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In the midst of other major controversies surrounding the implementation of Superfund,[1] an important constitutional issue has been overshadowed and misanalyzed. That issue arises from Congress's grant of authority to the federal government to issue ex parte administrative orders directing private parties to clean up hazardous waste sites. One district court has already declared that this Superfund (sometimes referred to herein as the Act) authorization violates constitutionally required due process.[2] Other courts have attempted to interpret the Act to save its constitutionality. However, none of these has adequately resolved the due process issue raised by the Act's administrative order authority.[3]

The controversy involves a provision authorizing the Envi-

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1. Superfund is the commonly used name for the Comprehensive Environmental Response, Compensation and Liability Act [CERCLA], Pub. L. No. 96-510, 94 Stat. 2767-2811 (1980) (codified at 42 U.S.C. §§ 9601-9657 (1982)), enacted in December 1980. Much of the public and legal attention in the early years of Superfund was directed at EPA's administration of the Act and alleged improprieties in its administration. *See, e.g., Oversight of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980: Hearings on S. 321-4 Before the Subcomm. on Environmental Pollution of the Senate Committee on Environment and Public Works*, 97th Cong., 2d Sess. 342 (1982). When commentators have focused more specifically on the proper legal interpretation of the Act, they have tended to analyze the liability provisions of Superfund and have largely ignored the due process implications of administrative orders. *See, e.g.*, Dore, *The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund*, 57 NOTRE DAME LAW. 260 (1981); Vernon & Dennis, *Hazardous Substance Generator, Transporter and Disposer Liability Under the Federal and California Superfunds*, 2 UCLA J. ENVTL. L. & POL'Y 67 (1981); Note, *Superfund: Conscripting Industry Support for Environmental Cleanup*, 9 ECOLOGY L.Q. 524 (1981) [hereinafter *Conscripting Industry*]; Note, *Joint and Several Liability for Hazardous Waste Releases Under Superfund*, 68 VA. L. REV. 1157 (1982); Note, *Generator Liability Under Superfund for Clean-up of Abandoned Hazardous Waste Dumpsites*, 130 U. PA. L. REV. 1229 (1982) [hereinafter *Generator Liability*].

2. Aminoil, Inc. v. EPA, 599 F. Supp. 69 (C.D. Cal. 1984). See *infra* notes 43-73 and accompanying text for a detailed discussion of the holding in this case.

3. See *infra* notes 74-129 and accompanying text for a discussion of other decisions considering due process rights of parties subject to a Superfund administrative order.

ronmental Protection Agency to order allegedly responsible parties to expend their own moneys on site cleanup.[4] Such parties may be liable for substantial penalties if they fail to comply with these ex parte orders, although the Act does not include express provisions for judicial or administrative hearings.[5] Not surprisingly, this unchecked power to penalize without providing a prior opportunity for hearing has generated litigation.

This article first reviews Superfund's administrative order provisions and their intended role in hazardous waste cleanup.[6] It then examines the decisions that have interpreted these provisions and attempted to cure their apparent constitutional due process problems.[7] As these attempts have fallen short of a fair and effective solution, the second major section of the article examines relevant constitutional precedents and principles, and suggests an alternative approach that better safeguards due process protections while preserving most of the effectiveness of the administrative order authority established by Congress.[8]

I. The Role of Administrative Orders in the Superfund Framework

To understand the significance of Superfund administrative orders, they must be placed in the context of the Act as a whole and the problem it was designed to remedy. Congress passed Superfund in response to the undeniably serious problems presented by hazardous waste dumpsites, many of which had been abandoned by dumpers.[9] The primary attack on hazardous waste was to be conducted by government cleanups financed through the fund from which the Act takes its name.[10] Congress also gave the President power to issue administrative orders in some circumstances, although this executive authority was at

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4. 42 U.S.C. § 9606(a) (1982). *See infra* notes 34-38 and accompanying text for a discussion of this authority.

5. Failure to comply with an administrative order subjects a party to maximum fines of $5,000 per day. 42 U.S.C. § 9606(b) (1982). If the government cleans up a site because of a private party's noncompliance, that party may be liable for treble the government's actual cleanup costs. 42 U.S.C. § 9607(c)(3) (1982).

6. *See infra* notes 9-38 and accompanying text.

7. *See infra* notes 39-129 and accompanying text.

8. *See infra* notes 130-224 and accompanying text.

9. For a summary of the hazardous waste problem that led Congress to enact Superfund, see Note, *Conscripting Industry, supra* note 1, at 524-26; Note, *Generator Liability, supra* note 1, at 1229-31.

10. *See infra* notes 28-31 and accompanying text.

most a peripheral aspect of Congress's response to the problem.[11]

A. Superfund-Financed Cleanups with Private Liability

During consideration of hazardous waste legislation in 1980, EPA urged Congress to establish a large "revolving fund" that would allow the government to "cleanup hazardous waste sites first [and] then try to recover the costs of cleanup later."[12] In a dramatic departure from the regulatory pattern typical of prior environmental legislation, Congress enacted such a system by creating a $1.6 billion "Hazardous Substance Response Trust Fund,"[13] financed primarily by taxes levied on the petroleum and chemical industries.[14]

EPA was given ample power to use this fund to protect public health by cleaning up abandoned dumpsites.[15] Section 104 of the Act authorizes the federal government, alone or in cooperation with the states, to use Superfund moneys to respond to re-

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11. As shown below, the terms of section 106 are abbreviated and unclear, with little legislative history to clarify them. This suggests that the provision was not intended to play a major role in hazardous waste cleanups. Indeed, the section and its legislative history are so cryptic that it was not even clear whether it had any substantive content or whether it was merely jurisdictional. *See* Clark, *Section 106 of CERCLA: An Alternative to Superfund Liability*, 12 B.C. ENVTL. AFF. L. REV. 381, 400-403 (1985). Much in the Act is unclear, and the final legislation was the product of "last-minute scrambling of a lame-duck Congress." Vernon & Dennis, *supra* note 1, at 77. The language of section 106(a), however, parallels that in the Safe Drinking Water Act's "imminent and substantial endangerment" authority, which was to be used only when the other authority of the Act was inadequate. *See* H.R. REP. No. 1185, 93d Cong., 2d Sess. 35 (1974). One early Superfund decision emphatically made this point, dismissing the government's request for a Superfund section 106 injunction because "the government here has chosen to ignore those provisions of the statute which give it clear authority to remedy the pollution problem at the Wade site and recover its costs . . . and has instead chosen to sue under two different statutory provisions [section 106 and section 7003]." United States v. Wade, 546 F. Supp. 785, 787 (E.D. Pa. 1982), *appeal dismissed*, 713 F.2d 49 (3d Cir. 1983). Nevertheless, section 106 is included in the Act, and its authority must be retained in an effective fashion.

12. S. REP. No. 848, 96th Cong., 2d Sess. 12 (1980).

13. *See* 42 U.S.C. §§ 9631-9657 (1982). Recognition is widespread that the fund is insufficient to complete the task of cleaning up hazardous waste in America. *See, e.g.*, Blaymore, *Retroactive Application of Superfund: Can Old Dogs Be Taught New Tricks?*, 12 B.C. ENVTL. AFF. L. REV. 1, 7 (1985) (estimating total cleanup cost at $25 to $44 billion).

14. Blaymore, *supra* note 13, at 7.

15. Although much of the statutory authority was originally granted directly to the President, it has been delegated to the administrator of EPA. *See* Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981).

leases of hazardous wastes.[16] Under the relatively detailed provisions of this section, EPA is authorized to undertake any investigations and information-gathering necessary to detect a hazardous site.[17] If these steps indicate the presence of a hazard, EPA may take a wide variety of short-term emergency actions, defined as "removal" actions, and longer range, more permanent "remedial" actions to improve site conditions.[18]

Section 105 assures that funds are expended efficiently by requiring EPA to evaluate the risk presented by all sites around the country and to list at least four hundred as priorities for response actions.[19] In addition, section 105 requires development of a National Contingency Plan (NCP) to provide a blueprint for cleanup actions.[20] The NCP must include "methods and criteria for determining the appropriate extent" of the cleanup[21] and means of assuring that these measures are "cost-effective."[22] Superfund's text stresses that the EPA response to releases of hazardous substances should, to the extent possible, accord with provisions of the NCP.[23]

Operating in combination with section 105, section 107 of Superfund allows the government to recoup its expenses and ensure the continued adequacy of the fund by making responsible parties liable for "costs incurred" in fund-financed cleanups.[24] Responsible parties might include site owners and operators, as well as transporters and waste generators who disposed of hazardous substances at the site.[25] As interpreted by the courts, this liability provision is onerous, being both strict[26] and joint and

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16. 42 U.S.C. § 9604(a)(1) (1982). The action is authorized any time that a "substantial threat" of any hazardous waste release exists. The government may also respond whenever a "substantial threat" exists of release of "any pollutant or contaminant" that "may present an imminent and substantial danger to the public health or welfare." *Id.*

17. 42 U.S.C. § 9604(b) (1982).

