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PACE ENVIRONMENTAL LAW REVIEW

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The CERCLA's Daily Penalty and Treble Damages Provisions: Is Any Cause "Sufficient Cause" to Disobey an EPA Order?

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The Comprehensive Environmental Response, Compensation and Liability Act of 1980 allows the EPA to order a party to cleanup hazardous waste before that party is found liable. However, a party can disobey this order when there is sufficient cause. This article discusses the instances where sufficient cause has been found. Further, the author determines whether the sufficient cause provision is a viable option for parties who have been ordered to cleanup. The author concludes that sufficient cause may be useful, although it is looked upon with skepticism.

I. Introduction

In most financial matters, one only pays for what's received, and then only what one justly owes. Only a fool parts with a dollar before he is sure that it needs to be spent. Typically we wait to find out what we owe rather than pay up front and risk a fight to get all or part of it back.

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The Comprehensive Environmental Response, Compensation, and Liability Act of 1980[1] ("CERCLA"), however, is extraordinary. Its scheme for cleanup of hazardous waste sites by private parties compels parties to fund cleanup, despite any objections, before actual legal responsibility for the costs is determined. A party's refusal to fund remediation until liability is determined can mean exposure to enormous penalties.

Under CERCLA's remediation scheme, the Environmental Protection Agency ("EPA") may issue an administrative order requiring parties to cleanup a hazardous waste site. Recipients of such orders must comply or face daily fines and punitive damages. In most cases, only after cleanup work is completed will a party have an opportunity to contest responsibility.

CERCLA does allow a party to disobey an order if it has "sufficient cause" to do so. However, a recipient of an EPA order, who relies on the sufficient cause defense does so at his peril, since the defense is poorly defined and may be so limited that reliance on it could prove imprudent and costly. This article explores the limitations of the sufficient cause defense through analysis of the statute and the resulting case law.

II. The Statute

CERCLA gives the EPA authority to take action in response to releases of hazardous substances into the environment, and then seek reimbursement post-cleanup from

1. CERCLA §§ 101-405, 42 U.S.C. §§ 9601-75 (1988 & Supp. 1989), *as amended by* Act of Nov. 5, 1990, CERCLA § 111, 42 U.S.C.A. § 9611 (1988 & West Supp. 1993). CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601-9674 (1988)) [hereinafter "SARA"]. Throughout this commentary, all statutory references will be to CERCLA unless otherwise indicated.

Authority granted to the President in CERCLA has been delegated to the EPA. *See* Exec. Order No. 12,580, 3 C.F.R. 193-200 (1987). All subsequent references in this commentary to EPA authority under CERCLA refer to authority originally delegated to the President.

responsible parties.[2] Alternatively, the EPA can compel potentially responsible parties ("PRPs") to cleanup hazardous waste sites via CERCLA section 106.12.[3]

One vehicle used by the EPA to secure private remediation of hazardous waste sites is the administrative order. An administrative order requires private parties associated with a hazardous waste site to remedy conditions at the site if a release or threat of a release of a hazardous substance may endanger public health, welfare, or the environment.[4] Once the EPA determines that an "imminent and substantial" endangerment exists, it has broad statutory authority to order a party or parties to abate the danger or threat of danger.[5] The EPA considers administrative orders a primary enforcement tool, since they provide incentives for PRPs to settle and abide by deadlines, and can be used to force commencement of cleanup efforts when a settlement cannot be reached.[6] Comparatively, negotiations for consent decree settlements, an option open to the EPA in which the EPA and a PRP enter into an agreement that the PRP will perform any response

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2. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1988). The EPA can recover its costs for remedial actions only if the site is listed on the National Priority List ("NPL").

3. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988). CERCLA allows the EPA to take steps it determines necessary to force PRPs to undertake EPA-selected cleanup actions as follows:

> (a) . . . [W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require . . . such relief as may be necessary to abate such danger or threat, and the district court of the United States . . . shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also . . . take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

Id.

