Study (the "Study"), 40 C.F.R. § 300.430, which requires EPA to engage in discussions with interested parties, to establish a local information repository near the site, to provide the public with an opportunity to comment on any proposed remedy, and to respond in writing to significant comments. 42 U.S.C. §§ 9613(k); 40 C.F.R. §§ 300.430, 300.815. EPA then selects the remedy in a Record of Decision ("ROD"), which, with the rest of the administrative record, is publicly available. 40 C.F.R. §§ 300.430(f)(4) & (f)(6); see 42 U.S.C. § 9617(b)-(d).

III. IMPLEMENTATION OF CLEAN-UP ACTIONS.

Once EPA selects a response action, it must then determine how to implement that action. CERCLA gives EPA discretion to choose among several response options based on site-specific circumstances. See Kelley v. EPA, 15 F.3d 1100, 1103 (D.C. Cir. 1994). First, EPA may initiate negotiations with responsible parties pursuant to section 122 of CERCLA, 42 U.S.C. § 9622. Among other things, section 122 allows EPA to initiate settlement negotiations by issuing what are called "special notice letters" to PRPs. 42 U.S.C. § 9622(e). The issuance of such letters invokes a statutory moratorium, which precludes EPA from taking certain actions, including issuing section 106 orders, during the negotiation period. Id. § 9622(e)(2). In negotiations, PRPs can raise any issues regarding liability or the appropriateness of the response action. Although these negotiations are not mandated by the statute, EPA, in practice, routinely invokes the section 122 procedures, including section 122(e), prior to implementing a remedial action at a site. See generally Interim Guidance on Notice Letters, Negotiations, and

Information Exchange, 53 Fed. Reg. 5298 (Feb. 23, 1988).[13] Indeed, if EPA chooses not to invoke the section 122 settlement procedures for a specific site, it must provide the potentially responsible parties written notice of its decision, and the reasons why it is not using the procedures. 42 U.S.C. § 9622(a).

EPA's second option for implementing a response action is to perform the work itself and then file an action under section 107 to recover its response costs from the parties responsible for the contamination. Id. § 9607(a)(4)(A). To perform the response action, EPA uses funds from the Hazardous Substance Superfund (the "Superfund"), which Congress established pursuant to CERCLA. Id. § 9611(a); see 26 U.S.C. § 9507. The amount of money in the Superfund pales in comparison to the formidable size of the national hazardous waste problem. Cost recovery actions therefore are necessary to replenish the Superfund for additional cleanups. See Kelley, 15 F.3d at 1103; Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 388 (8th Cir. 1987).

The final alternatives Congress provided EPA for implementing response actions are contained in section 106(a) of CERCLA, which is the centerpiece of this litigation. 42 U.S.C. § 9606(a). That section allows EPA to order parties to clean up a site contaminated with hazardous substances, or to ask a federal district court to issue an order compelling a party to clean up a site. Id.; see also Kelley, 15 F.3d at 1103.

Cognizant of the funding limitations of the Superfund, Congress intended those responsible for hazardous substance contamination to bear clean-up responsibility. To ensure that responsible parties not engage in unreasonable delay and force EPA unnecessarily to use its

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[13] EPA also often invokes these procedures at earlier stages in the clean-up process in an effort to facilitate cleanup of hazardous waste sites. See generally 53 Fed. Reg. 5298.

limited Superfund resources to clean up sites, Congress included several disincentives in the statute. See Solid State Circuits, 812 F.2d at 388. These disincentives include the penalty provision in CERCLA section 106(b), which provides that any person who, "*without sufficient cause, willfully* violates, or fails or refuses to comply with," a section 106(a) order "*may*" be fined up to $27,500 per day.[14] 42 U.S.C. § 9606(b)(1) (emphasis added). Another disincentive is contained in CERCLA section 107(c)(3), which provides that any person who is liable under CERCLA who

> fails *without sufficient cause* to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 . . . may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action.

42 U.S.C. § 9607(c)(3) (emphasis added). These statutory disincentives – in effect for twenty-five years – have consistently been upheld as constitutional. See, e.g, Employers Ins. of Wausau, 52 F.3d at 664; Solid State Circuits, 812 F.2d at 389-92; Wagner Seed Co. v. Daggett, 800 F.2d 310, 315-17 (2d Cir. 1986).

Notwithstanding these disincentives, section 106 administrative orders are not self-executing. Cf. Florida Power & Light Co. v. EPA, 145 F.3d 1414, 1419 (D.C. Cir. 1998) (EPA administrative orders issued under Resource Conservation and Recovery Act are not self-executing). When a recipient of an order chooses not to comply because it disputes the validity or scope of an order or its applicability, EPA must go to federal court to compel compliance. Specifically, EPA must either file a civil action to compel the recipient of the order

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[14] 42 U.S.C. § 9606(b)(1), as amended by Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990); see 40 C.F.R. § 19.4 (Table 1).

to conduct the response action, 42 U.S.C. § 9606(a), or conduct the response action itself and file an action under section 107, id. §§ 9604, 9607(a), to recover response costs.

Thus, a party who chooses not to comply with a section 106 order will have an opportunity to present to a federal court all of its challenges to the order, including any challenges to the appropriateness of the clean-up action specified in the order or the constitutionality of the provisions under which EPA acted in issuing the order and any defenses to liability and the imposition of civil penalties or punitive damages. This judicial hearing will occur before the party can be compelled to do any work at the site or pay any penalties, damages or response costs. See, e.g., Solid State Circuits, 812 F.2d at 389-92; Barmet Aluminum Corp. v. Reilly, 927 F.2d 289, 294-96 (6th Cir. 1991). By statute, civil penalties and punitive damages cannot be imposed if the district court finds that the recipient of the order had "sufficient cause" for not complying with the order. 42 U.S.C. §§ 9606(b)(1), 9607(c)(3). Even where such a defense is lacking, the court has discretion in deciding whether to impose civil penalties and in assessing the amount of punitive damages as provided in section 107(c)(3).

IV. OPPORTUNITY FOR PARTIES OTHER THAN EPA TO RECOVER RESPONSE COSTS.

Parties that choose to comply with section 106 clean-up orders can petition EPA for reimbursement of response costs from the Superfund. See 42 U.S.C. § 9606(b)(2)(A), (C)-(D). If EPA denies the petition, a party can file an action for reimbursement in federal district court. Id. § 9606(b)(2)(B) & (E). To obtain reimbursement, a party must establish either (1) that it is not liable for response costs under section 107(a), *or* (2) that, based on the administrative record, the response action EPA selected and specified in the order was arbitrary and capricious or otherwise not in accordance with law. 42 U.S.C. § 9606(b)(2)(A), (C), and (D); see H.R. Rep.

No. 99-253, Pt. 1, at 138-40 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2920-22 (reimbursement provision allows parties who comply with an order and clean up a site to preserve all defenses to liability and the appropriateness of the response action). A party must also establish that the costs for which it seeks reimbursement are reasonable in light of the work required by the order. 42 U.S.C. § 9606(b)(2)(A). A party can thus be made whole through the reimbursement process, receiving all reasonable response costs incurred in carrying out the cleanup required by the order plus interest and any other costs and expenses in accordance with 28 U.S.C. § 2412(a) and (d). 42 U.S.C. § 9606(b)(2)(A) & (E).

V. JUDICIAL REVIEW PROVISIONS.

In addition to its cleanup and liability scheme, CERCLA contains detailed provisions governing when a federal court can hear a controversy arising under CERCLA. Section 113(b), the general jurisdictional provision, is conditioned by two specific provisions. Section 113(a) provides for the review of regulations promulgated under CERCLA and is not at issue here. Section 113(h), inter alia, provides that "[n]o federal court shall have jurisdiction . . . to review any order issued under section [106(a)] of this title, in any action except" one of five enumerated exceptions. 42 U.S.C. § 9613(h). See infra at 31-37. Thus, in the absence of such an enforcement action, or an applicable 113(h) exception, 113(h) acts as a "blunt withdrawal of federal jurisdiction" from federal courts, and no challenge to a section 106 order can go forward. North Shore Gas Co. v. EPA, 930 F.2d 1239, 1244 (7th Cir. 1991). See also United States v. City and County of Denver, 100 F.3d 1509, 1514 (10th Cir. 1996). Nevertheless, this provision merely postpones – but does not permanently bar – review of challenges that could affect the selection or implementation of a response action. See Barmet, 927 F.2d at 295 (CERCLA scheme "merely

serves to effectuate a delay in a plaintiff's ability to have a full hearing on the issue of liability and does not substantively affect the adequacy of such a hearing."). Thus, PRPs' procedural rights are preserved.

FACTUAL BACKGROUND

For the purposes of this motion only, the United States takes the facts of the Complaint as true. The Site, near Herington, KS, is currently known as the Tri-County Public Airport Superfund Site. Complaint ¶1. It was constructed by the Army and operated by the Army Air Corps between 1942 and 1946, during which time bombing crews and aircraft were processed there as part of the World War II war effort. Id. ¶ 12. During that period, the Site was known as the Herington Army Airfield. Id. In 1948, the United States quitclaimed the property to the City of Herington pursuant to the Surplus Property Act of 1944., Pub. L. No. 78-457, Ch. 479, 58 Stat. 765. Id. ¶ 18. The City renamed the Site the Tri-County Public Airport and leased portions of the property to commercial tenants, including, but not limited to, Beech Aircraft Company ("Beech"). Id. ¶ 19. From 1950 until 1960, Beech used the property for various manufacturing purposes. Id. ¶ 20.