18. *Id.* § 9604(c) (1982). Removal action is "that initial response . . . which after discovery must be undertaken quickly to protect or prevent actual or potential injury." Remedial action "involves the more permanent, costly measures which may be necessary after the need for emergency action has terminated." S. REP. No. 848, 96th Cong., 2d Sess. 53-54 (1980).

19. 42 U.S.C. § 9605(8)(b) (1982).

20. *Id.* § 9605 (1982). Section 104 only authorizes government response actions that are "consistent with the national contingency plan." *Id.* § 9604(a)(1).

21. *Id.* § 9605(3) (1982).

22. *Id.* § 9605(7) (1982).

23. *Id.* § 9605 (1982).

24. *Id.* § 9607 (1982).

25. *See id.* § 9604(a)(1) (1982).

26. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032,1042 (2d Cir. 1984). In

several.[27] These sections comprise a comprehensive, detailed system for site cleanup and cost recovery from responsible parties when they can be found.

One of the earliest Superfund decisions declared that the site cleanup and the cost recovery authority constitute "the heart of the statute."[28] Even proponents of expanded use of other sections of Superfund acknowledge that the major purpose of the Act is to provide authority for governmental cleanup.[29] When the fund was created, it was viewed by some legislators as the "key solution" to the hazardous waste problem in America.[30] The centrality of sections 104, 105, and 107 to the Act's scheme is reflected in the detail which they receive in the statutory text and the legislative history.[31] Notwithstanding their importance, however, these provisions are not the exclusive source of cleanup authority in Superfund. The Act in section 106 also provides authority to require private parties to undertake cleanup without employing the resources of the fund.

B. Private Cleanup Compelled by Injunctions and Administrative Orders

Section 106 of the Act provides a second source of cleanup authority by authorizing EPA to compel responsible parties to initiate private response actions. This provision is much briefer and vaguer than the site cleanup and cost recovery power, but it

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addition, possible affirmative defenses to liability are very narrowly circumscribed by the Act. *See* 42 U.S.C. § 9607(b) (1982).

27. *See, e.g.*, United States v. Conservation Chem. Co., 589 F. Supp. 59, 62-63 (W.D. Mo. 1984); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 845 (W.D. Mo. 1984); United States v. A & F Materials Co., 578 F. Supp. 1249, 1255-57 (S.D. Ill. 1984); United States v. Wade, 577 F. Supp 1326, 1337-39 (E.D. Pa. 1983).

28. United States v. Wade, 546 F. Supp. 785, 793 (E.D. Pa. 1982), *appeal dismissed*, 713 F.2d 49 (3d Cir. 1983). Some legislators believed this provision to be the most important power in Superfund. *See* Note, *Conscripting Industry*, *supra* note 1, at 529.

29. *See* Clark, *supra* note 11, at 383.

30. Blaymore, *supra* note 13, at 7.

31. As codified, sections 104, 42 U.S.C. § 9604 (1982), and 107, 42 U.S.C. § 9607 (1982), each contain more than six times as many lines of text as section 106, 42 U.S.C. § 9606 (1982)—and this notwithstanding that section 106 covers much in addition to the administrative order authority. *See* ENVIRONMENT AND NATURAL RESOURCE POLICY DIVISION, CONGRESSIONAL RESEARCH SERVICE, 97TH CONG., 2D SESS., 3 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510, 383-85 (Comm. Print 1983) (indexing legislative history references by section and revealing dozens more discussing the government cleanup authority than the section 106 power).

has seen much use in the first few years of Superfund's existence.[32]

Section 106 has a higher threshold for action than the section 104 government cleanup. While section 104 may be invoked for any "release" of a hazardous substance, section 106 authority is limited to circumstances when such a release presents an "imminent and substantial endangerment to the public health or welfare or the environment."[33]

When EPA finds such endangerment, it has two options under section 106. First, it may turn to the Attorney General "to secure such relief as may be necessary to abate such danger,"[34] or it may "take other action . . . including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment."[35] The only other discussion of administrative orders in section 106 is the penalty provision: Anyone who "willfully" violates the terms of a section 106 order may be fined as much as $5,000 per day.[36] In addition, under section 107(c) persons who fail "without sufficient cause" to comply with a section 106 order are liable for treble the costs of any subsequent fund-financed cleanup.[37]

Section 106 as a whole, including the administrative order authority, gives little guidance regarding significant substantive and procedural matters. There are crucial yet unanswered substantive questions regarding proper party defendants, the standard of liability, retroactivity, the applicability of the NCP, and the availability of defenses.[38] Procedurally, the issuance and enforcement of administrative orders pose significant questions including the scope of the hearing rights which must be granted to

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32. *See* Blaymore, *supra* note 13, at 7 ("EPA has relied considerably on section 106"). EPA has also declared its intent to make additional use of the administrative order authority in the future. *See, e.g.*, [14 Transfer Binder] Env't Rep. (BNA) 1900 (Mar. 2, 1984) (announcement by then assistant administrator Lee Thomas that administrative orders would be appropriate for a significant percentage of cleanup actions).

33. 42 U.S.C. § 9606(a) (1982). Also, section 106 cannot be used in case of a release other than a hazardous substance. *Id.* For the leading decisions interpreting the "imminent and substantial endangerment" language in a waste disposal context, see Environmental Defense Fund v. EPA, 465 F.2d 528, 535-36 (D.C. Cir. 1972); United States v. Vertac Chem. Corp., 489 F. Supp. 870, 885 (E.D. Ark. 1980).

34. 42 U.S.C. § 9606(a) (1982). This authority is discussed at length in Clark, *supra* note 11.

35. 42 U.S.C. § 9606(a) (1982).

36. *Id.* § 9606(b) (1982).

37. *Id.* § 9607(c)(3) (1982).

38. *See, e.g.*, Clark, *supra* note 11, at 384.

the subjects of such orders. The few courts that have grappled with these issues have reached contradictory and problematic results.

II. Decisions Interpreting Procedural Aspects of Superfund's Administrative Order Authority

Four district court decisions have considered the constitutionality of administrative orders issued under section 106: *Aminoil, Inc. v. EPA,*[39] *Industrial Park Development Co. v. EPA,*[40] *United States v. Reilly Tar & Chemical Corp.,*[41] and *Wagner Electric Corp. v. Thomas.*[42] All four of these cases involved similar procedural due process challenges to EPA administrative orders, but their outcomes differ radically. This subsection summarizes their holdings and examines their implications for future operation of Superfund in a constitutionally acceptable manner.

A. Aminoil, Inc. v. EPA

Aminoil, Inc. v. EPA[43] was the first decision to rule on the constitutionality of section 106 administrative orders. In *Aminoil,* the plaintiff companies were the subjects of a section 106 order to "submit a response plan" for a site cleanup and to "implement such a plan upon approval by the EPA."[44] Plaintiffs had no opportunity for a pre-order hearing to contest the terms of or the need for the section 106 order.[45] They did not directly challenge the legality of the absence of a hearing but focused on the unconstitutional chilling effect of daily civil penalties and treble damages for non-compliance.[46] The *Aminoil* court noted that the threat of sustaining such penalties had the effect of "coercing plaintiffs into foregoing their legal challenge to the ad-

39. 599 F. Supp. 69 (C.D. Cal. 1984).

40. 604 F. Supp. 1136 (E.D. Pa. 1985).

41. 606 F. Supp. 412 (D. Minn. 1985).

42. 612 F. Supp. 736 (D. Kan. 1985).

43. 599 F. Supp. 69 (C.D. Cal. 1984).