4. *Id.* In addition to administrative orders, the EPA can secure private response work via a settlement embodied in a judicial consent decree or an injunction issued by a federal district court to compel cleanup. *Id.*

5. *Id.*

6. *See Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions* [1990 Administrative Materials] 20 ENVTL. L. REP. (Envtl. L. Inst.) 35,253 [hereinafter "EPA *Guidance*"].

action,[7] often drag on interminably, thus frustrating CERCLA's prompt cleanup policy.[8]

Administrative orders, on the other hand, are usually met with prompt compliance. With administrative orders, a site may be cleaned up without depleting the Superfund,[9] and the EPA's time and money need not be spent on a suit against responsible parties for reimbursement. Thus, funds are conserved for government financed cleanups.[10]

Under CERCLA section 106, the EPA need not show that an endangerment actually exists, only that one *may* exist.[11] An endangerment need not be immediate or an emergency for it to be "imminent."[12] Indeed, a risk may be considered imminent even if the health effects will be latent for many years.[13] Moreover, an endangerment may be "substantial" when rea-

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7. CERCLA § 122(a), 42 U.S.C. § 9622(a) (1988).

8. Walls v. Waste Resources Corp., 761 F.2d 311, 318 (6th Cir. 1985). Moreover, Congress passed CERCLA to "provide a national inventory of inactive hazardous waste sites and to establish a program for appropriate environmental response action to protect public health and the environment from the dangers posed by such sites." H.R. Rep. No. 1016, 96th Cong. 2d Sess. 17, *reprinted in* 1980 U.S.C.C.A.N. 6119.

9. CERCLA, The Superfund Act, was enacted by Congress for the sole purpose of compensating the public for damages caused by hazardous substances. *See* WARREN FREEDMAN, HAZARDOUS WASTE LIABILITY 212-13 (BNA Books The Bureau of National Affairs, Inc. 1992). Thus, CERCLA established a fund for such compensation. The initial amount appropriated to this Superfund was $1.6 million for a five-year period allocated for the sole purpose of cleaning up hazardous waste sites throughout the United States. *Id.* at 214.

10. EPA *Guidance*, *supra* note 6, at 35,253. If the EPA performs cleanup work itself with Superfund money, the money can be recovered by the Attorney General bringing an action on behalf of the Fund under CERCLA section 112(c)(3). *Id.*

11. United States v. Conservation Chem. Co., 619 F. Supp. 162, 192 (W.D. Mo. 1985) (finding that a chemical landfill site containing known or suspected carcinogens for which the recommended exposure level is zero and whose waste material had the potential for migration via groundwater, surface water or air, and posed the potential for exposure of humans and other living organisms in the surrounding suburban and urban areas which included agricultural, residential and manufacturing areas warranted an injunction against the responsible parties).

12. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988).

13. B.F. Goodrich Co. v. Murtha, 697 F. Supp. 89, 90 (D. Conn. 1989) (finding that hazardous substances released from landfill and presenting significant risk of migration through groundwater and leachate to nearby residential wells and brooks where they may be ingested by humans and animals presented im-

sonable cause for concern exists regarding exposure to a risk of harm by a release or threatened release of a hazardous substance.[14]

Any person named in an administrative order best pay attention, since Congress provided substantial penalties to promote compliance. A PRP who, without "sufficient cause, willfully violates, or fails, or refuses to comply with" an administrative order is subject to fines of up to $25,000 per day.[15] These large daily fines for noncompliance may be enhanced by punitive damages.[16] Under CERCLA section 107(c)(3), a court may assess damages equal to three times the amount of any costs incurred by the Superfund if a party fails, without "sufficient cause," to take proper action pursuant to an EPA order.[17]

A recipient of an administrative order may believe that because he doesn't have the finances necessary to undertake the cleanup he has sufficient cause to refuse to comply. Or, he may believe he is not responsible for the contamination and the EPA has targeted the wrong person, or that the order is based on mistaken conclusions or lacks merit. He may believe that someone else is also responsible. Perhaps he is lax in complying because he is too busy with other matters or hopes to stall the EPA. Or, maybe he just does not understand the significance of the whole matter. Regardless of these beliefs, the recipient of an EPA administrative order cannot challenge the validity of the order, its basis, or its requirements in a court of law prior to its enforcement.[18] The 1986 amendments to CERCLA, in recognizing that a

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minent and substantial endangerment to the public health, welfare or the environment).