In October 1997, the United States tested private groundwater wells in the area around the Site and detected TCE. Id. ¶ 22. EPA promptly notified Raytheon of its findings and of Raytheon's status as a potentially responsible party. Id. ¶ 22. As part of its investigation of the Site, EPA issued to USACE an information request pursuant to CERCLA section 104(e), 42 U.S.C. § 9604(e). In responding to that information request, USACE acknowledged that the Site had been used by the Army Air Corps, but indicated that the Army Air Corps had never used

TCE at the Site, and therefore denied any liability for remediation at the Site.[15] Complaint ¶¶ 24, 28; Administrative Order on Consent, issued March 29, 2000 ("Ex. A")[16] ¶ 19.

On March 29, 2000, EPA issued an Administrative Order on Consent to Raytheon requiring Raytheon to conduct a removal action to address TCE and TCE degradation products at the Site. Complaint ¶ 25. Specifically, the order required, inter alia, Raytheon to install whole-house water treatment units in identified homes. Ex. A ¶ 28. The AOC notes that USACE declined to participate in the AOC because USACE denied that the United States used TCE at the Site. Complaint ¶ 28 and Ex. A ¶ 19. Raytheon has conducted work pursuant to that order. Complaint ¶ 29. On November 20, 2000, the Kansas Department of Health and Environment ("KDHE") issued a second AOC to Raytheon. Id. ¶ 30. That AOC required Raytheon to perform a Remedial Investigation/Feasibility Study (the "Study") at the Site. Raytheon has performed work pursuant to this AOC, as well. Id. ¶¶ 30, 31.

While the Study was underway, EPA entered into discussions with Raytheon regarding a third AOC for performance of a response action to remove a source of groundwater contamination. Letter from Cecilia Tapia, EPA, to Paul Schumacher, Raytheon, dated February 5, 2004 (w/o enclosures) ("Ex. B"). Raytheon declined to agree to such a settlement. See Letter from James E. Schuster, Raytheon, to the Honorable Pat Roberts, U.S. Senate, dated March 1,

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[15] The Corps continues to assert that the Army Air Corps did not use TCE at the Site and therefore denies any liability for remediation there. EPA has not found otherwise. Complaint ¶ 16. The Complaint alleges, however, that USACE did use TCE. For purposes of this motion, this fact is not material, so the Court need not address this matter in resolving this motion.

[16] In compliance with Local Rule 5.4.5, the United States has filed only those pages of Exhibit A, the AOC issued by EPA to Raytheon, and Exhibit D, the UAO issued by EPA to Raytheon, that are specifically referenced in this memorandum.

2005 ("Ex. C"). Thus, in order to address contamination at the Site, EPA was compelled to either issue a Unilateral Administrative Order requiring Raytheon to complete the work or to perform the work itself and seek reimbursement from Raytheon. 42 U.S.C. §§ 106, 107. Accordingly, on September 30, 2004, EPA issued a UAO to Raytheon. Complaint ¶ 32; Unilateral Administrative Order dated September 30, 2004 ("Ex. D"). Raytheon has conducted and is conducting work pursuant to the UAO. Complaint ¶ 35. Raytheon then initiated this lawsuit.

STANDARD OF REVIEW

"A motion to dismiss for failure to state a claim admits all well-pleaded facts in the complaint as distinguished from conclusory allegations." Elliott Indust. Ltd Partnership v. BP America Prod. Co., 407 F.3d 1091, 1107 (10th Cir. 2005) (citations omitted). A dismissal is appropriate "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." Society of Separationists v. Pleasant Grove City, 416 F.3d 1239, 1241 (10th Cir. 2005) (citations omitted). In considering a motion to dismiss for failure to state a claim, "the district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." Jacobsen v. Deseret Book Co., 287 F.3d 936, 941 (10th Cir. 2002). Where the court relies on documents outside of the pleadings, however, the motion is treated as one for summary judgment. Nichols v. United States, 796 F.2d 361, 364 (10th Cir. 1986).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law." Fed. R. Civ. P. 56(c). "The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a dispute of fact that is 'genuine'; an issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant." Lawmaster v. Ward, 125 F.3d 1341, 1347 (10th Cir. 1997). In applying this standard, the court views the evidence in the light most favorable to the nonmovant. Simms v. Oklahoma, 165 F.3d 1321, 1326 (10th Cir. 1999).

QUESTIONS PRESENTED

In accordance with Local Rule 7.6(a), the United States provides this Statement of Questions Presented:

1. Must Count I, which asserts a cause of action for joint and several liability, be dismissed where Raytheon is a liable party whose only recovery can be in contribution?
2. Must Count II, which asserts a cause of action in contribution, be dismissed in so far as it seeks recovery of costs incurred in complying with a Unilateral Administrative Order, where Count II has not been brought "during or following any civil action under section 9606 of [CERCLA] or under section 9607(a) of [CERCLA]" and where Raytheon has not "resolved its liability to the United States," as required by CERCLA section 113(f), 42 U.S.C. § 9613(f), and the United States Supreme Court decision in Aviall, 125 S. Ct. 580?
3. Must Count III, which asserts a common law cause of action in contribution, be dismissed where any common law finding a cause of action in contribution under CERCLA, whether valid or not, has been replaced by the Congressional amendment to CERCLA adding a statutory contribution claim in section 113(f)?

4. Must Count IV, which asserts that CERCLA's "UAO regime" is facially unconstitutional, be dismissed where this Court lacks jurisdiction over pre-enforcement challenges to section 106 orders and where, in any event, Raytheon can make no showing that there is no circumstance in which a UAO can be issued in compliance with Constitutional requirements, and where the opportunity to obtain an hearing before a federal district court judge is afforded any party prior to the deprivation of any property interest?

5. Must Count V, which asserts that the particular UAO issued to Raytheon at the Site pursuant to section 106(a) of CERCLA, 42 U.S.C. § 9606(a), is unconstitutional and in violation of CERCLA, be dismissed where there has been no enforcement of the UAO and where CERCLA section 113(h) prohibits pre-enforcement review of "any order issued under section 9606(a) of [CERCLA]," and where, even if review were not barred, the UAO has been issued in compliance with all constitutional and statutory requirements?

ARGUMENT

I. COUNT I MUST BE DISMISSED BECAUSE RAYTHEON IS A PRP AND ITS ONLY CLAIM UNDER CERCLA CAN BE IN CONTRIBUTION AS GOVERNED BY CERCLA SECTION 113(f).

Section 107 of CERCLA provides for recovery of response costs by the United States, a State, an Indian tribe, or an innocent party. See, e.g., In re Reading Co., 115 F.3d at 1124-25; supra at 8-11. It does not, however, permit one liable party to recover response costs by imposing joint and several liability on another allegedly liable party. See, e.g., United States v. Colorado & Eastern R.R., 50 F.3d 1530, 1535-36 (10th Cir. 1995). In its Complaint, Raytheon

acknowledges that it leased a portion of the Site and conducted various manufacturing activities there, Complaint ¶¶ 19-20, and thus Raytheon was an operator at the Site. 42 U.S.C. § 9607(a). EPA has found that Raytheon used TCE at the Site and is a potentially responsible party at the Site. See Ex. D, UAO, at ¶¶ 10, 24(d). See generally Complaint.[17] Raytheon does not allege that there was no release of TCE at the facility during the time Raytheon was an operator of the Site. Thus, these allegations are sufficient to establish that Raytheon is a former operator of the Site and, therefore, a PRP. See United States v. Bestfoods, 524 U.S. at 66-67 ("[A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."). Therefore, the only way that Raytheon can escape liability under CERCLA, and therefore be able to maintain an independent Section 107 action against another PRP, is to establish that it falls under one of the enumerated defenses in Section 107(b), or certain other narrowly defined exclusions to liability that are inapplicable in this case. See supra n.9. Raytheon has not alleged a single fact in its Complaint to establish that any of these defenses is applicable. Raytheon therefore is a liable party and, under controlling Tenth Circuit precedent, cannot maintain an action under CERCLA Section 107(a) against another allegedly liable party. See, e.g., Morrison Enters., 302 F.3d at 1133 ("the plaintiff PRP must proceed under the contribution provisions of § 9613(f) and is barred from proceeding under § 9607(a)."); Bancamerica, 100 F.3d at 800 (action by one PRP to recover costs against another is the

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[17] The UAO issued by EPA against Raytheon is indisputably central to Raytheon's complaint. Jacobsen v. Deseret Book Co., 287 F.3d at 941; Nichols v. United States, 796 F.2d at 364. Therefore, consideration of the UAO by this Court does not convert this motion into a motion for summary judgment.