44. *Id.* at 71. A separate provision of the administrative order, compelling federal access to the site in question, was not before the court at that time. *Id.*

45. *Id.*

46. *Id.* at 72.

ministrative order," regardless of its merits.[47] Hence, the companies sought a preliminary injunction stopping the order.[48]

The court reviewed the legislative history of Superfund to ascertain what procedural safeguards Congress intended under section 106 administrative orders. Legislative history for this section is quite sparse, however, and the court found only one short passage expressing the generalized need for prompt action at some sites "[b]ecause delay will often exacerbate an already serious situation."[49] Relying on this slim reed and the Act's failure to expressly authorize pre-enforcement review, the court concluded that "Congress did not intend to allow judicial review of such orders prior to the commencement of either an enforcement action under § 106(b) or a recovery action under § 107(c)(3)."[50] This finding was no doubt grounded in the court's concern for "promptly and effectively responding to [an] emergency."[51] Thus, the court found that "[a]llowing an allegedly responsible party to challenge the merits of the section 106(a) administrative order prior to an enforcement or recovery action would handcuff the Environmental Protection Agency (EPA) by delaying effective responses to emergency situations."[52] While this public health concern is understandable, we shall see that the court was just shedding crocodile tears in its stated objective of environmental protection.[53]

Although the *Aminoil* court held that the Act precluded judicial review of the merits of the administrative order, it noted that the constitutionality of this scheme was "fit for judicial determination."[54] When the court turned to the procedures relating to Superfund administrative orders, it found them constitutionally inadequate. It noted that strong precedent holds that non-compliance penalties must not be assessed until a party has

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47. *Id.*

48. *Id.* at 71.

49. *Id.*

50. *Id.* (citation omitted). This discussion is quite brief and contains no further mention of established judicial principles for construing statutes in the absence of clear legislative history.

51. *Id.*

52. *Id.*

53. This pro-environmental statutory interpretation was the basis for the court's subsequent finding of unconstitutionality which struck down the entire authority of Superfund administrative orders. In short, rather than "handcuffing" EPA's administrative order authority, the court chose summary execution.

54. 599 F. Supp. at 72.

an opportunity to challenge the ex parte order,[55] and that as a practical matter, the threat of excessive penalties and treble damages may make compliance with the administrative order the only feasible alternative.[56] "[T]he threat of statutory sanctions has a direct and immediate impact on whether plaintiffs will comply with the administrative order" and failure to decide the plaintiffs' challenge could "foreclose their access to a legal forum."[57] The coercive impact of such excessive sanctions may render any subsequent post-enforcement right of judicial review "merely nominal and illusory."[58] The chilling effect of penalties may obliterate any realistic opportunity for a hearing on the merits of the administrative order and destroy the defendant's due process safeguards.[59] Although it noted the government's strong interest in prompt hazardous waste cleanup, to which it deferred in its analysis of congressional intent,[60] the court still felt it possible to address this interest and satisfy due process at the same time.[61]

Before holding the administrative order authority unconstitutional, however, the court considered one more possibility for saving the provision. According to section 107(a) of the Act, the statutory penalties for non-compliance do not apply to a party who can show "sufficient cause" for not complying.[62] On the floor of Congress, Senator Stafford stated that sufficient cause would encompass cases where the recipient of the order "was not the party responsible under the Act" or "did not at the time have the financial or technical resources to comply" or was incapable of complying.[63] The *Aminoil* court interpreted Senator Stafford's enumeration as exhaustive, and therefore extremely

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55. *See id.* at 73-74. The leading cases on this issue, most of which were cited in *Aminoil*, are addressed *infra* at notes 137-52 and accompanying text.

56. *Id.* at 75.

57. *Id.* at 72.

58. *Id.* at 75 (quoting Wadley Southern Ry. v. Georgia, 235 U.S. 651, 661 (1915)).

59. *See id.* The court perceived a "serious risk that plaintiffs will erroneously lose their property interest in the funds expended in complying with the order." *Id.*

60. *Id. See supra* notes 52-53 and accompanying text.

61. *Id.* at 76. Of course, such a scheme could have easily been fashioned out of Superfund as it currently exists, if the court had not ruled out such a constitutional interpretation ab initio. *See Reilly Tar*, 606 F. Supp. 412, 420-21 (D. Minn. 1985) (emphasizing that *Aminoil*'s statutory interpretation "is not mandated by the legislative history" and that a contrary interpretation "is consistent with the statute's language as well as its legislative history").

62. *See* 599 F. Supp. at 73.

63. *See id.* (quoting 126 CONG. REC. SA30986 (daily ed. Nov. 24, 1980) (statement of Sen. Stafford)).

limited, rather than illustrative of a wider range of possible defenses.[64] Thus, the sufficient cause defense was not applicable "to situations in which alleged responsible parties in good faith assert a reasonable defense that is ultimately rejected by the Court."[65] Consequently, the court reasoned that the administrative order authority of section 106 violated procedural due process guarantees, and it enjoined any assessment of non-compliance penalties as well as enforcement of the terms of the order that compelled federal access to the hazardous waste site.[66]

Although *Aminoil*'s holding that the threat of penalties may not be used to coerce compliance with an ex parte order without prior due process is sound, the court's reasoning suffers from several shortcomings. It assumes that Congress' public health concerns preclude pre-enforcement hearings and then concludes that the absence of such hearings renders the section unconstitutional.[67] Hence, the court's solicitousness for public health in its interpretation of congressional intent results in its ultimate rejection of those same concerns on constitutional grounds.[68] The court's criticism of Congress for failing to protect procedural rights[69] is actually a criticism of its own interpretation of the Act, which is not necessitated by the Act itself.[70]

The *Aminoil* court's holding rests solely on its own rather extreme interpretation of the Act.[71] A fundamental principle of statutory construction requires that legislation be interpreted to

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64. *Id.* at 73. In contrast to the analysis found in *Reilly Tar* and *Wagner Electric*, this discussion is quite sketchy and lacks authority.

65. *Id.* at 73.

66. *Id.* at 76.

67. *Compare id.* at 70 *with id.* at 74.

68. The court is no doubt correct that requiring a hearing prior to the enforceable effective date of an administrative order will undermine the ability to compel quick cleanup of health hazards, but by enjoining any threat of non-compliance penalties, as well as site access, the court virtually eliminated this authority.

69. 599 F. Supp. at 74.

70. Nowhere did Congress exclude the prospect of prior review, either administrative or judicial. The *Aminoil* court found it significant that analogous environmental authorities expressly provided for review. *See id.* at 75 n.2. The court interpreted Superfund's silence on the issue as significant, without considering the hasty manner in which Superfund's ultimate statutory language was drafted. *See supra* note 11. Even more surprisingly, the court overlooked the directive in section 106 that the administrative order authority be coordinated with the constitutional procedures of other environmental authorities. 42 U.S.C. § 9606(c) (1982).

71. Had the court found an opportunity for pre-enforcement judicial review or, alternatively, adopted an expansive interpretation of the statutory good faith defense, the constitutional objections would have been overcome.

preserve its constitutionality whenever possible.[72] The *Aminoil* decision seems to defy this basic tenet of statutory interpretation—particularly when considered in light of subsequent decisions.[73]

B. Industrial Park Development Co. v. EPA

Industrial Park Development v. EPA,[74] the second case to consider the constitutionality of Superfund administrative orders, is less extreme than *Aminoil*, but makes some of the same errors. As in *Aminoil*, the plaintiff company in *Industrial Park* was the subject of a section 106 order. Unlike *Aminoil*, however, the company in *Industrial Park* initially complied with the order and submitted a cleanup plan.[75] Because it found the plan inadequate, EPA determined that the company had violated the administrative order and began its own site cleanup.[76] Fearful of penalties, the company sought a ruling on the constitutionality of the procedures used and a declaratory order absolving it of liability under Superfund's penalty provisions.[77]

From its examination of the Act, the court concluded that it "appears to authorize Presidential (or EPA) response without prior administrative notice and hearing for the parties ultimately liable."[78] Although the court was uncertain whether the Act authorized pre-enforcement judicial review, it accepted jurisdiction in this case.[79]

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72. *See, e.g.*, United States v. Security Indus. Bank, 459 U.S. 70, 78-79 (1982); Califano v. Yamasaki, 442 U.S. 682, 693 (1979).