14. Conservation Chem. Co., 619 F. Supp. at 194.

15. CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1) (1988).

16. CERCLA § 107(c)(3), 42 U.S.C. § 9606(c)(3) (1988).

17. *Id. See e.g.*, United States v. Carolina Transformer Co., 739 F. Supp. 1030, 1039 (E.D.N.C. 1989) (court imposed treble damages for PRP's refusal to remediate a site under an EPA order).

18. CERCLA § 113(h), 42 U.S.C. § 9613(h) (1988). Section 113(h) precludes pre-enforcement review of section 106 orders.

Superfund Amendments and Reauthorization Act ("SARA")[19] pre-enforcement review would delay cleanup and increase costs, preclude judicial review of the merits of a cleanup order prior to an attempt by the EPA to enforce it.[20] If PRPs refuse to comply with an administrative order, the EPA has two choices. First, it may use Superfund money to cleanup the site and later initiate court proceedings to recover from the PRP costs, punitive damages,[21] and penalties.[22] Second, the EPA may compel compliance by bringing an action for judicial enforcement of the order[23] and seek penalties and punitive damages. Consequently, to be heard in court, a recipient who disagrees with an order must wait for the EPA to initiate judicial proceedings.[24] At that point, the recipient will be

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19. In 1986, the government enacted SARA. Pub. L. No. 99-499, 100 Stat. 1613 (1986). SARA "enhanced the federal government's ability to learn of the releases of hazardous substances into the environment and to respond more promptly to those unauthorized releases of hazardous waste." *Freedman, supra* note 9, at 214. Congress provided $8.5 billion in funding for a 5 year period, to cleanup 175 sites during the first three years and 200 more sites in the last two years. *Id.*

> SARA also expands and clarifies EPA's powers, encourages and facilities settlements, increases state government and public involvement in the process of cleanup, amends state statutes of limitation for certain actions arising from exposure to hazardous substances that might be barred, provides for limited indemnification at contractors, delineates the underground petroleum storage tank problems, and deals effectively with damage to public natural resources and the adverse health effects of Superfund sites.

Id. at 215.

20. *Id.* Under CERCLA section 113(h), courts may review section 106 orders only when the EPA seeks to enforce the order, the EPA seeks penalties for violation of the order, or the PRP seeks reimbursement from EPA of response costs incurred after compliance with the order. CERCLA section 113(h) also allows judicial review in the context of section 107 cost recovery actions, section 310 citizens suits, and section 106 injunctive action. CERCLA § 113(h), 42 U.S.C. § 9613(h) (1988). The scope of review for issues of adequacy of the response action taken or ordered by the EPA is narrowly limited to the administrative record, and upon review the court should uphold the EPA action unless the opposing party can prove that the action taken was arbitrary or capricious. CERCLA § 113(j)(1)-(2), 42 U.S.C. § 9613(j)(1)-(2) (1988).

21. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3) (1988).

22. CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1) (1988).

23. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988).