"'quintessential claim for contribution' and proceeds pursuant to § 113 rather than § 107, regardless of how pled.") (citing Colorado & E. R.R., 50 F.3d at 1536, 1538).[18]

In Aviall, the Supreme Court did not address this rule. Nor has the Tenth Circuit called this long-standing rule into question since Aviall was decided. In a recent post-Aviall decision, the Tenth Circuit declined to reconsider the issue, ruling instead that the plaintiff in the case before it would not succeed on a section 107 claim in any event because it had not incurred response costs consistent with the National Contingency Plan. Young v. United States, 394 F.3d

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[18] See also Centerior Serv., 153 F.3d at 350 ("Claims by PRPs . . . seeking costs from other PRPs are necessarily actions for contribution, and are therefore governed by the mechanisms set forth in § 113(f)"); Pneumo Abex, 142 F.3d at 776 ("[S]ection [113] must be used by parties who are themselves potentially responsible parties"); Pinal Creek, 118 F.3d at 1302 ("Under CERCLA's scheme, section 107 governs liability, while section 113(f) creates a mechanism for apportioning that liability among responsible parties"); Halliburton, 111 F.3d at 1120 ("An action brought by a potentially responsible person is by necessity a section 113 action for contribution."); Redwing Carriers, 94 F.3d at 1513 ("[W]hen one liable party sues another liable party under CERCLA, the action is not a cost recovery action under § 107(a). Rather, it is a claim for contribution under § 113(f)."); Browning-Ferris Indus., 33 F.3d at 103 ("[A]n action by a responsible party to recover from another responsible party that portion of its costs that are in excess of its *pro rata* share of the aggregate response costs . . . clearly qualifies as an action for contribution under section 9613(f)(1)."); Akzo, 30 F.3d at 764 ("Whatever label Akzo may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make. Akzo's suit accordingly is governed by section 113(f)."); Bedford Affiliates, 156 F.3d at 424 ("The language of CERCLA suggests Congress planned that an innocent party be able to sue for full recovery of its costs, *i.e.*, indemnity under § 107(a), while a party that is itself liable may recover only those costs exceeding its *pro rata* share of the entire cleanup expenditure, *i.e.*, contribution under § 113(f)(1)."). But see Consolidated Edison, 423 F.3d at 102 (holding "that a party that has not been sued or made to participate in an administrative proceeding, but, if sued, would itself be liable under section 107(a), may still recover necessary response costs incurred voluntarily, not under a court or administrative order or judgment"). The Second Circuit expressly declined to overrule Bedford Affiliates, however, distinguishing that case on the facts because in Bedford Affiliates, the plaintiff had been adjudged liable for a portion of the costs. Id. Similarly, in this case, Raytheon has been adjudged liable in an administrative order, the UAO, see Unilateral Administrative Order dated September 30, 2004 ("Ex. D") ¶ 24(d), and thus, even if Consolidated Edison is correctly decided, it does not apply here.

858, 862-63 (10th Cir. 2005). In dicta, however, the court noted the long-standing precedent holding that no cause of action is available for PRPs pursuant to section 107 and gave no suggestion that those cases do not remain good law. Id.

Many other courts, post-Aviall, have reaffirmed the rule that PRPs are restricted to contribution claims under section 113. The Eastern District of Virginia, for example, recently held that "since CERCLA contains an explicit provision for contribution suits, a potentially liable party under CERCLA seeking recovery from another PRP must utilize the means Congress established in § 9613." Mercury Mall Assocs., Inc. v. Nick's Market, Inc., 368 F. Supp. 2d 513, 519 (E.D. Va. 2005). The court acknowledged that, post-Aviall, this would leave some PRPs without a means to seek contribution. Id. "Nonetheless," explained the court, "when the law is transparent, notwithstanding the logic underpinning it, this Court is duty bound to impose it." Id. The court went on to explain that it "lack[ed] the authority to imply a cause of action where one does not exist," and noted that "[i]t is a well-established common law principle, dating back to cases before the King's Bench in the Eighteenth Century, that as between joint tortfeasors or even intentional wrongdoers, there is no *right* to contribution." Id. at 520 (citing cases) (emphasis in original). "Similarly," concluded the court, "no federal right to contribution exists unless Congress creates one." Id. Several other courts have likewise found, post-Aviall that PRPs seeking recovery from other PRPs are restricted to suing in accordance with the mechanisms provided by section 113(f) of CERCLA. See In re FV Steel and Wire Co., 331 B.R. 385, 393 (Bankr. E.D. Wisc. 2005); City of Waukeshaw v. Viacom Int'l, Inc., 362 F. Supp. 2d 1025, 1027-28 (E.D. Wisc. 2005); Cadlerock Props Joint Venture, L.P. v. Schilberg, No. 3:01-896, 2005 WL 1683494, at *4 (D. Conn. July 19, 2005); Benderson Dev. Co., Inc. v. Neumade

Prods. Corp., No. 98-241, 2005 WL 1397013, at *11 (W.D.N.Y. June 13, 2005); Atlantic Research Corp. v. United States, No. 02-CV-1199 (W.D. Ark. May 31, 2005); AMW Materials Testing, Inc. v. Town of Babylon, 348 F. Supp. 2d 4, 11 (E.D.N.Y. 2004); Elementis Chem. Inc. v. T H Agric. and Nutrition, L.L.C., 373 F. Supp. 2d 257, 272 (S.D.N.Y. 2005).

Accordingly, the law is clear: a PRP – like Raytheon – cannot rely solely on Section 107(a) to recoup its response costs and instead is limited to bringing a contribution action under Section 113(f), unless the PRP can establish that it is not liable because it can avail itself of one of the enumerated defenses in Section 107(b).

II. COUNT II MUST BE DISMISSED EXCEPT TO THE EXTENT RAYTHEON HAS "RESOLVED ITS LIABILITY . . . IN AN ADMINISTRATIVE OR JUDICIALLY APPROVED SETTLEMENT."

CERCLA does provide means for recovery in contribution for PRPs. CERCLA section 113(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607 of [CERCLA], during or following any civil action under 9606 of [CERCLA] or under 9607(a) of this title." 42 U.S.C. § 9613(f)(1). In addition, section 113(f)(3)(B) provides that "[a] person who has resolved its liability to the United States or a State . . . in an administrative or judicially approved settlement may seek contribution from any person who is not a party to" the settlement. 42 U.S.C. § 9613(f)(3)(B). As this language makes clear, however, and as the Supreme Court has held, this right to contribution is not limitless. Instead, such a cause of action can *only* be brought where a party (a) has had a civil action brought against it pursuant to CERCLA sections 106 or 107, or (b) has resolved its liability to the United States or a State in an administrative or judicially approved settlement. See Aviall, 125 S. Ct. at 583-84. Here, Raytheon alleged that it has resolved its liability to the United States

or a State in administrative settlements as to its costs in performing work pursuant to the Administrative Orders on Consent issued by EPA on March 29, 2000, and by KDHE on November 20, 2000. Its Complaint, therefore, may be read to state a claim as to those costs.

As to costs incurred complying with the Unilateral Administrative Order, however, the complaint does not state a claim for which relief may be granted. A UAO, because it is a *unilateral order*, does not constitute a settlement. Nor is a unilateral administrative order a "civil action" within the meaning of section 113(f)(1). See Sun Co., Inc. v. Browning-Ferris, Inc., 124 F.3d at 1190-92 (pre-Aviall decision holding that parties that complied with a UAO were limited to bringing a claim in contribution under section 113 rather than section 107, but that because the parties "have never been defendants in a civil action under §§106 or 107" the statute of limitations provided in section 113(g)(3) did not apply; rather the limitations period in § 113(g)(2) governed). See also Pharmacia Corp. v. Clayton Chemical Acquisition LLC., No. 02-0428, 2005 WL 615755 (S.D.Ill. Mar. 8, 2005) (finding that a UAO does not qualify as a civil action under § 113(f)(1)); Blue Tee Corp. v. ASARCO, No. 03-5011, 2005 WL 1532955, at *3 (W.D. Mo. June 7, 2005) (same); Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."). Pursuant to the plain language of the statute, therefore, and the ruling of the Supreme Court in Aviall, Raytheon has no right to contribution as to its UAO costs and its claim for those costs should be dismissed.

III. COUNT III MUST BE DISMISSED BECAUSE THERE IS NO COMMON LAW RIGHT OF CONTRIBUTION UNDER CERCLA.

Raytheon's claim for contribution under federal common law must likewise fail. The focus "in any case involving the implication of a right of action, is on the intent of Congress." Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981). As to contribution

rights under CERCLA, the intent of Congress could not be more clear, since Congress has specifically set forth its intent in the language of section 113(f).

When CERCLA was enacted in 1980, it "made no express provision for contribution actions among parties held jointly and severally liable under its section 107 liability scheme," County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1515 (10th Cir. 1991). To address the situation in which a defendant might find itself facing disproportionate liability, therefore, courts "recogniz[ed] an implicit federal right to contribution under CERCLA." Id. at 1515-16. See Aviall, 125 S. Ct. at 581 (citing cases).[19] This "judicially-created expansion of § 107(a)(4)(B) served as the sole means by which parties could obtain contribution" until Congress enacted section 113(f)(1) as part of the 1986 SARA amendments. Reading, 115 F.3d at 1119. Presumably, these cases, whether rightly decided or not, are what Raytheon is referring to when it references "federal common law," since it identifies no other source for such a claim.