73. In view of the constitutional and environmental significance of the decision, the brevity of the court's opinion and its limited consideration of issues of statutory interpretation is surprising.

74. 604 F. Supp. 1136 (E.D. Pa. 1985).

75. *Id.* at 1139.

76. *Id.* at 1140.

77. *Id.* at 1138. This scenario amply illustrates the breadth of the potential due process problems with Superfund's administrative order authority. Not only may the EPA use its power and the ever-present threat of penalties to compel site cleanup, the agency may also arbitrarily require any actions by a private party which it deems appropriate to the cleanup operation—all without any hearing on the necessity of the actions. In this case, the court subsequently found some of the EPA's actions to be arbitrary and capricious. *Id.* at 1143.

78. *Id.* at 1141.

79. The court cited previous cases where courts held that such pre-enforcement review was unavailable in the context of a section 104 government cleanup action. Ultimately, the court concluded that it "need not determine the general availability of judicial review under CERCLA" because the government had conceded jurisdiction to the degree relevant in this case. *Id.*

In evaluating the plaintiff's request for a temporary injunction, the court expressed "grave doubts about the constitutionality of delegating to a variety of administrative officials statutory authorization for deprivation of property without prior notice and hearing or prompt subsequent administrative or judicial review."[80] It addressed the due process issue in an analysis that in some respects goes beyond *Aminoil.* Rather than rely on the in terrorem effect of subsequent penalties to invalidate section 106 administrative orders, the *Industrial Park* court focused on the process for issuing such orders and observed that it knew "of no authority permitting such summary administrative action by a relatively low-level official without a court order, hearing, or any record."[81] In past cases, according to the decision, "summary administrative deprivation of property interest violates the Constitution's due process guarantees *except in very narrowly circumscribed emergency situations.*"[82] And, even in emergency situations, "a prompt post-deprivation hearing was an integral part of the emergency power."[83] "In contrast, EPA has interpreted CERCLA to permit delegation of extraordinary powers without any prior judicial authorization or subsequent judicial review."[84]

Although it acknowledged the "strong public interest in protecting public health and our environment," and the substantial public interest in cost-effective clean-ups,[85] the court, nevertheless, emphasized the compelling public interest in judicial oversight of governmental actions that deprive citizens of property interests.[86] The implications of this decision, however, are ambiguous. The *Industrial Park* court treated the complaint as one for injunctive relief, apparently failing to notice that its analysis seems to hold the administrative order provision unconstitutional as applied.[87] Although the court clearly stops short of declaring section 106's administrative authority unconstitutional per se, it admonishes EPA to not use this authority, but to

80. *Id.*
81. *Id.* at 1142.
82. *Id.* (emphasis in original).
83. *Id.*
84. *Id.*
85. *Id.* at 1144.
86. *Id.* at 1145.
87. Nevertheless, the constitutional analysis, when connected to the decision, appears to provide precedential support for the conclusion that the administrative order authority may be unconstitutional. *See id.* at 1142.

"come to court for an injunction ordering private clean-up of the site."[88] The court also cautions EPA against "[u]nilateral administrative action under section 104" and suggests that such authority is limited to cases of "extreme emergency" and cases where "the site has been abandoned."[89] Ultimately, the court ruled against plaintiffs for failure to show an "irreparable injury" in this preliminary injunction context.[90] However, as to administrative penalties, it held that "EPA will not be permitted to impose sanctions or impose costs . . . later found unjustified."[91]

Although its analysis of section 106 administrative orders appears less extreme than *Aminoil*'s,[92] the *Industrial Park* decision may represent the worst of both worlds. To the extent that the court relies upon constitutional and statutory analysis, mostly in dicta, it functionally eliminates the use of administrative orders under section 106 and hamstrings EPA's cleanup authority under section 104.[93] Yet in so doing, the court provides little due process protection to companies. If these sections are employed, a target company's only defense against non-compliance penalties after *Industrial Park* is that the orders were "unjustified."[94] The uncertainty of this defense ensures that any

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88. *Id.* at 1145.

89. *Id.*

90. *Id.* at 1144. The court did prohibit EPA from expanding its cleanup operation at the site. *Id.*

91. *Id.* This ambiguous holding makes no sense without further elaboration. As discussed in *Aminoil*, the prospect of a later enforcement hearing on whether response costs and penalties are justified does not necessarily cure the chilling effect of the threat of such penalties. The court must have been aware of this problem because it cited *Aminoil*, but apparently intended for the parties to rely on sound judicial discretion to mitigate any such fear. The shortcomings of relying on such discretion are explained in Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 744 (D. Kan. 1985): "We are not so inclined as those courts to believe that mere judicial discretion sufficiently removes the chill. . . . Absent any guidelines by which a court is to exercise its discretion, plaintiffs are in no position to judge the advisability of a challenge to the order's validity." The court in *Industrial Park* supplies no such guidelines and expresses no concern for the possibility of the chilling effect of the Act's sanctions.

92. *Aminoil* enjoined the operation of sanctions altogether, *see* 599 F. Supp. at 76, while *Industrial Park* declined to do so, *see* 604 F. Supp. at 1144-45.

93. Although the precedential effect of this language is unclear, the court makes it quite clear that administrative orders will seldom be appropriate. *See* 604 F. Supp. at 1145. Even worse, the case limits EPA's own section 104 cleanup authority, which was meant to be the heart of the statute, *see supra* notes 28-31 and accompanying text, to cases of extreme emergency. This directly contradicts the statutory language that authorizes action for any hazardous substance release, regardless of whether it presents an imminent and substantial endangerment. *See* 42 U.S.C. § 9604(a) (1982).

94. 604 F. Supp. at 1144.

person receiving an administrative order will suffer the chilling effect criticized in *Aminoil* and thereby lose any effective forum for vindication of due process rights.[95]

C. United States v. Reilly Tar & Chemical Corp.

As in the two previous cases, EPA in *United States v. Reilly Tar & Chemical Corp.*[96] issued an administrative order compelling site cleanup. The plaintiff, Reilly Tar, considered the cleanup terms unlawful and, fearful of statutory penalties, went to court to enjoin their accrual. Unlike the decisions discussed above, however, *Reilly Tar* upheld the constitutionality of the administrative order procedures. In so doing, the court preserved the effectiveness of Superfund section 106, but needlessly undermined the plaintiff's fundamental due process rights. The *Reilly Tar* opinion acknowledges the constitutional principle relied on in the earlier decisions, that "a statute denies due process if the penalties for disobeying it are so severe that they effectively intimidate a party into not seeking judicial review."[97] But the court avoided this issue by interpreting Superfund so as to provide adequate defenses to the penalty provisions in any post-cleanup enforcement action.[98]

Reilly Tar implicitly rejected the availability of any pre-enforcement review, as did *Aminoil* and *Industrial Park*.[99] But it then departed from these earlier decisions by criticizing *Aminoil*'s interpretation of the Act and enlarging the sufficient cause defense to cover non-compliance.[100] In reinterpreting the sketchy legislative history of section 106, the court found it "unfair to assess punitive damages against a party who for good reason believed himself not the responsible party."[101] Indeed, anytime the government's demands under administrative order

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95. *See supra* note 93.

96. 606 F. Supp. 412, 414 (D. Minn. 1985).

97. *Id.* at 417.

98. *Id.* at 418-21.

99. Early in the decision, the court discusses the plaintiff's options in response to an administrative order but does not mention the possibility of seeking pre-enforcement judicial review. *Id.* at 416. Moreover, the decision's lengthy due process analysis would be needless if such early court review were available. The court suggested that pre-enforcement review is unavailable. *Id.* at 418 n.2.

100. The *Reilly Tar* decision stressed that *Aminoil*'s extreme statutory interpretation "is not mandated by the legislative history" and that a contrary interpretation "is consistent with the statute's language as well as its legislative history." *Id.* at 420-21. *See supra* notes 70-72.