24. PRPs may comply with administrative orders without admitting liability for the response costs. CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A)

subject to daily penalties and punitive damages unless he can prove he had "sufficient cause" to disobey.[25]

III. When is there "Sufficient Cause" to Disobey?

The phrase "sufficient cause" is not defined in CERCLA, and only a few courts have addressed the issue. The case law is scant,[26] which may be due to the fact that the EPA has only recently employed administrative orders with any regularity.[27] The increased use of administrative orders marks a sharp shift from prior EPA policy which relied mainly on the Superfund to finance cleanups, believing it was faster and avoided lengthy and costly litigation.[28] Moreover, many administrative orders are never challenged, perhaps because PRPs know that the federal judiciary is generally favorable to CERCLA policy and the EPA's position.[29]

(1988). A recipient who complies with an order issued under section 106 and is later judged not liable will be reimbursed. CERCLA § 106(b)(2)(C), 42 U.S.C. § 9606(b)(2)(C) (1988). Recovery in such a claim is allowed if the PRP can show by a preponderance of the evidence that it is not liable for the response costs. CERCLA § 106(b)(2)(C), 42 U.S.C. § 9606(b)(2)(C) (1988). Recovery is also permitted if the PRP can show, on the administrative record, that the response action required of him was arbitrary and capricious or was otherwise not in accordance with law. CERCLA § 106(b)(2)(D), 42 U.S.C. § 9606(b)(2)(D) (1988).

25. CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1) (1988).

26. *See* Solid State Circuits v. United States Environmental Protection Agency, 812 F.2d 383, 390 (8th Cir. 1991); Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 744 (D. Kan. 1985); United States v. Reilly Tar & Chem. Corp., 606 F. Supp. 412, 421 (D. Minn. 1985).

27. The EPA announced only in 1989, its "Enforcement First" policy in response to severe criticism of its failure to get tough with private parties. Since 1989, EPA officials have endeavored to meet this criticism by increasingly forcing private companies to bear the burden of cleanups, and reporting its increased enforcement efforts. *See Environmental Protection Agency Reports Increased Enforcement Efforts, More Money Paid By Companies For Cleanups*, 21 ENV'T REP. (BNA) 1527 (Dec. 7, 1990). Accordingly, the EPA recently reported that it sought over $135,000,000 in civil and criminal penalties during the fiscal year of 1992. *Penalties Assessed: 1992*, 23 ENVTL. L. REP. (Envtl. L. Inst.) 10,112 (Feb. 1993).

28. *Environmental Protection Agency Chief Pledges to Force Polluters to Pay Rather than Rely on Trust for Cleanups*, 20 ENV'T REP. (BNA) 428 (June 16, 1989).

29. *See e.g.*, United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir. 1992) (CERCLA will be construed liberally to effectuate its goals, and EPA's interpretation of statute will be given great deference); United States v.

According to the EPA, a PRP who bears the burden of proof has "sufficient cause" for noncompliance only if it has a reasonable and good faith belief that it was: (1) not a liable party to whom the order should have been issued; (2) that the actions required in the order were inconsistent with the National Contingency Plan ("NCP"); or (3) that the EPA acted arbitrarily and capriciously in issuing the order.[30] Furthermore, in the EPA's view, if a recipient fails to identify its concerns with an administrative order at the time it is issued, it cannot make out a good faith "sufficient cause" defense later.[31]

Legislative history, while scant, sheds some light on what the drafters meant by "sufficient cause." Furthermore, an examination of court decisions, reveals little about what constitutes "sufficient cause." Instead, the decisions give a better indication as to what will *not* satisfy the "sufficient cause" criteria.

The phrase "sufficient cause" was discussed only once during the original drafting of the statute. One Senator explained that the drafters intended that the phrase encompass defenses such as those where the recipient of the order is not a responsible party, or who "for good reason" believed he was not a responsible party.[32] Punitive damages should not be assessed, or at least should be reduced "in the interest of equity," if a recipient of an order did not substantially contribute to the release or threatened release of hazardous

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Gurley Ref. Co., 788 F. Supp. 1473, 1491 (E.D. Ark. 1992) (response costs are conclusively presumed to be reasonable and thus recoverable under CERCLA).

30. *See* Solid State Circuits v. United States Environmental Protection Agency, 812 F.2d 383, 390 (8th Cir. 1991); Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 744 (D. Kan. 1985); United States v. Reilly Tar & Chem. Corp., 606 F. Supp. 412, 421 (D. Minn. 1985); *see also* H.R. Rep. No. 253, 99th Cong., 2d Sess. 82 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2864. *See supra* note 25.