However, in 1986, when the SARA amendments enacted Section 113(f)(1), "the language of § 113(f), permitting contribution, *replaced* the judicially created right to contribution under § 107(a)(4)(B)," Reading, 115 F.3d at 1119 (emphasis added), and became "the *sole* means for seeking contribution." Id. at 1120 (emphasis added); see Halliburton, 111 F.3d at 1120-22. "[O]nce Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Therefore, the task of the federal courts is to interpret and apply statutory law, not to create

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[19] The Supreme Court in Aviall noted that these district court decisions were "debatable in light of two decisions of this Court that refused to recognize implied or common-law rights to contribution in other federal statues." 125 S. Ct. at 581 (citing Texas Indus., 451 U.S. at 638-47; Northwest Airlines, 451 U.S. at 90-99).

common law." Northwest Airlines, 451 U.S. at 95 n.34. The Supreme Court also has "explained [that] where Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute, as Congress has done with . . . CERCLA, 'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under' the statute." Meghrig v. KFC Western, Inc., 516 U.S. 479, 487-88 (1996) (citing Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14 (1981)).

Thus, since the enactment of section 113(f), the Tenth Circuit, together with every other court of appeals to address the issue, has held that "[w]hatever label [a PRP] may wish to use," a "claim by and between jointly and severally liable parties for an appropriate division of payment one of them has been compelled to make" is "as a matter of law . . . controlled by § 113(f)." Colorado & E. R. R., 50 F.3d at 1536. See also, e.g., Bancamerica, 100 F.3d at 800; Dico, 340 F.3d at 530; N.J. Turnpike Auth. v. PPG Indus., Inc., 197 F.3d 96, 104 (3d Cir. 1999); Axel Johnson, Inc. v. Carroll Carolina Oil Co., 191 F.3d 409, 415 (4th Cir. 1999); Bedford Affiliates, 156 F.3d at 424; Centerior Serv., 153 F.3d at 350; Pinal Creek, 118 F.3d at 1306; Redwing Carriers, 94 F.3d at 1496; Browning-Ferris, 33 F.3d at 101; Akzo, 30 F.3d at 764; Amoco Oil, 889 F.2d at 672. [20] It would be, therefore, inappropriate to create any additional common law cause of action. Accordingly, Count III of Raytheon's Complaint must be dismissed.

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[20] But see Consolidated Edison v. UGI Utilities, Inc., 423 F.3d 90, 102-03 (2d Cir. 2005) (allowing a PRP to bring a § 107 claim under the facts before it), see supra at n.11. Consolidated Edison did not find that a separate common law right to contribution was available.

IV. COUNT IV MUST BE DISMISSED BECAUSE SECTION 113(h) BARS PRE-ENFORCEMENT REVIEW OF SECTION 106 ORDERS; IN THE ALTERNATIVE, THE UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT ON THIS CLAIM BECAUSE CERCLA SECTION 106 DOES NOT DEPRIVE PARTIES OF DUE PROCESS.

In Count IV of its Complaint, Raytheon seeks a declaration that the "UAO regime" violates its due process rights under the United States Constitution. While this is a facial challenge to the CERCLA statute, the effect of this count is to challenge every UAO issued by EPA, including the UAO issued against Raytheon in this case. CERCLA section 113(h), however, prohibits judicial review until such time as EPA may bring an enforcement action, except in limited circumstances, none of which apply here. See North Shore Gas Co. v. EPA, 930 F.2d at 1244 (calling § 113(h) a "blunt withdrawal of federal jurisdiction"); McClellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 328 (9th Cir. 1995) (same). See also United States v. City and County of Denver, 100 F.3d at 1514 ("Section 9613(h) provides that no federal court shall have jurisdiction to review any challenges to removal or remedial action selected by the EPA under §§ 9604 or 9606(a)."). Even if there were jurisdiction over this claim, however, Count IV would fail because the UAO provisions of CERCLA comply with all relevant constitutional and statutory requirements.

A. CERCLA Section 113(h) Bars Pre-enforcement Review of Unilateral Administrative Orders.

"Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims [at issue] can be afforded meaningful review." Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994) (citing Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984)). Any presumption

favoring judicial review is overcome "whenever the congressional intent to preclude review is 'fairly discernible in the statutory scheme.'" Block, 467 U.S. at 351 (citation omitted).

That Raytheon raises a constitutional claim in this case does not change the analysis of whether pre-enforcement review is available, as confirmed by the Supreme Court in Thunder Basin, 510 U.S. at 207-08. There, the Supreme Court held that the administrative and judicial review provisions of the Mine Safety and Health Act precluded a pre-enforcement constitutional challenge to an administrative order. The Court found that, although the statute was "facially silent" with respect to pre-enforcement review claims, an intent to preclude pre-enforcement review was "fairly discernible" from the statutory scheme and legislative history, which indicated a preference for "channeling and streamlining the enforcement process." 510 U.S. at 207-08, 216.

As shown below, it is more than "fairly discernible," id. at 216, from the statutory language, structure, legislative history, and purposes of CERCLA that Congress intended, through section 113(h), to preclude pre-enforcement review of any challenge -- constitutional or otherwise -- that could frustrate EPA's ability to select and implement a response action. See, e.g., Oil, Chem. And Atomic Workers Int'l Union v. Richardson, 214 F.3d 1379, 1382-83 (D.C. Cir. 2000) (section 113(h) precludes judicial review of claim under National Environmental Policy Act because review would delay implementation of removal action); Barmet, 927 F.2d at 292-94 (section 113(h) precludes due process challenge to "the entire CERCLA statutory scheme" prior to EPA enforcement action); South Macomb Disposal Auth. v. EPA., 681 F. Supp. 1244, 1251 (E.D. Mich. 1988) (pre-enforcement review of constitutional challenges to CERCLA

"would impede the EPA's ability to clean up hazardous waste sites promptly and expeditiously."). Raytheon's claim constitutes such a challenge.

1. Both The Plain Language Of The Statute And Its Legislative History Prohibit Pre-Enforcement Review Of An Order Issued Under Section 106 Of CERCLA.

Section 113(h) provides:

> No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section [9604] of this title, or to review any order issued under section [9606(a)] of this title, in any action except one of the following:
>
> (1) An action under section 9607 of this title to recover response costs or damages or for contribution.
>
> (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
>
> (3) An action for reimbursement under section 9606(b)(2) of this title.
>
> (4) An action under section 9659 of this title (relating to citizen suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.
>
> (5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

42 U.S.C. § 9613(h).

This provision is designed to ensure that judicial review of CERCLA cleanup activities does not prevent or delay CERCLA response actions. See Boarhead Corp., 923 F.2d at 1019 (3rd Cir. 1991) ("The limits section 113(h) imposes on a district court's jurisdiction are an integral part of Congress's overall goal that CERCLA free the EPA to conduct forthwith clean-up

related activities at a hazardous [waste] site"); Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1388 (5th Cir. 1989) ("it is clear that CERCLA explicitly limits judicial review of remedial and removal plans where such review will delay cleanup."). Section 113(h)'s limitation on judicial review also serves other important interests. Congress sought to avoid entangling EPA in "piecemeal" litigation and judicial review of EPA's actions so as to guard against inconsistent rulings from different courts, and to prevent EPA's resources from being consumed in litigation with parties who seek to challenge a remedy, but whom EPA does not seek to hold liable. Voluntary Purchasing, 889 F.2d at 1390.[21]

Nor can Raytheon escape the strictures of 113(h) by claiming it is challenging the "UAO regime" as a whole and not a specific order. See South Macomb, 681 F. Supp. at 1245, 1251 (allowing a challenge to "the statutory scheme as a whole" could involve injunctions, which is "precisely the type of impediment that the preenforcement review [bar in section 113(h)] was meant to prohibit."). Similarly, in Schalk, the Seventh Circuit precluded pre-enforcement challenges to the procedures employed in selecting a remedy because such procedural challenges "nevertheless impact the implementation of the remedy" and delay the CERCLA cleanup. Schalk, 900 F.2d at 1097. Likewise, the practical effect of Raytheon's facial challenge would be to nullify the section 106 order that EPA has issued as to the Tri-County Site. Raytheon's constitutional challenge cannot be separated from the underlying agency action of issuing that

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[21] Because a facial challenge is purely a question of law, no discovery related to such a claim is necessary or appropriate. Nevertheless, in this case, Raytheon has already indicated its intent to seek extraordinarily broad discovery from the United States in connection with this claim, discovery that would impose exceptional burdens on three government agencies with offices throughout the country, EPA, USACE, and DOJ. Such discovery, if permitted, would divert significant resources from remediation at a host of sites and would clearly thwart the purposes of 113(h).

administrative order. 42 U.S.C. § 9606(a). See also Missouri v. United States, 109 F.3d 440, 442 (8th Cir. 1997) (rejecting attempt to circumvent jurisdictional bar in the Clean Air Act by bringing facial constitutional challenges); Virginia v. United States, 74 F.3d 517, 522-23 (4th Cir. 1996) (same).