101. *Id.* at 420.

authority were "not proper, then certainly no punitive damages should be assessed or they should be proportionate to the demands of equity."[102] Such a determination necessarily requires a de novo review of the appropriateness and cost-effectiveness of EPA's remedy.[103]

According to the court, ensuring such a defense to penalties for non-compliance compensates for due process shortcomings in section 106.[104] The opinion emphasizes that the availability of a good faith defense will prevent parties from being too intimidated by potential penalties to seek judicial review in a post cleanup hearing.[105] Consequently, the court denied Reilly Tar's request for preliminary injunction but stayed accrual of administrative penalties.[106]

Although the statutory interpretation and ultimate holding of *Reilly Tar* is preferable to *Aminoil* and *Industrial Park*, it too suffers from major problems. The first is its overly optimistic view of the value of post-cleanup review and the efficacy of the good faith defense. Given the ambiguity of such terms as "cost-effective" and "good faith," a party subject to an administrative order may still be deterred from risking non-compliance penalties.[107] If a company uses a cost-benefit analysis, the treble damages provision combined with daily fines may intimidate it from seeking vindication of due process rights even in some instances where the company's chances of ultimate victory are good.[108] Such a result is constitutionally deficient.[109]

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102. *Id.*

103. *Id.* at 421 n.5.

104. *Id.* at 417-18, 421.

105. *Id.* at 418. Even with a good faith defense, this dismissal of the remaining chilling effect is too blithe. *See infra* notes 185-210 and accompanying text.

106. *Id.* at 422.

107. *See infra* notes 185-192 and accompanying text.

108. Consider the following scenario. A company is confronted with an administrative order and believes that it is not the responsible party and should not be liable for an estimated $1 million cleanup cost. Typically there is some level of uncertainty about liability. Suppose the company concludes that it has a 60% probability of prevailing in a subsequent penalty action. Defending such an action to vindicate its rights would not be a wise investment. The residual 40% chance of liability for $3 million (treble damages) yields a present value liability of $1.2 million. Such a company would be better advised to comply with the order and forget its possible valid objections. Such a company would have to be confident of a 67% or greater probability of success before risking non-compliance. This situation is further exacerbated by the daily penalties, which would increase the threshold success probability before a defense of the company's rights would be economically warranted.

109. The hypothetical company in note 108 is being penalized for exercise of its lawful rights, something that the due process clause prohibits. *See infra* notes 137-152

The *Reilly Tar* court attempts to avoid this problem by adopting such an expansive definition of good faith that the good faith defense would always shield the alleged offender.[110] Although this approach saves the Act from its procedural due process flaws, such a broad defense effectively destroys the penalty provisions and the Act's deterrence value.[111] If penalties can always be avoided, companies subject to administrative orders have little incentive to comply, thereby forcing the expenditure of scarce fund resources for site cleanup and eliminating the effectiveness of the administrative order procedures of section 106.[112] Although section 106 authority may not have been central to the congressional plan for Superfund, it should be preserved for appropriate circumstances.[113] *Reilly Tar*'s attempt to preserve the authority of section 106 may destroy it every bit as surely as *Aminoil*'s extreme posture.

D. Wagner Electric Corp. v. Thomas

The *Wagner Electric Corp. v. Thomas*[114] decision is the most recent and perhaps best reasoned of the four decisions analyzing administrative order authority. Although it tracks the *Reilly Tar* analysis and makes many of the same mistakes, the *Wagner Electric* court acknowledges the fundamental shortcomings of its holding and urges administrative action to help resolve the due process difficulties inherent in section 106 administrative orders.[115]

The facts of this case parallel those of the first three cases

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and accompanying text.

110. If any meaningful prospect of loss in a post facto proceeding remains, a company may still be deterred from seeking such review out of fear of substantial penalties in the event of such loss. *See infra* notes 185-210 and accompanying text.

111. If an expansive defense is created to cure the due process problems of Superfund's penalty clause, and a defendant has little fear of awaiting a later penalty proceeding, no financial incentive to voluntarily comply with the order exists. The court in Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 749 (D. Kan. 1985), noted: "Without that threat of punitive damages, respondents to EPA cleanup orders might make it a practice to withhold compliance with those orders until EPA obtained judicial enforcement thereof."

112. For an explanation of the need to have an effective section 106 remedy available to supplement the limited resources of Superfund, see Clark, *supra* note 11, at 389-90.

113. It is axiomatic that an Act should not be interpreted in a way that renders any of its terms functionless.

114. 612 F. Supp. 736 (D. Kan. 1985).

115. *See infra* notes 125-129 and accompanying text.

except that EPA in *Wagner Electric* was preparing to proceed with a section 104 site cleanup which presented an immediate risk of treble damages for plaintiffs. In accord with the prior decisions, the court found that it lacked "subject matter jurisdiction to review the merits of a CERCLA order prior to EPA's seeking to enforce that order."[116] But it nonetheless examined the constitutional dilemma created by non-compliance penalties levied in the absence of a court review.[117] The court was sympathetic to the subject of the order and the possibility that the company would suffer "chilled access to judicial review"[118] and noted that Superfund may intimidate target companies into compliance and abandonment of their right to seek such review.[119]

Rather than hold the Act unconstitutional, the court saved the penalty provisions by holding that due process was satisfied because of an available defense similar to the sufficient cause defense suggested by *Reilly Tar*. Noting that the "sufficient cause" standard was inherently ambiguous and therefore insufficient to remove the chill, the court transformed it into a good faith standard defense,[120] based in large measure on Supreme Court precedent.[121]

Nevertheless, the court conceded that "good faith" might also be too ambiguous to cure the chilling effect of penalties.[122] To remedy this, a liberal definition of good faith was adopted to protect parties who might desire to vindicate due process rights

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116. 612 F. Supp. at 740. The court simply declared that the prior decisions on this question were "virtually unanimous" without evaluating the merits of the issue. *Id.*

117. *Id.* at 741-47. This analysis was framed in the context of a request for a stay of the administrative order, and the court applied traditional standards for granting preliminary injunctions. *Id.*

118. *Id.* at 742.

119. *Id.* at 743. As did the prior decisions, *Wagner Electric* relied predominantly on the applicable precedent of *Ex parte* Young, 209 U.S. 123 (1908), in this analysis.

120. 612 F. Supp. 736, 744. In this discussion the court was quite clear that "judicial discretion" alone was insufficient to protect the due process rights of affected parties.

121. *Id.* at 745. The court found Supreme Court precedents in Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920), and Reisman v. Caplin, 375 U.S. 440 (1964), to the effect that a good faith defense is constitutionally sufficient to save a penalty provision. *See Wagner Electric*, 612 F. Supp. at 743-45.

122. For example, the court rejected EPA's approach to review on the grounds that "plaintiffs would be greatly handicapped in their attempt to convince the reviewing court that their asserted defense . . . was raised in objective good faith," and therefore plaintiffs would be denied a "fundamental requirement of due process." 612 F. Supp. at 747.

through subsequent judicial review.[123] As noted above, however, such a broad defense trades off the against effectiveness of section 106 orders.[124] The court acknowledged that its interpretation "could lead one to conclude that parties will seldom be assessed treble punitive damages under CERCLA."[125] It also recognized that "[w]ithout that threat of punitive damages, respondents to EPA cleanup orders might make it a practice to withhold compliance with those orders until EPA obtained judicial enforcement thereof."[126] If this were to happen, EPA would be unable to employ administrative orders to compel private party cleanup and would be forced to expend the relatively scarce resources in the fund.[127] This would make section 106 administrative orders worse than useless because they would only serve to stall section 104 fund-financed cleanup operations.[128] Finding no judicial answer to this problem, *Wagner Electric* urged EPA to take administrative action to restore the effective operation of the administrative order authority by granting appropriate administrative hearings before issuing ex parte orders under section 106.[129]

In sum, section 106 administrative order authority, combined with the non-compliance penalties of the Act, presents a difficult constitutional problem that the *Aminoil, Industrial Park, Reilly Tar,* and *Wagner Electric* decisions fail to resolve adequately. An approach exists, however, that strikes a balance between the public's need for an effective hazardous waste cleanup program and the constitutional requirement that target parties be afforded due process. The remainder of this article explains such an approach.

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123. *Id.* at 748.

124. *See supra* notes 110-13 and accompanying text.

125. 612 F. Supp. at 749.

126. *Id.*

127. *See* Blaymore, *supra* note 13. This revenue shortfall has recently grown more serious since Congress has failed to reauthorize the taxing authority provided for in the Act, which could require EPA to shut down most of its cleanup operations. *See* N.Y. Times, Jan. 29, 1986, § 1, at 17, col. 1.