31. EPA *Guidance*, *supra* note 6, at 35,257. The EPA provides a conference opportunity before the order becomes effective, and orders generally include a requirement that the recipients notify the EPA of their intent to comply, accompanied by any basis for a sufficient cause defense. *See infra* notes 71-72 and accompanying text.

32. 126 Cong. Rec. 30,986 (1980) (statement of Senator Stafford) *microformed on* CIS No. 96/2:126/Pt. 23 (Congressional Info. Serv.).

substances. Moreover, there could be "sufficient cause" for non-compliance if the recipient "did not at the time have the financial or technical resources to comply, or if no technological means for complying was available."[33] The drafters also contemplated that a reviewing court would look into the propriety of the order itself. If the order or expenditures were not proper, for example not consistent with the NCP, then certainly no punitive damages should be assessed or they should be proportionate to the demands of equity.[34]

A less specific and less permissive explanation was given in 1986 when Congress added "sufficient cause" language to section 106(b).[35] Congress now anticipated that the phrase would

> continue to be interpreted to preclude the assessment of penalties or treble damages when a party can establish that it had a reasonable belief that it was not liable under CERCLA or that the required response action was inconsistent with the [National Contingency Plan]. The court must base its evaluation of the defendant's belief on the objective evidence of the reasonableness and good faith of that belief. Given the importance of EPA orders to the success of the CERCLA program, courts should carefully scrutinize assertions of "sufficient cause" and accept such a defense only 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.[36]

Before the 1986 amendments, courts generally held that pre-enforcement review of the propriety of section 106 orders

33. *Id.*

34. *Id.*

35. "To avoid potential unfairness that might arise from the limitation on the timing of review of section 106 orders, this amendment expressly extends the 'sufficient cause' defense to the penalty provision in section 106." H.R. Rep. No. 253, 99th Cong., 2d Sess. 82 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2864.

36. *Id.*

was prohibited, since judicial review would only serve to delay prompt response action.[37] The inability to challenge administrative orders, however, implicates constitutional due process violations as well.[38] An objective good faith standard of "sufficient cause" was adopted by several courts[39] so as to ensure that the penalty provisions were constitutionally permissible. The Eighth Circuit, for example, rejected a due process challenge to the EPA's authority to seek treble damages from a responsible person who, without sufficient cause, failed to properly comply with an EPA cleanup order.[40] In *Solid State Circuits, Inc. v. United States Environmental Protection Agency*,[41] the recipients of an EPA order sued to enjoin the EPA from enforcing the order it had issued. Meanwhile, EPA performed the cleanup it had ordered the recipients to undertake. The court determined that it lacked jurisdiction to consider a challenge to the merits of the EPA order, but that it did have jurisdiction to consider the constitutionality of CERCLA's treble damage liability provision.[42] The court held that, the "without sufficient cause" provision in the Act afforded adequate due process protection by preventing the assessment of treble damages if the opposing party had an objectively reasonable basis for believing that the EPA order

37. *E.g.*, Wagner Seed Co. v. Daggett, 800 F.2d 310, 315 (2d Cir. 1986); Aminoil Inc. v. United States Environmental Protection Agency, 599 F. Supp. 69, 71 (C.D. Cal. 1984).

38. *See* Industrial Park Dev. Co. v. United States Environmental Protection Agency, 604 F. Supp. 1136, 1141 (E.D. Pa. 1985) (the court ruled that the failure of CERCLA to provide either pre-deprivation or prompt post-deprivation hearing upon the enforcement of 106(a) orders could violate due process rights). The statutory scheme for issuing administrative orders has been challenged under the takings clause as well. *See* Wagner Seed Co. v. Daggett, 800 F.2d at 315-17 (most challenges to the penalty provisions of CERCLA alleged due process violations). *See also* United States v. Reilly Tar & Chem. Corp., 606 F. Supp. at 418 (D. Minn. 1984).