The legislative history supporting the 1986 SARA amendments also demonstrates that Congress intended section 113(h) to apply to any challenge that could affect the selection and implementation of response actions, whether that implementation be through a section 106 order or another authority under the Act. Both the House and Senate Judiciary Committees played a pivotal role in drafting CERCLA section 113(h). Representative Glickman,[22] a member of the House Judiciary Committee and SARA Conference Committee, confirmed during debate on the Conference Report that section 113(h) "covers all issues that could be construed as a challenge to the response, and limits those challenges to the opportunities specifically set forth in th[at] section." 132 Cong. Rec. 29,735 (1986) (emphasis added). Senator Thurmond, chairman of the Senate Judiciary Committee responsible for drafting SARA's judicial review provision, made virtually identical remarks during the Senate debate on the Conference Report. 132 Cong. Rec. 28,441 (1986).

Section 113(h) therefore precludes the federal courts from entertaining challenges – regardless of the legal basis – to incomplete response actions or to section 106 orders that do not fall within one of the five statutory exceptions.

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[22] Representative Glickman was the leading spokesman for the House on the issue of judicial review in the Conference Committee on SARA. See 132 Cong. Rec. 29,716, 29,735 (1986) (statement of Rep. Dingell; statement of Rep. Lent).

2. In this Case No Exceptions Apply to the General Rule That Review Of Ongoing Remedial Activities Is Barred.

Of the five exceptions in section 113(h), only one could even arguably apply here: section 113(h)(1), which allows review in an action under section 107 "to recover response costs or damages or for contribution." 42 U.S.C. § 9613(h)(1).[23] However, this exception allows challenges only by the responsible party against whom costs or damages are sought. Because Raytheon is not such a party, it does not fall within the exception and it cannot challenge the UAO it received from EPA.

Section 113(h)(1) is not intended to allow a party seeking recovery of its own response costs simultaneously to challenge response actions undertaken by EPA. Rather, subsection 113(h)(1) is intended to ensure that when EPA, a State, or a private party brings a cost recovery, natural resource damage, or contribution action, the *defendants* will be able to challenge, in the same action, the costs being sought. In other words, "*there must be a direct relationship between the challenge to the response action and the action listed in section 113(h).*" Avnet, Inc. v. Amtel, Inc., Civ. A. Nos. 91-0383B, 91-0690B, 1994 WL 705433, at *12-13 (D.R.I. Nov. 29, 1994) (emphasis in original)

The fact that Raytheon is itself bringing a section 107 claim, therefore, does not trigger the subsection (h)(1) exception, nor does it allow judicial review of the order issued to Raytheon

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[23] The other commonly invoked exception, section 113(h)(4), is available to any "person," but only after the remedial action is completed. See, e.g., Schalk v. Reilly, 900 F.2d at 1095 ("[t]he obvious meaning of [section 113(h)(4)] is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy"); Clinton County Comm'rs v. EPA, 116 F.3d 1018, 1022 (3rd Cir. 1997) ("Congress intended to preclude *all* citizen suits against EPA remedial actions under CERCLA until such actions are complete.") (emphasis in original). See also North Shore Gas Co., 930 F.2d at 1244 ("the purpose of section 113(h) is to prevent litigation from delaying remediation.").

under section106(a). If Raytheon were allowed to challenge the issuance of the UAO in the context this complaint, the section 113(h)(1) exception would swallow the general rule, and Congress' restrictions on judicial review would be rendered a nullity. A person could challenge an ongoing cleanup or order at any time just by including a claim to recover response costs from someone else somewhere in its complaint.

Thus, parties may not challenge an order prior to its enforcement "simply because a [section 107] claim is pleaded somewhere in the Complaint." United States v. Charles George Trucking, 682 F. Supp. 1260, 1272 (D. Mass. 1988). The fact that some type of section 107 claim appears somewhere "in a single Complaint cannot be used as a mechanism by which to undercut Congress's clear intent . . . to preclude pre-enforcement review of EPA remedies [and orders], and, thereby, expedite the clean-up of hazardous wastes." Id.

B. Even If This Court Had Jurisdiction Over This Claim, The Claim Would Fail.

It is well-settled that "[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully." Salerno, 481 U.S. at 745. For Raytheon to prevail on Count IV of its Complaint, it "must establish that *no* set of circumstances exists under which the [challenged provisions of the] Act would be valid." Id. (emphasis added); see, e.g., Derby Unified School District, 206 F.3d at 1367 (applying the Salerno standard and noting that facial challenges are "disfavored"). See also Public Lands Council v. Babbit, 167 F.3d 1287, 1293, 1301(10th Cir. 1999) (applying the Salerno standard in facial challenges to regulations), aff'd, 529 U.S. 728 (2000).[24] Raytheon cannot meet this burden.

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[24] Although the Salerno rule is inapplicable in the First Amendment overbreadth context, no such issue is raised here. Salerno, 481 U.S. at 745; Time Warner Entertainment Co. V. FCC, 93

Raytheon also cannot overcome the weight of authority which rejects similar due process challenges and upholds the constitutionality of the statutory provisions challenged here. This very Court has previously ruled that section 106 passes muster under the due process provisions. Wagner Elec. Corp. v. Thomas, 612 F. Supp. 736, 748 (D. Kan. 1985). See also, e.g., Employers Ins. of Wausau, 52 F.3d at 664 (rejecting due process challenge to CERCLA's section 106 administrative order scheme); Fairchild Semiconductor Corp. v. EPA, 984 F.2d 283, 288-89 (9th Cir. 1993) (rejecting due process challenge to CERCLA section 113(h)); Barmet, 927 F.2d at 295-96 (same); Schalk v. Reilly, 900 F.2d at 1091, 1098 (same); Solid State Circuits, 812 F.2d at 390-92 (rejecting due process challenge to CERCLA section 107(c)(3)); Wagner Seed, 800 F.2d at 314-17 (rejecting due process challenge to CERCLA sections 106 and 107(c)(3)); Aminoil, Inc. v. United States, 646 F. Supp. 294, 299 (C.D. Cal. 1986) (rejecting due process challenge to CERCLA section 107(c)(3)); United States v. Reilly Tar & Chem. Corp., 606 F. Supp. 412, 421 (D. Minn. 1985) (same).

F.3d 957, 972 (D.C. Cir. 1996). Some Justices have questioned Salerno's applicability in certain other kinds of facial constitutional challenges that are also not relevant here. See City of Chicago v. Morales, 527 U.S. 41, 55 n.22 (1999) (plurality op.) (Stevens, J, Souter, J., and Ginsburg, J.) (facial attack appropriate where vagueness "permeates" the text of a law); but see id. at 78-82 (dissenting op. of Scalia, J.) (endorsing and re-affirming Salerno standard); id. at 111 (dissenting op. of Thomas, J. with Rehnquist, C.J. joining) (concurring regarding continued vitality of Salerno). The Court has not, however, overruled Salerno, which still controls here. See Agostini v. Felton, 521 U.S. 203, 237 (1997) ("[I]f a precedent of th[e Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (citations omitted).

1. Raytheon's Due Process Claim Fails Upon Identification Of Even One Scenario In Which The Challenged Statutory Provisions Are Constitutional.

"Because the plaintiffs' contention on this point presents a facial challenge to the federal constitutionality of [CERCLA section 106], we must start with the venerable rule of statutory construction that a statute is presumed to be constitutional unless shown otherwise." Branson Sch. Dist. RE-82 v. Romer, 161 F.3d 619, 636 (10th Cir. 1998). "Furthermore, in light of this deferential rule of statutory construction, we may not invalidate [section 106] if there is some 'fairly possible' construction that would confirm the measure's constitutionality." Id. (citing Communications Workers v. Beck, 487 U.S. 735, 762 (1988)).

Raytheon cannot demonstrate that there is *no* circumstance in which the provisions of section 106 can be constitutionally applied. As emergency situation, in which there is an active release posing an immediate threat to the surrounding community, is the easiest example of a clearly constitutional application of the statute. See Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 299-200 (1981) ("The Court has often acknowledged, however, that summary administrative action may be justified in emergency situations.")

Even setting aside the strict Salerno standard, Raytheon still cannot prevail on the merits because there are no constitutional infirmities in the challenged statutory scheme. Federal courts have thus had no difficulty rejecting due process challenges like Raytheon's and upholding the constitutionality of CERCLA's section 106 administrative order scheme. See, e.g., Employers Ins. of Wausau, 52 F.3d at 660, 664 (dismissing due process challenge to CERCLA section 106 administrative order scheme as "baseless" and "misdirected").

a. The Challenged Statutory Provisions Provide A Full And Fair Opportunity To Be Heard By A Federal District Court Judge Before Any Deprivation Of A Protected Interest Can Occur.