128. 612 F. Supp. at 749.

129. *Id.* The court stressed that EPA "can usually remove any good faith defense to a cleanup order merely by granting that party an administrative hearing at which EPA presents persuasive evidence of the party's 'responsibility.' " In such a case "a reviewing court would be far less likely to accept a party's contention that its challenge to an EPA order was asserted in objective good faith." *Id.*

III. Reconciling Superfund Administrative Orders and Due Process

The fundamental problem with all the cases to date is their preliminary, largely unexamined conclusion that pre-enforcement judicial review of administrative orders is precluded by the Act. Superfund can be interpreted in a manner that preserves the existence of administrative orders while still protecting the due process rights of the parties affected. This section proposes such an interpretation and suggests steps that EPA and the courts should take to effect the goals of the statute in a constitutionally appropriate manner.

A. The Right to a Hearing Undeterred by Threat of Sanctions

Due process requires that a party have the opportunity to be heard whenever the government seeks to deprive it of a constitutionally protected interest. This opportunity loses much of its meaning if the government can penalize its exercise. Accordingly, a due process hearing, without the threat of sanction, must be available to subjects of Superfund's section 106 administrative orders.

The fifth amendment guarantees that "no person shall be deprived of life, liberty or property without due process of law."[130] Laurence Tribe has emphasized that "[a]t the core of the procedural due process right is the guarantee of an opportunity to be heard."[131] Because property interests are at stake in the typical Superfund administrative order, the constitutional due process guarantees apply.[132]

Once such a constitutionally protected interest is implicated, a party has "the right to be heard before being condemned to suffer grievous loss of any kind."[133] This right, referred to as the "fundamental requisite" of due process,[134]

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130. U.S. Const. amend. V.

131. L. Tribe, American Constitutional Law, § 10-15, at 550 (1978).

132. Property deprivation occurs as soon as the emergency order is issued because from that point a defendant is potentially liable for daily non-compliance fines. A recipient of an order has a due process right to some form of hearing before such deprivation. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 605-606 (1975) (garnishment of bank account pending litigation is a taking of property).

133. Joint Anti-Fascist Refugee Comm'n v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

134. Grannis v. Ordean, 234 U.S. 385, 394 (1914). *See also* Fuentes v. Shevin, 407

"requires that there be an opportunity to present every available defense."[135] When a party is deterred from exercise of its right to be heard by the accrual of non-compliance fees, as in the case of EPA cleanup orders, it is doubtful that due process is satisfied.[136]

The seminal case addressing this issue is *Ex parte Young*.[137] Arising in the earliest days of government regulation of industry, *Young* dealt with maximum railway rates set by state law. These rates could be challenged only at the risk of incurring penalties, including criminal liability.[138] The Court held such restrictions on due process to be facially unconstitutional:

> [W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.[139]

The Court elaborated on this decision in another rate case, *Oklahoma Operating Co. v. Love*,[140] which involved a statute setting laundry rates and providing a $500-per-day penalty for violating its terms. To challenge the statute a party had to suffer such penalties "as might well deter even the boldest and most

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U.S. 67, 82 (1972).

135. American Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932). *See also* Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974); Vlandis v. Kline, 412 U.S. 441, 446-47 (1973).

136. The issue in dispute is not the existence of a hearing, which the government concedes is required prior to assessing penalties, but the timing of such hearing. As shown below, the right to a hearing may control its timing and compel that the right be available sufficiently early to make the hearing right a meaningful one. *See infra* notes 137-151 and accompanying text. There is a general principle that the government may not deter or chill the exercise of a constitutional right through threats of economic penalties or deprivation of benefits. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (deprivation of welfare benefits impermissably restricts constitutional right to interstate travel). This principle has been applied to the denial of due process hearing rights, as elaborated in the following discussion in the text.

137. 209 U.S. 123 (1908).

138. Under a Minnesota statute, maximum railroad freight charges were set by law. If a railroad violated these charges the company was subject to penalties and the officers and directors subject to possible imprisonment. There was no opportunity for pre-enforcement review of the statute's applicability and the only way to test the question was to violate the law and risk penalties. The penalties mounted cumulatively with each individual violation, up to a maximum of $5,000 per instance. *Id.* at 145.

139. *Id.* at 147. The Court stressed that the statutory scheme in *Young* would, in effect, "close up all approaches to the courts." *Id.* at 148.

140. 252 U.S. 331 (1920).

confident" from seeking judicial review.[141] The Court found that a right to judicial review beset by such deterrents does not satisfy the constitutional requirements of due process.[142]

Another roughly contemporaneous case, *Wadley Southern Ry. v. Georgia,* summarized the Supreme Court's holding in *Young* by noting:

> [T]he right to judicial review must be substantial, adequate, and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the laws.[143]

This trilogy of cases constructs a strong constitutional barrier to any scheme that penalizes parties for non-compliance, without providing a prior opportunity to challenge the legality of government action.[144] These early cases still form the primary support for the constitutional principle at stake, and the Court continues to adhere to the precedents they establish. For example, even when addressing wartime emergency legislation, a statutory penalty system was approved only because "the statute itself provides an expeditious means of testing the validity of any price regulation, without necessarily incurring any of the penalties of the Act."[145] And in *St. Regis Paper Co. v. United States,*[146] the Supreme Court directly addressed the issue of statutory penalties which chill due process rights. In that case, a penalty provision in the Federal Trade Commission Act was held constitutional only because pre-enforcement judicial review

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141. *Id.* at 336.

142. *Id.* at 337.

143. 235 U.S. 651, 661 (1915). *Wadley* involved a state railroad commission rate order subsequently violated by a railroad at the risk of penalties. In this case, the plaintiff railroad had an opportunity for a hearing at approximately the time of the order but failed to avail itself of the opportunity. As a result, the Court found that no due process violation was present. The Court stressed that penalties could not begin to incur until after the subject company had an opportunity for hearing on the merits. *Id.* at 669.

144. Other Supreme Court decisions support this principle as well. One decision from this era emphasized that "imposition of severe penalties as a means of enforcing a rate . . . is in contravention of due process of law, where no adequate opportunity is afforded . . . for safely testing in an appropriate judicial proceeding, the validity of the rate . . . before any liability for the penalties attaches." St. Louis, Iron Mountain & S. Ry. v. Williams, 251 U.S. 63, 64 (1919).

145. Yakus v. United States, 321 U.S. 414, 438 (1944).

146. 368 U.S. 208 (1961).

was provided by the Declaratory Judgment Act and the Administrative Procedure Act.[147]

More recent decisions of several circuit courts have followed *St. Regis*.[148] For example, the Second Circuit held in 1985 that "parties have the 'right to contest the validity of a legislative or administrative order affecting [their] affairs without necessarily having to face ruinous penalties if the suit is lost.' "[149] Significantly, all four of the Superfund district court decisions discussed above affirmed the applicability of this concept in the specific context of section 106 administrative orders.[150]

The right to a fair hearing is guaranteed by the due process clause, and it is only a short and logical step to hold that the government cannot chill the exercise of such a right through the threatened imposition of onerous penalties. The "onerous penalty," arguably created by Superfund, presents parties with a "Hobson's choice" between compliance with an ex parte, costly, and possibly illegal administrative order on one hand, and severe administrative penalties on the other.[151] However, it is not clear that Superfund actually poses such a dilemma.[152]

Before any final judgment is made about the constitutionality of Superfund administrative orders, it is necessary to understand the nature and timing of the hearing rights to which affected parties are entitled under Superfund and whether the Superfund scheme is capable of providing such hearings. Thus, the need for an administrative or pre-enforcement judicial hear-

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147. *Id.* at 226-27. This decision may also be distinguished by the much lower penalty applicable—$100-per-day violation with a 30-day grace period as opposed to an immediate running of up to $5,000-per-day in *Young* and *Wadley* and $500-per-day in *Love*. *Id.* at 211 n.2. Commentators have suggested that the principle at stake may depend in part on the severity of the penalties. *See* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 477 n.24 (1970). Superfund's penalties, of course, exceed those in any of the preceding cases, when one considers the potential treble damages as well as the $5,000 daily penalty.