39. Solid State Circuits, Inc. v. United States Environmental Protection Agency, 812 F.2d 383, 391 (8th Cir. 1987); Wagner Seed Co. v. Daggett, 800 F.2d 310 at 319; United States v. Reilly Tar & Chem. Corp., 606 F. Supp. at 418.

40. *Solid State Circuits*, 812 F.2d at 391.

41. Solid State Circuits, Inc. v. United States Environmental Protection Agency, 812 F.2d 383 (8th Cir. 1987).

42. *Id.* at 386.

at issue was either invalid or inapplicable to it.[43] In assessing the objective reasonableness of a challenge to an EPA cleanup order, the EPA will be presumed to have acted correctly and its decision to issue an order may be found erroneous only if it acted arbitrarily or capriciously.[44] A party would have to show that CERCLA, EPA regulations, or any hearings or guidance the EPA may provide, gave rise to an objectively reasonable belief in the invalidity or inapplicability of the cleanup order.[45]

In addition to *Solid State Circuits*, other pre-amendment decisions addressing constitutional challenges construed "sufficient cause" to mean that treble damages may not be imposed when a challenge to the proposed remedy is made in good faith by a defendant who reasonably believes that it has a valid defense to the government order.[46] In *United States v. Reilly Tar & Chem. Corp.*,[47] for example, the defendant contended that the remedial action the EPA had ordered was far more expensive than what was required. The court held that the defendant could challenge the order without being subjected to exorbitant penalties even if the challenge is ultimately rejected on the merits, provided the challenge was made in good faith.[48] A more PRP-sensitive view of sufficient cause was espoused in *Aminoil, Inc. v. United States*,[49] where the court said punitive damages under section 107(c)(3) may only be assessed where the government proves that a PRP has refused to comply with an administrative order in bad faith.[50]

While these cases provided some comfort to well-intentioned PRPs, they provide little insight as to what would con-

43. *Id.* at 391.
44. *Id.* at 392.
45. *Id.* at 392.
46. Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 744-45 (D. Kan. 1985); United States v. Reilly Tar & Chem. Corp., 606 F. Supp. 412, 421 (D. Minn. 1985); *see also* H.R. Rep. No. 253, 99th Cong., 1st Sess. 82, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2864.
47. 606 F. Supp. at 415.
48. *Id.* at 420.
49. 646 F. Supp. at 294.
50. *Id.* at 299.

stitute sufficient cause, or what beliefs would be considered in good faith or reasonable. Moreover, these cases were decided before the 1986 amendments. The pre-amendment courts were quick to establish a good faith defense to both section 106(a) daily fines and section 107(c)(3) treble damages in efforts to satisfy due process. SARA[51] not only codified the bar on pre-enforcement review of administrative orders, but quelled the due process problem with section 113(h) and additions to section 106. Section 106 was amended to allow parties complying with an administrative order to obtain reimbursement for reasonable compliance costs incurred, plus interest, if the parties can show they are not liable for response costs under section 107(a) or that the government's decision to issue the order was arbitrary and capricious.[52] In addition, the amendments restrict the timing of judicial review, thereby deferring all challenges to EPA orders until an enforcement suit for reimbursement is brought by the government.[53]

Thus it remains to be seen whether court determinations of "sufficient cause" will show any tolerance for non-complying parties. Based on the tone of two courts that have specifically considered parties' reasons for disobeying EPA orders, it appears that few, if any, excuses will be accepted.

For example, despite Senator Stafford's remarks in 1980, at least two courts have refused to accept PRPs' "sufficient cause" defenses based on financial inability.[54] In *United States v. Parsons*,[55] the EPA issued an administrative order requiring several parties to cleanup drums containing hazardous substances. The recipients of the orders refused to comply, claiming, among other things, a lack of involvement

51. *See supra* note 19.

52. *See supra* note 20.