The Constitution prohibits the Government from depriving parties of a protected interest without due process of law. U.S. Const. Amend. V; Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citations omitted). As the Supreme Court has recently clarified, "[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999); see Federal Lands Legal Consortium, ex rel. Robart Estate v. United States, 195 F.3d 1190, 1195-96 (10th Cir. 1999); Greene v. Barrett, 174 F.3d 1136, 1140 (10th Cir. 1999). Only after finding the deprivation of a constitutionally protected interest does the court reach the second due process inquiry, which is to evaluate whether the procedures followed comport with due process. American Mfrs. Mut., 526 U.S. at 59.

Consistent with this framework, the threshold issue in this case is whether, under the challenged statutory provisions, Raytheon could be deprived of a protected property or liberty interest upon EPA's mere issuance of an administrative clean-up order under CERCLA section 106(a). The answer is plainly no. The only protected interest purportedly implicated by a CERCLA section 106 administrative order is a property interest, and no deprivation of that interest can occur prior to a hearing in district court. Employers Ins. of Wausau, 848 F. Supp. 1359, 1365 n.10, 1368 (N.D. Ill. 1994), aff'd, 52 F.3d at 664; see Solid State Circuits, 812 F.2d at 390-92 (upholding constitutionality of CERCLA section 107(c)(3) on grounds that federal court hearing occurred before punitive damages could be imposed); J.V. Peters & Co. v. EPA, 767 F.2d 263, 266 (6th Cir. 1985) (rejecting a due process challenge to CERCLA scheme and

holding that plaintiffs "can suffer no deprivation until the adjudication of the section 107 litigation" where they will have a full opportunity to argue issues of liability); supra pp. 10-12. That judicial hearing can arise in two contexts.

First, the United States may file an action in federal district court seeking both a judicial order requiring the party to comply with EPA's clean-up order and civil penalties for noncompliance. In that action, the recipient of the administrative order can raise any liability defenses, any challenges to the scope or validity of the order, and any defenses to EPA's request for penalties. Even if the court decides to enforce EPA's order, the court cannot impose penalties if it finds the defendant had "sufficient cause" not to comply. 42 U.S.C. § 9606(b)(1). "Sufficient cause" means an objectively reasonable belief that the order was either invalid or inapplicable to the party. Solid State Circuits, 812 F.2d at 390-91; United States v. Parsons, 723 F. Supp. 757, 763 (N.D. Ga. 1989). Moreover, if the defendant in a section 106 enforcement action lacked "sufficient cause" for noncompliance, the district court ultimately would have discretion as to whether and in what amount to grant civil penalties under section 106(b), and would do so only after full consideration of the defendant's arguments.[25] 42 U.S.C. § 9606(b)(1); see also supra pp. 16-17.

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[25] See United States v. ITT Continental Baking Co., 420 U.S. 223, 229 n.6 (1975) (statute that prescribed no minimum penalty gave the district courts discretion to determine the amount of penalty for each violation); Wagner Seed, 800 F.2d at 316 (civil penalties are discretionary under section 106(b)); Employers Ins. of Wausau, 848 F. Supp. at 1375 ("CERCLA § 9606(b)(1) expressly makes the imposition of penalties discretionary with the court"); see also Thunder Basin Coal Co. v. Reich, 510 U.S. at 218 (rejecting due process challenge to a pre-enforcement review bar where penalty assessments would become final and payable only after review by a federal court).

In addition, EPA may itself undertake the cleanup required by the order and later file an action under section 107 to recover its response costs. 42 U.S.C. § 9607(a)(4)(A). In that action, EPA can ask the court to impose punitive damages for noncompliance with the order. Id. § 9607(c)(3). Once again, the defendant can raise any and all defenses to the clean-up order, including any defenses to liability.[26] A court can impose punitive damages only if it determines that the defendant is liable and lacked sufficient cause for not complying with the order. Even where such a defense is lacking, the court still has discretion to determine the appropriate amount of damages to be assessed in each case. 42 U.S.C. § 9607(c)(3) (authorizing awards "in an amount at least equal to, and not more than three times, the amount of any costs incurred by the [Superfund]").

CERCLA thus provides a party that receives and disputes an EPA clean-up order a full and fair opportunity to be heard by an Article III judge prior to any deprivation of a protected interest. In other words, the recipient of a section 106 administrative order need not take any action to comply with the order or pay any costs or penalties until after a federal court has heard and ruled on its challenges to the order and any other defenses it may have. There can be no question that this judicial hearing fully comports with the requirements of due process.

Although this Court's analysis should end here, because this is a facial challenge under which Raytheon must show that a UAO can *never* be issued in a manner protective of due process rights, it is important to understand that section 106 clean-up orders are not issued in a vacuum, as Raytheon's Complaint suggests. For sites listed on the NPL, by the time a party

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[26] A defending party may even challenge the removal or remedial action in these circumstances, as an exception to the 113(h) jurisdictional bar. 42 U.S.C. § 9613(h)(3).

must decide whether to comply with a section 106 order, it generally has had the opportunity to comment on and challenge the listing of the site on the NPL; to provide EPA with information concerning its status as a "PRP;" to submit comments, with accompanying data or other information, to EPA regarding proposed response actions; and to evaluate EPA's response to those comments. Supra pp.11-14; see also 40 C.F.R. §§ 300.415(n)(2); 300.430(f)(3)-(5). Through the section 122 settlement negotiation process, a party has additional opportunities to assess the strengths and weaknesses of its liability and remedy defenses. 42 U.S.C. § 9622; supra pp. 14-15. Even after receipt of a section 106 order, a party can further assess whether it has sufficient cause not to comply with the order by meeting with EPA to discuss implementation issues and "whether the order is based on complete and accurate information." Guidance of CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions, OSWER Dir. No. 9833.0-1 (March 13, 1990), at 23 (discussing conference held prior to effective date of order). Even for removal actions with on-site work beginning within six months of EPA's involvement at the site, the public has an opportunity to review and comment on the administrative record; for removal actions with a longer lead time, a PRP has the opportunity to comment on the site investigation and response action, as well. 40 C.F.R. §§ 300.415(n), 300.820, 300.825. See supra at 12. Accordingly, the recipient of an order should generally be well-positioned, prior to the effective date of a clean-up order, to evaluate its litigation risks and decide whether to comply with the order, or await a judicial enforcement action, if any.

b. Raytheon's Allegations Attacking The Sufficiency Of The Judicial Enforcement Proceeding Lack Merit.

Raytheon recognizes that it can refuse to do the work required by a clean-up order and await EPA's initiation of a civil action in federal district court under CERCLA section 106 or 107 and that such action will result in a hearing before an impartial decision-maker. Complaint ¶ 52. Nevertheless, Raytheon claims that the judicial hearing in the enforcement action is not a "meaningful hearing." Id. This claim is a repetition of arguments previously rejected by federal courts.

i. Raytheon's Ex Parte Young Challenges To The Constitutionality Of Section 113(h) Are Unfounded.

Apparently relying on Ex Parte Young, 209 U.S. 123 (1908), and its progeny, Raytheon alleges that CERCLA's preclusion of pre-enforcement review of administrative orders coupled with the threat of potential penalties and punitive damages for noncompliance creates an untenable coercion to comply rather than to test the legality of an order in an enforcement proceeding. Complaint ¶¶ 52-73. Courts, including this one, have consistently rejected this argument because of the procedural safeguards available in enforcement proceedings brought under CERCLA sections 106(a) and 107(c)(3). See, e.g., Wagner Electric, 612 F. Supp. at 745 (rejecting Ex Parte Young argument in due process challenge to CERCLA section 106) (citing Oklahoma Operating Co. v. Love, 252 U.S. 331, 338 (1920)); Solid State Circuits, 812 F.2d at 389-92 (same, addressing CERCLA section 107(c)(3)); Wagner Seed, 800 F.2d at 315-17 (rejecting Ex Parte Young argument in due process challenge to CERCLA sections 106(b) and 107(c)(3)) (citing Oklahoma Operating); Reilly Tar, 606 F. Supp. at 418.

Those safeguards, as explained above, ensure that if a challenging party has "an objectively reasonable basis for believing that the EPA's order was either invalid or inapplicable to it" (i.e., a "sufficient cause" defense), the court will not impose any civil penalties or punitive damages for noncompliance with the order. Solid State Circuits, 812 F.2d at 391; see Wagner Seed, 800 F.2d at 316 (both sections 106 and 107(c)(3) "contain a good faith exception"). CERCLA provides an additional safeguard in that, even where a court concludes that a party lacked a sufficient cause for noncompliance, the court still has discretion as to whether and in what amount to impose civil penalties. That discretion also extends to the amount of punitive damages that can be imposed. 42 U.S.C. § 9607(c)(3) (discussing range of damages). Thus, contrary to Raytheon's contention, the CERCLA scheme does not offend the constitutional requirement of due process.

Moreover, the choice of complying with a clean-up order is no different from the choice parties face daily to comply or not to comply with federal statutes that if violated, involve the accrual of daily civil penalties. Indeed, Raytheon's argument – taken to its logical extreme – would call into question any federal statute that allows civil penalties to accrue on a daily basis from the date of violation through the conclusion of an enforcement action. This position has been squarely rejected. See Duquesne Light Co. v. EPA, 698 F.2d 456, 470 n.14 (D.C. Cir. 1983) (rejecting Ex Parte Young argument because the "penalties that accrue during the period in which the alleged violator contests his liability to the penalty" are "common" and "valid" provided the party "is accorded [an] adequate opportunity to challenge their assessment at the administrative level before payment must begin.") (citation omitted).