148. *See, e.g.*, Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1119 (2d Cir. 1975), *cert. denied*, 426 U.S. 911 (1976) ("[D]ue process requires that some real opportunity to challenge administrative action be afforded, and that such opportunity cannot exist where penalties are so great that noncompliance and a judicial challenge cannot be risked."); Genuine Parts Co. v. FTC, 445 F.2d 1382, 1394 (5th Cir. 1971).

149. Winston v. City of New York, 759 F.2d 242, 245 (2d Cir. 1985).

150. Aminoil, Inc. v. EPA, 599 F. Supp. 69, 71 (C.D. Cal. 1984); United States v. Reilly Tar & Chem. Corp., 606 F. Supp. 412, 417 (D. Minn. 1985); Industrial Park Dev. Co. v. EPA, 604 F. Supp. 1136, 1141-42 (E.D. Pa. 1985); Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 742-43 (D. Kan. 1985).

151. *See Wagner Electric*, 612 F. Supp. at 742, for a discussion of the dimensions of this "Hobson's choice."

152. *See infra* notes 211-216 and accompanying text.

ing prior to imposition of penalties under the Act must be considered.

B. The Timing and Nature of the Hearing Requirement

Recent Supreme Court authority discusses fifth amendment due process in the context of the right to an administrative hearing prior to agency action.[153] This subsection evaluates the following issues in light of that precedent and resolves each in the negative: 1) whether the right to a pre-order hearing is constitutionally compelled for section 106 of Superfund; 2) whether the government may penalize a party for non-compliance before it provides a hearing, such as a pre-enforcement judicial hearing; and 3) whether the "sufficient cause" defense, relied upon in *Reilly Tar* and *Wagner Electric* to avoid the need to conduct such a hearing, satisfies due process requirements.

1. The right to an administrative hearing

Current conceptions of due process make it unlikely that the subjects of Superfund administrative orders will prevail on claims asserting a right to a hearing prior to agency action.[154] However, the decisions denying administrative hearings in a pre-order context bolster the conclusion that some judicial hearing must be made available under circumstances that do not chill the review.[155]

Mathews v. Eldridge[156] establishes the constitutional test used to determine a party's right to an administrative hearing. The *Mathews* Court enunciated a three prong test which weighs the private interest in an administrative hearing, the risk of an

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153. *See, e.g.*, Hewitt v. Helms, 459 U.S. 460 (1983); Ingraham v. Wright, 430 U.S. 651 (1977); Mathews v. Eldridge, 424 U.S. 319 (1976).

154. At one time, the judiciary recognized an absolute right to a hearing before any administrative agency action. *See* ICC v. Louisville & Nashville Ry., 227 U.S. 88, 91 (1913) (holding that "administrative orders, quasi-judicial in character, are void if a hearing was denied"). As discussed below, this is no longer the law and courts have specifically held that administrative hearings are not provided under the administrative order authority of Superfund. *See Wagner Electric*, 612 F. Supp. at 738; *Industrial Park*, 604 F. Supp. at 1141.

155. *See infra* notes 166-175 and accompanying text.

156. 424 U.S. 319 (1976). This decision has come under considerable criticism recently. Edward Rubin, referring to the *Mathews* test, states, "Its premises are debatable; its methodologies are impractical; and each of its three factors is of questionable relevance." Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1137 (1984) (footnote omitted).

erroneous decision in the absence of a hearing, and the government's interest in not granting a hearing.[157] Application of this test to Superfund administrative orders is likely to be resolved in favor of the government. Although the first two factors should militate in favor of those seeking a hearing, their impact will likely be dwarfed by the government's interest in expeditious issuance of section 106 orders.[158] If EPA chooses to resist efforts to conduct administrative hearings, as it has to date, the agency may rely successfully on the considerable public policy interest in expediting cleanup of the "imminent and substantial endangerment" of hazardous wastes.[159]

Although application of the *Mathews* test may vary on a case-by-case basis, there is precedent for denying a pre-order administrative hearing under an act such as Superfund. On similar facts, the Supreme Court yielded to an "imminent and substantial endangerment" argument in *Ewing v. Mytinger & Casselberry, Inc.*[160] In this case the Court ruled "that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective."[161] By analogy, other emergencies have been the impetus to deny a right to an administrative hearing. For example, emergencies have been invoked to justify denial of a hearing right in cases involving consumer protection from impure food products,[162] providing for effective tax collection,[163] seizing arti-

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157. 424 U.S. at 334-35.

158. Regardless of the disposition of the first two prongs of the test, the Court will allow an agency to dispense with a hearing when required by "a countervailing state interest of overriding significance." Boddie v. Connecticut, 401 U.S. 371, 377 (1971). Hazardous waste dump sites may present a serious risk to public health, necessitating prompt cleanup. *See supra* note 9. Where public health is at issue, the Court has tended to permit administrative action without a hearing. *See infra* notes 160-61 and accompanying text.

159. Courts have used this reasoning under Superfund to deny pre-cleanup judicial review to potentially responsible parties attempting to challenge the government's plan to clean up the site under section 104. *See* J.V. Peters & Co. v. EPA, 767 F.2d 263, 266 (6th Cir. 1985); Lone Pine Steering Comm'n v. EPA, 600 F. Supp. 1487, 1499 (D.N.J. 1985). These holdings are responsive to the congressional concern that "delay will often exacerbate an already serious situation." H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. I, at 28 (1980). *See also* Aminoil, Inc. v. EPA, 599 F. Supp. 69, 71 (C.D. Cal. 1984).

160. 339 U.S. 594 (1950).

161. *Id.* at 598. The Court characterized FDA's seizure of misbranded products as "merely the statutory prerequisite to the bringing of the lawsuit." *Id.* The fundamental holding of *Ewing* is that "no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective." *Id.*

162. North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908).

cles used in the commission of a crime,[164] and avoiding disruption of public schools.[165] Superfund administrative orders arguably fall within these decisions.

Often overlooked, however, is the value of this line of decisions in supporting a party's right to a fully effective and timely judicial review of any summary agency action authorized under this "emergency" exception. *Ewing* contains the admonition that judicial review be made available before the agency action becomes "effective."[166] This phrase is pregnant with both significance and ambiguity. Various other decisions have employed this language without shedding much light on its meaning.[167] In at least one case, however, the Court held that "statutory penalties cannot lawfully attach during the period of a bona fide judicial review" of an agency's ruling.[168] In the present context, this constitutional principle suggests that an administrative order is not "effective" until a hearing is granted and that no statutory penalties would accrue prior to a hearing.[169] If so, the parties' due process rights should be amply protected, but the penalty provisions would seldom be available, at least when judicial review is limited to a government enforcement action.[170] *Ewing*

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163. Phillips v. Commissioner, 283 U.S. 589 (1931).

164. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

165. Goss v. Lopez, 419 U.S. 565 (1975).

166. Ewing v. Mytinger & Caselberry, Inc., 339 U.S. 594, 598 (1950).

167. *See* Inland Empire Dist. Council, Lumber & Sawmill Workers Union, v. Millis, 325 U.S. 697, 710 (1945) (NLRB need not grant hearing on complaints before labor election but must do so before certification becomes effective); Opp Cotton Mills v. Administrator of Wage and Hour Div., 312 U.S. 126, 152 (1941) (order fixing hourly minimum wage for textile industry may not be effective until hearing granted); Lawrence Typographical Union v. McCulloch, 349 F.2d 704 (D.C. Cir. 1965) (hearing required prior to the time that NLRB decertification order becomes effective).

168. United States v. Pacific Coast European Conference, 451 F.2d 712, 715 (9th Cir. 1971). This case involved a government request for civil penalties against defendants who allegedly filed illegal rates for international shipping. As no hearing was granted prior to the administrative determination, the court held that penalties would not begin running until the date of final judicial disposition of the case.

169. Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1119 (9th Cir. 1975), *cert. denied*, 426 U.S. 911 (1976). upholds the constitutionality of an FTC determination because "the penalties which the appellants seek to have stayed did not attach prior to their opportunity to contest the validity of the orders."

170. If penalties do not commence until a hearing, a private party subject to an administrative order has an incentive to sit back and await government enforcement rather than expend the funds required to clean up a waste site. In a true emergency situation, the government presumably will employ its section 104 authority to clean up the site, which presumably will be more expeditious than litigation to compel private cleanup. This scenario renders the administrative order power moot and virtually useless, as discussed *supra* notes 110-12, 126-28 and accompanying text.

and its progeny seem to hold that when an administrative agency denies a party a hearing, the agency may not attach non-compliance penalties until the party's due process is satisfied.