53. Section 113(h) does not totally bar review, but delays review until the EPA brings enforcement actions. Thus, since review is available, the due process clause is satisfied. *See supra* note 20 and accompanying text.

54. United States v. Lecarreaux, No. Civ. 90-1672, 1991 WL 341191, at *18, *26 (D. N.J. July 30, 1991); United States v. Parsons, 723 F. Supp. 757, 763 (N.D. Ga. 1989).

55. 723 F. Supp. 757 (N.D. Ga. 1989).

with the site and financial inability.[56] In the district court's view, financial ability cannot serve as a "sufficient cause" defense because, from a policy standpoint, one should consider one's financial risks before becoming involved in transporting and disposing potentially hazardous materials.[57] As to the parties' disagreement on when cleanup began, the court ruled that punitive damages should not be assessed when the EPA begins its own cleanup operations before a PRP has a chance to comply with an EPA order.[58]

Likewise, the defendant in *United States v. Lecarreaux*,[59] when faced with an action by the United States for assessment of daily penalties and punitive damages, argued that his lack of financial resources gave him sufficient cause not to comply with an EPA administrative order that directed him and 34 other parties to cleanup a contaminated site. Despite the defendant's assertion that he was on the brink of insolvency, the court, while noting that the defendant provided no concrete evidence of his financial status, rejected the defense and followed the public policy reasoning advanced by the *Parsons* court.[60] In granting summary judgment for the United States on the issue of punitive damages under 107(c)(3) and daily penalties under 106(b)(1), the court also rejected the defendant's other attempts to establish sufficient cause. Although held liable as a PRP in an earlier proceeding, the defendant asserted that at the time he failed to comply with EPA's order, he was relying in good faith on statutory defenses under which he believed that he was not liable for removal costs.[61] Specifically, he believed he was not liable because a fire, as an Act of God, was the sole cause of the release of hazardous substances. The court concluded that since the defendant had been found liable under CERCLA, his good faith defense was not reasonable.[62] The court cited

56. *Parsons*, 723 F. Supp. at 763.
57. *Parsons*, 723 F. Supp. at 763-64.
58. *Id.* at 763.
59. No. Civ. 90-1672, 1991 WL 341191, at *18 (D.N.J. July 30, 1991).
60. *Id.* at *26.
61. *Id.* at *25.
62. *Id.* at *26.

the 1986 legislative history suggesting that courts should "carefully scrutinize" assertions of sufficient cause. The court held that consideration of the equities would not work to prevent the assessment of punitive damages in this case.[63] The court went so far as to suggest that only in a situation like that mentioned in *Parsons*, where the EPA undertakes the cleanup before the recipient of the order has a chance to comply, would the equities require that no penalties or treble damages be assessed.[64]

IV. Conclusion

Although the parameters of "sufficient cause" have not yet been clearly defined, it is safe to conclude that a recipient of an EPA cleanup order has little choice but to comply. Only if the PRP is absolutely certain that he is not a responsible party under CERCLA,[65] or that he has a defense to CERCLA liability, should he dare to disobey.

The EPA has unfettered statutory discretion to dictate the requirements, method of removal or remediation, and the level of cleanup required at a site by issuing an administrative order. Judicial review of the order is postponed until after the response action is taken. Although a recipient of an order may be reimbursed for costs incurred once cleanup is completed if a court finds that he is not liable under CERCLA or that the costs were not proper under the NCP, any such reimbursement could take years and will cost the PRP even more.

Additionally, courts are usually steadfast to further the route contemplated by the statute and will not look favorably upon a PRP who refuses to comply with a cleanup order. With the government's "pay now, complain later" procedure, its speedy cleanup policy is accomplished and PRPs' argu-

63. *Id.* at *27.

64. *Id.* at *27.