Furthermore, the choice posed under CERCLA is the same choice posed by other environmental statutes that provide for the issuance of compliance orders and preclude pre-enforcement review of those orders. Courts have consistently sustained these statutory schemes as constitutional.[27] Also instructive is the Supreme Court's decision affirming the Tenth Circuit in Thunder Basin, where the Supreme Court held that the Mine Safety and Health Act precluded pre-enforcement review of certain agency action. In so holding, the Court found no need to consider petitioner's claim that the bar to pre-enforcement review violated its due process rights "because neither compliance with, nor continued violation of, the statute [would] subject petitioner to a serious prehearing deprivation." Thunder Basin, 510 U.S. at 216. The Court recognized that while penalties "may become onerous if petitioner chooses not to comply" with the Act's requirements, the case did not create the "constitutionally intolerable" choice at issue in Ex parte Young because the civil penalties "become final and payable" only after full review by an independent commission and the federal court of appeals. 510 U.S. at 218.

In his concurring opinion in Thunder Basin, Justice Scalia stated that "preclusion of pre-enforcement judicial review is constitutional whether or not compliance produces irreparable harm – at least if . . . judicial review is provided before a penalty for noncompliance can be

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[27] See, e.g., Laguna Gatuna, Inc. v. Browner, 58 F.3d 564, 566 (10th Cir. 1995) (rejecting argument that precluding pre-enforcement review of Clean Water Act compliance order was "constitutionally intolerable" even though recipient may have "to violate an EPA order and risk civil . . . penalties to obtain judicial review"); Southern Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418, 1426 (6th Cir. 1994) (rejecting due process challenge and holding that "Congress provided one forum in which to address all issues, including constitutional issues, raised by the issuance of a [Clean Water Act] compliance order: an enforcement proceeding"); Armco, Inc. v. EPA, 124 F. Supp. 2d 474, 478 (N.D. Ohio 1999) (holding that precluding pre-enforcement judicial review of Resource Conservation and Recovery Act administrative orders was not constitutionally infirm); Amoco Oil Co. v. EPA, 959 F. Supp. 1318, 1324 (D. Colo. 1997) (same).

imposed." Thunder Basin, 510 U.S. at 220-21 (emphasis in original). Were this not the case, he remarked, pre-enforcement challenges would be the rule, not the exception. Id. Justice Scalia further remarked that there is no due process violation where "the company can obtain judicial review if it complies with the agency's request, and can obtain presanction judicial review if it does not." Id. at 221. In light of this precedent, Raytheon 's reliance on Ex Parte Young is wholly misplaced.

ii. The "Sufficient Cause" Defense Affords Suitable Protection.

Equally unavailing is Raytheon 's contention that the "'sufficient cause' defense to these penalties . . . is illusory." Complaint ¶ 67. As noted above, the term "sufficient cause" has been consistently interpreted by federal courts to mean a party's objectively reasonable belief that the order was invalid or inapplicable to it. See generally Solid State Circuits, 812 F.2d at 390-91 (citing 1986 legislative history concerning "sufficient cause" language). Construing sufficient cause in this manner provides recipients of clean-up orders a real and meaningful opportunity to test the validity of section 106 orders in a judicial proceeding and that is all that is required for purposes of due process. Id.

Prior to the 1986 Amendments to CERCLA, courts rejected Ex Parte Young challenges to CERCLA section 107(c)(3), because of the "sufficient cause" language in the statute. See, e.g., Wagner Electric, 612 F. Supp. at 742-45, 749; Wagner Seed, 810 F.2d at 314-15. Cognizant of these cases and seeking to ensure consistency in the statutory scheme, Congress amended section 106(b)(1) in 1986 to include the same "sufficient cause" language contained in CERCLA section 107(c)(3). 2 Legislative History 1109, 1156 (1990). Acknowledging that the

courts should carefully scrutinize whether sufficient cause exists in a particular case, the House Committee on Energy and Commerce's Report made clear "sufficient cause" exists where:

> a party can demonstrate by objective evidence the reasonableness and good faith of a challenge to an EPA order. The amendment also contemplates that courts will continue to interpret "sufficient cause" to encompass other situations where the equities require that no penalties or treble damages be assessed.

Solid State Circuits, 812 F.2d at 391 n.11 (quoting H.R. Rep. No. 253, Pt. 1, at 82, reprinted in 1986 U.S.C.C.A.N. 2835, 2864). Accordingly, when assessing the constitutionality of CERCLA, courts have properly construed the sufficient cause language – consistent with Congressional intent – to mean an objectively reasonable belief that the order was either invalid or inapplicable. See United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) ("It is therefore incumbent upon us to read the statute to eliminate those [serious constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress.").

Nothing precludes Raytheon from arguing to a federal court how and why its defenses to a particular clean-up order constitute sufficient cause in a particular enforcement action. Solid State Circuits, 812 F.2d at 391 n.11 (recognizing case and fact-specific nature of sufficient cause inquiry) (citing H.R. Rep. No. 253, Pt. 1, at 82, reprinted in 1986 U.S.C.C.A.N. 2835, 2864). That issue cannot, however, be decided in the context of the facial constitutional challenge presented in Count IV.

iii. Raytheon's Speculations About The Timing Of The EPA Enforcement Action And Adequacy Of The Administrative Record Do Not Present A Proper Facial Challenge.

Raytheon also alleges that defense of a judicial enforcement proceeding is inadequate because the timing of that action is left to EPA's discretion. Complaint ¶ 65. Raytheon specifically complains that EPA "can arrange for massive penalties to accumulate against a

response action. 40 C.F.R. § 300.810 (original published at 55 Fed. Reg. 8666, 8859 (Mar. 8, 1990)); see Barmet, 927 F.2d at 294 (noting comprehensive nature of material to be included in record pursuant to the NCP).[28]

Pursuant to those regulations, the administrative record for each Superfund site contains not only the materials that EPA has gathered in support of its proposed response action, but also the materials submitted by the public in commenting on the action. 40 C.F.R. §§ 300.430(f)(3), 300.815, 300.820. Thus, if Raytheon questions the completeness of the administrative record in a specific case, it can raise that issue to the court in the enforcement action. In addition, CERCLA and the NCP provide extensive opportunities for public involvement in the selection of a response action. 42 U.S.C. §§ 9613(k), 9617; 40 C.F.R. §§ 300.810, 300.815, 300.820. Accordingly, Raytheon's allegation that EPA "unilaterally creates" the administrative record, Complaint ¶ 64, is without foundation.

In addition, the plain language of CERCLA section 113(j) undermines Raytheon 's position regarding the administrative record. That section provides that "[o]therwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court" in any "judicial action [brought] under this chapter [which includes cases brought under CERCLA sections 106 and 107]." 42 U.S.C. § 9613(j). Thus, not only do EPA's CERCLA regulations allow a PRP to submit materials to EPA for inclusion in the

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[28] To the extent Raytheon disagreed with these requirements, it should have filed a petition for review challenging the regulations ten years ago. See Ohio, 997 F.2d 1520 (challenge to EPA's 1990 revisions to the NCP at 40 C.F.R. Pt. 300). Section 113(a) allows parties only ninety days from the date of promulgation of a final rule to challenge the rule in the D.C. Circuit. 42 U.S.C. § 9613(a).

administrative record, but CERCLA does not entirely foreclose judicial consideration of materials outside the administrative record, where the responsible party can make the requisite showing to the court in a particular case. Id.; cf. Franklin Sav. Ass'n v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1137 (10th Cir. 1991) (listing certain recognized exceptions to rule that judicial review of agency action is normally to be confined to the administrative record). Thus, Raytheon's charge that confining review to the administrative record renders judicial review "meaningless," Complaint, ¶ 64, is without foundation.

Since no deprivation of a protected interest can occur under the challenged statutory provisions prior to a judicial proceeding in a federal district court, Raytheon's facial attack fails and, should the Court find it has jurisdiction over this claim, the Court should grant the United States summary judgment.

c. CERCLA Also Allows Parties That Choose To Comply With Section 106 Orders An Opportunity To Petition For Reimbursement Once The Clean-Up Is Complete.

The availability of the constitutionally valid pre-deprivation hearing described above renders irrelevant Raytheon's allegations regarding the adequacy of the section 106(b) reimbursement petition process. Nevertheless, the reimbursement petition process affords a party that disputes a section 106 clean-up order yet another avenue for judicial review and for relief. That party can comply with the order and, after the cleanup is complete, petition EPA for reimbursement of its response costs. 42 U.S.C. § 9606(b)(2); Kelley, 15 F.3d at 1103; see supra p. 17-18. The petition process provides full and adequate relief to parties that choose to delay their day in court because successful challengers can become whole, receiving not only reimbursement for all reasonable costs incurred but also interest and other appropriate costs.

A party cannot, however, choose to forego the opportunity for the adequate pre-deprivation hearing described above and then complain about the delayed availability of the additional reimbursement procedure that Congress provided. See AJA Assocs. v. Army Corps of Eng'rs, 817 F.2d 1070, 1073 (3d Cir. 1987) (an "applicant cannot lay blame on an agency for the applicant's own failure to pursue every available channel of advocacy"); see also Employers Ins. of Wausau, 52 F.3d at 664 (holding that because a party served with a clean-up order may refuse to obey that order and obtain judicial review of the order when EPA seeks to enforce the order, CERCLA's judicial review provisions would be constitutional even absent the post-enforcement reimbursement provision). The time at which a party may file for reimbursement will, of course, vary by site. Id., at 663-65. Raytheon 's allegation that, in some cases, there may be a long delay before it can file a reimbursement petition is simply not relevant where, as here, the statute provides an opportunity for more than adequate process before any deprivation of a protected interest occurs. These allegations are also irrelevant in the context of a facial constitutional challenge.

d. CERCLA Does Not Deprive Any Party Of A Constitutional "Right" To Contribution.

Finally, Raytheon complains that when EPA issues a UAO, recipients are denied their right to contribution, thus imposing on recipients a disproportionate share of liability. Complaint ¶¶ 60, 72, 79, 84. This argument fails both because Raytheon is not being deprived of any protected property interest and, even if it were, as discussed above, CERCLA provides ample process to more than meet constitutional requirements.

No federal case has ever held that a contribution claim is a constitutionally protected property right for purposes of the due process clause. Cf. Mercury Mall, 368 F. Supp. 2d at 520

("It is a well-established common law principle, dating back to cases before the King's Bench in the Eighteenth Century, that as between joint tortfeasors or even intentional wrongdoers, there is no *right* to contribution."). Indeed, "[i]t is by now axiomatic that the 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object.'" Boyd v. Bulala, 877 F.2d 1191, 1196 (4th Cir. 1989) (quoting Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 88 n.32 (1978)). See also Aves v. Shah, No. 96-3063, 1997 WL 589177, at *1 (10th Cir. 1997) ("A State may abolish a common-law cause of action without violating the Constitution, even though 'otherwise settled expectations may be upset thereby.'") (quoting Duke Power, 438 U.S. at 88 n.32). Moreover, joint and several liability under CERCLA has been repeatedly upheld against constitutional challenges, even where it results in disproportionate liability being imposed on one party. See, e.g., United States v. Alcan Aluminum Corp., 315 F.3d 179, 190 (2nd Cir. 2003) (joint and several liability under CERCLA "does not result in . . . a deprivation of [a defendant's] right to due process"), cert. denied, 540 U.S. 1103 (2004); United States v. Iron Mountain, 812 F. Supp. 1528, 1545, 1547 (E.D. Cal. 1993) (joint and several liability poses neither equal protection nor due process concerns). Thus, Raytheon has no property interest in a contribution claim.[29]

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[29] In addition, what Raytheon complains about here, under the guise of a facial challenge, is its inability to sue the *United States* in contribution. Complaint ¶¶ 60, 72, 79, 84. Such an inquiry has no place in a facial challenge, since Raytheon has forfeited not only its ability to seek contribution from the United States, but also has forfeited its opportunity to seek contribution from any other party for costs incurred under the UAO. If there had been allegations that another private party had also been responsible for TCE contamination, Raytheon, by declining to settle its liability through an AOC and declining to await an enforcement action under section 106 or 107, would likewise have lost its ability to seek contribution from that private party. To maintain a successful facial challenge, therefore, Raytheon would be required to demonstrate

Even if there were such a property interest, however, as discussed supra, CERCLA provides ample process to protect against Constitutional infirmity. Raytheon was given the opportunity to enter an AOC, which would have preserved its contribution rights, but it chose not to do so. Raytheon also chose to comply with the order rather than await an enforcement action, thereby choosing to forgo its right to a judicial hearing where it could have raised any defenses to liability, including any divisibility defenses, it may have, and would also have preserved its contribution rights. Even now, Raytheon could seek to settle its claims with EPA or it could cease complying with the UAO and await enforcement action by EPA. Raytheon cannot, therefore, be heard to complain that it has been deprived of these opportunities. AJA Assocs., 817 F.2d at 1073.[30]

V. COUNT V MUST BE DISMISSED BECAUSE IT IS BARRED BY CERCLA SECTION 113(h) AND BECAUSE THE UAO AT ISSUE COMPLIES WITH THE REQUIREMENTS OF BOTH THE CONSTITUTION AND THE STATUTE.

In the final count of its Complaint, an "as applied" challenge, Raytheon alleges that the UAO issued against it in connection with the Site deprives Raytheon of its "statutory right to seek contribution" as well as the "substantive and procedural requirements of CERCLA." Complaint ¶¶ 86-88. Count V also alleges that the UAO violates Raytheon's constitutional due process rights. Complaint ¶ 89. In short, Count V seeks "pre-enforcement review" of the UAO issued against it. As discussed, however, this Court has no jurisdiction to hear such a claim. See

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that section 106 is constitutionally unsound in removing the right to seek contribution against *any* party, not just the United States.

[30] Raytheon also retains its section 106(b)(2) rights to seek reimbursement of moneys spent complying with the order. 42 U.S.C. § 9606(b)(2).

supra at 31-37. The Third Circuit has explained that the timing of review procedures set forth in section 113(h) were adopted in part because "disputes about . . . what measures actually are necessary to clean-up the site and remove the hazard *or who is responsible for its costs* should be dealt with after the site has been cleaned up." Boarhead, 923 F.2d at 1019 (emphasis added). See also In re CMC Heartland Partners, 966 F.2d 1143, 1148 (7th Cir. 1992) ("CERCLA postpones all judicial review of administrative orders under § 106(a) until the work has been performed or the EPA itself applies for judicial enforcement.") (citing cases); Solid State Circuits, 812 F.2d at 386 n.1 (court "agree[d] with the district court's decision that it lacked jurisdiction to review the merits of an EPA clean-up order [under section 106] prior to an attempt by the EPA to enforce it."). Thus, this count should be dismissed for lack of jurisdiction.

Even if there were jurisdiction over this claim, however, the United States would be entitled to summary judgment on Count V because the UAO complies with all relevant constitutional and statutory requirements.[31] Raytheon alleges that by issuing the UAO to Raytheon on September 30, 2004, the United States has violated Raytheon's due process rights. Complaint ¶ 86. These allegations are meritless for the same reasons discussed in connection with the dismissal of Count IV. See supra at 40-52. First, Raytheon was offered the opportunity to enter into an Administrative Order on Consent for the work covered by the UAO, which would have preserved Raytheon's contribution rights, but Raytheon declined. 42 U.S.C. § 9613(f)(3)(B); Ex. C. Raytheon also could have obtained a judicial hearing prior to any deprivation of property by declining to comply with the order and presenting any "sufficient

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[31] In addition, all necessary statutory findings were made prior to issuance of the UAO, see Ex. D, at ¶¶ 7-24, and all such findings are reasonable in light of the administrative record. Raytheon does not allege otherwise.

cause" defense it may have to this Court. 42 U.S.C. § 9606(b)(1). In addition, in spite of Raytheon's allegation that it will "never" have an opportunity for a hearing regarding the UAO, Complaint ¶ 86, if Raytheon believes the order has been wrongly issued, Raytheon remains free to bring a claim for reimbursement of its costs after the response action is complete. 42 U.S.C. § 9606(b)(2); Kelley, 15 F.3d at 1103; see supra at 51-52. Thus, the UAO issued against Raytheon on September 30, 2004 complies with the due process requirements of the Constitution.

The UAO complies with all the requirements of the statute, as well. Raytheon alleges that by issuing a UAO, the United States has violated section 120(a)(1) of CERCLA, which "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.'" Complaint ¶ 87. Raytheon further alleges that the United States has "unilaterally awarded itself protection from contribution claims" in a manner inconsistent with CERCLA section 113(f)(2). Id. ¶ 88. These claims, however, have no merit. Section 106 of CERCLA provides express authority for EPA to "issue[] such orders as may be necessary to protect public health and welfare and the environment." 42 U.S.C. § 9606(a). Raytheon makes no allegation that the United States did not comply with section 106 in issuing the UAO; instead, through the allegations in its complaint, Raytheon asks this Court to read that authority out of the statute. Nor does this put the United States in any different position than any private party, as Raytheon alleges. Complaint ¶¶ 87. By declining to enter an AOC and instead compelling EPA to issue a UAO, Raytheon has given up its rights to seek contribution against any potentially liable private parties, not just against the United States. Aviall, 125 S. Ct. 583-84.

Thus, the UAO complies with all statutory requirements and constitutional requirements and, if this Court determines it has jurisdiction over this count, this Court should grant the Unitd States summary judgment.

CONCLUSION

For these reasons, the United States moves that the entire complaint, with the exception of that portion of Count II that seeks reimbursement of costs incurred complying with the March 29, 2000 and December 11, 2000 AOCs, be dismissed; or, in the alternative, that the United States be granted summary judgment, and that Raytheon take no relief whatsoever.

Dated: November 17, 2005

Respectfully submitted,

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