65. It should be noted that the language of section 106(a) does not limit issuance of orders only to covered persons as defined in CERCLA section 107(a). According to EPA, that language grants EPA broad authority to issue an order to any party. For example, the EPA may issue an order to an adjoining landowner to obtain access to the site. EPA *Guidance*, *supra* note 6, at 35,255.

ments concerning liability or appropriateness of the order must wait until another day. More likely than not only the most innocent of PRPs — those found not liable under CERCLA or those who successfully assert a section 107(b) defense — will have sufficient cause to balk at the established procedure. If a recipient thinks he may not be responsible, he had better think again, and if a recipient does not have the money to comply, he had better find it quick.

Assertions of "sufficient cause" will be viewed with a much more skeptical eye than that of the pre-amendment cases. The *Lecarreaux* decision, for example, is contrary to the reasoning of the pre-amendment cases. The *Reilly Tar* court stated that a PRP should be able to defend himself at an enforcement proceeding without being forced to pay penalties, even if his defense is ultimately rejected.[66] Yet the defendant in *Lecarreaux* was punished with costs (over $200,000),[67] daily penalties and punitive damages[68] precisely because his Act of God[69] defense had been rejected and he had been found liable under CERCLA. Under this kind of analysis, "sufficient cause" will not be met when a party in good faith asserts a defense to CERCLA liability that is ultimately rejected by the court. Despite a PRP's honest belief that it is not liable, the PRP is subject to enormous penalties if a court deems its belief to be unreasonable. In short, while the drafters of the "sufficient cause" language said noncompliance could be "for good reason,"[70] it will be up to a court to decide what is (or is not) a good reason. Since disobedience of an order places PRPs at the mercy of judicial discretion, even the most litigious of PRPs will not want to risk treble damages and daily fines.

Moreover, EPA policy itself has probably contributed to diluting or even removing the sufficient cause defense. At least two courts, in considering the constitutionality of CER-

66. 606 F. Supp. 412, 415 (D. Minn. 1985).

67. These numbers were not calculated by the court, but left to determination by the magistrate. *Lecarreaux*, 1991 WL 341191, at * 29.

68. *Id.* at *23.

69. CERCLA § 107(b)(1), 42 U.S.C. § 9607(b)(1) (1988).

70. *See supra* note 32.

CLA's penalty provisions, have suggested that informal hearings held by EPA prior to the order's compliance date could remove or greatly limit a PRP's good faith or sufficient cause defense.[71] EPA subsequently adopted a policy whereby its administrative orders will specify that the recipient should provide EPA with notice of, and the basis for, any sufficient cause defense upon receipt of the order.[72] Additionally, all PRPs will have an "opportunity to confer" with EPA regarding the order.[73] The availability of a conference with EPA, albeit limited by time constraints, may take the reasonableness out of a PRPs reliance on his defense, if he continues to rely on the defense after the conference or if he does not take advantage of the conference opportunity.

Finally, the EPA's use of section 106 orders will likely increase. The EPA announced in 1989 that it would begin an aggressive effort to force polluters to pay for cleaning up hazardous waste sites.[74] Implementation of this "Enforcement First" policy marked a shift from past policy that relied chiefly on the Superfund to finance cleanups.[75] The new policy has led to a more active effort by the EPA to routinely issue orders to PRPs to pay for cleanup work before judicial action is sought.[76] That, coupled with fierce judicial deference to EPA discretion, should be a warning to recipients of EPA orders not to rely on the sufficient cause defense.

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71. Solid State Circuits, Inc. v. United States Environmental Protection Agency, 812 F.2d 383, 392 (8th Cir. 1987); Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 749 (D. Kan. 1985).

72. EPA *Guidance*, *supra* note 6, at 35,257.

73. *Id.* PRPs will have up to ten days from the date the order is mailed to request a conference. *Id.*

74. *Environmental Protection Agency Reports Increased Enforcement Efforts, More Money Paid By Companies for Cleanups*, *supra* note 27, at 1527.

75. *Chief Pledges*, *supra* note 28, at 428.

76. Environmental Protection Agency, *A Management Review of the Superfund Program* 2-6 (1989).