This interpretation is strengthened by *Armstrong v. Manzo*.[171] In *Armstrong*, the Court held that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[172] Specifically, the Court struck down a procedure providing for a judicial hearing after the issuance of a summary administrative decree because the subsequent hearing would shift the burden of proof from the government to the private party.[173] This ruling is consistent with *Ewing* in its indication that an agency can only deny a pre-order administrative hearing when judicial review is equally effective.[174] This decision, too, would appear to preclude a procedure that in any way undermined the ultimate right of parties to full judicial review, either through penalizing exercise of the right or through delay.[175] Together, these cases suggest that an administrative order cannot become legally binding until some hearing has been granted.

In sum, section 106 of Superfund should not be interpreted to require an administrative hearing before administrative orders are issued. In the absence of such a hearing, however, due process would seem to dictate that EPA cannot begin imposing the statutory penalties on non-complying parties until judicial review is completed.

The purpose behind statutory penalties for non-compliance is to deter parties from ignoring the administrative orders. *See, e.g., Brown & Williamson*, 527 F.2d at 1120; Aminoil, Inc. v. EPA, 599 F. Supp. 69, 72 (C.D. Cal. 1984). If these penalties cannot attach prior to a judicial hearing, the parties have no incentive to comply prior to such hearing, and the penalties fail their purpose.

171. 380 U.S. 545 (1965).

172. *Id.* at 552.

173. *Id.* at 551.

174. In *Armstrong*, the Court emphasized that the shift in burden of proof may be decisive of the outcome. *Id.* In finding such a procedure constitutionally inadequate, the Court properly ruled that the government could not structure the timing of the hearing in such a manner as to "rig the deck" and enhance its prospects for success.

175. "[T]here is no question that a civil trial, fully comporting with due process, is required for the final determination. Due process requirements thus remain constant." Rubin, *supra* note 156, at 1140. Thus, pre-hearing remedies are unconstitutional if they have the effect of biasing the ultimate hearing or imposing undue hardship on one party. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 264 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, 340-42 (1969).

2. The right to pre-enforcement judicial review

In all the decisions under section 106 to date, courts have been reluctant to evaluate the merits of an administrative order prior to an enforcement proceeding initiated by EPA.[176] This reluctance is unwarranted, as it unnecessarily injures the due process rights of the parties subject to administrative orders.[177] Moreover, while this judicial hesitance is motivated by concern for expeditious environmental protection, the effect of such unwillingness to act may be counterproductive, preventing the effective operation of Superfund's administrative order authority.[178]

The courts have founded their denial of pre-enforcement review on the legislative history of Superfund, but this foundation is unpersuasive. Congressional evidence of intent is simply too unclear to be dispositive.[179] Nor is the balancing test of *Mathews v. Eldridge* appropriate in the context of judicial review.[180] Rather, the existence of pre-enforcement judicial review should turn on the demands of constitutional due process.[181]

Every court that has examined this issue under Superfund

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176. *See supra* notes 53, 79, 116.

177. A hearing in the context of an enforcement proceeding is insufficient to protect fully the due process rights of those subject to Superfund's administrative orders. *See infra* notes 182-210 and accompanying text. In the absence of an administrative hearing, pre-enforcement judicial review is essential to protect these rights.

178. By straining to protect due process rights in an enforcement proceeding, the defenses to penalties may become so broad as to destroy their effectiveness. *See supra* notes 111-113, 126-27, 170. More seriously, if the non-compliance penalty provisions are shaken in this way, the entire administrative authority may also come tumbling down. *See supra* note 170.

179. *See supra* notes 11, 31, 38, 61, 70. The legislative history of Superfund as a whole is quite vague and such evidence of congressional intent is virtually nonexistent in the context of section 106. Nothing in this sketchy background rules out pre-enforcement review.

180. Unlike the *Mathews* test for administrative hearings, which is fundamentally ends-oriented, the basic due process right enshrined in the Constitution is deontological—an essential obligation of government regardless of whether the outcome is "efficient." Were it otherwise, due process would afford little protection for citizens. As Professor Edward Rubin notes:

> The Court has never suggested that the *Mathews* framework be used for determining due process requirements in traditional common law or other nonadministrative cases. In fact, the effort to do so would produce major dislocations in existing doctrine, since it would be very difficult to derive the components of criminal or civil trials from that framework.

Rubin, *supra* note 156, at 1137.

181. In a case such as this, where the legislative intent is ambiguous or unexpressed, statutory interpretation should be guided by constitutional requirements. *See, e.g.*, cases cited *supra* note 72.

has found the statutory administrative order provision constitutionally problematic.[182] Nevertheless, the decisions in *Reilly Tar* and *Wagner Electric* sought to deny pre-enforcement judicial review of administrative orders while salvaging the provision's constitutionality through a "sufficient cause" defense for noncompliance.[183] Under the Supreme Court decisions above, however, this defense can only save the Act's constitutionality if it provides protection comparable to that of a pre-order hearing.[184] The primary due process shortcoming of a "sufficient cause" or "good faith" defense in an enforcement proceeding is the chilling effect which deters parties from exercising their fundamental right to a hearing. However framed, such a defense will unavoidably involve considerable uncertainty regarding its scope and applicability.

Even if characterized as a "good faith" defense, due process problems are still not avoided. Although such a defense already exists in many other contexts, it is not clear whether "good faith" should be objectively or subjectively determined.[185] Even if a subjective approach is used, the recipient of an administrative order has little assurance that even the best good faith defense will immunize it from penalties. Some courts have sug-

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182. *Wagner Electric* acknowledged the problem with the statutory structure, emphasizing that the "right of access to the courts cannot be infringed upon or burdened" and that Superfund "may be said to intimidate [private parties] into complying with the order and abandoning their right to seek a judicial determination of its validity." Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 743 (D. Kan. 1985). *Reilly Tar* likewise recognized that the Act "denies due process if the penalties for disobeying it are so severe that they effectively intimidate a party into not seeking judicial review." United States v. Reilly Tar & Chem. Corp., 606 F. Supp. 412, 417 (D. Minn. 1985).

183. *See Wagner Electric*, 612 F. Supp. at 743-45; *Reilly Tar*, 606 F. Supp. at 418-19.

184. Otherwise, the right of access to courts is burdened by reducing a party's fair opportunity to prevail on the merits. This diminished opportunity could certainly intimidate some parties into foregoing a legitimate challenge. *See supra* note 108. This conclusion is also compelled by Armstrong v. Manzo, 380 U.S. 545 (1965). *See supra* notes 171-75 and accompanying text; *see also* St. Louis, Iron Mountain & Southern Ry. v. Williams, 251 U.S. 63, 64-65 (1919) (statute must provide opportunity "for safely testing, in an appropriate judicial proceeding, the validity of the rate").

185. *See, e.g.*, Sherbicki v. United States, 366 F. Supp. 1290, 1294 (S.D.N.Y. 1973) (good faith in *forma pauperis* appeals is an objective standard); Hartford Accident & Indem. Co. v. Millis Roofing & Sheet Metal Inc., 11 Mass. App. Ct. 998, 1000, 418 N.E.2d 645, 647 (1981) (good faith term in contract interpreted subjectively); Karibian v. Paletta, 122 Mich. App. 353, 360, 332 N.W.2d 484, 487 (1983) (good faith standard under U.C.C. is subjective); Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 124 N.J. Super. 244, 248, 306 A.2d 77, 79 (1973), *aff'd*, 65 N.J. 474, 323 A.2d 495 (1974). The court in *Wagner Electric* described its Superfund good faith standard as an objective one but did not explain why this was the case. *See* 612 F. Supp. at 747.

gested that the good faith standard should rely on whether the party's action is "arbitrary and capricious."[186] The ambiguity of this phrase is well known to anyone versed in administrative law.[187] Other formulations, such as "reasonably diligent effort,"[188] "thoroughly honest [and] . . . realistic",[189] and "honest and intelligent,"[190] offer little clarity to parties considering whether to challenge an administrative order. As the court itself recognized in *Wagner Electric*, the presence of such ambiguity concerning the terms of the defense perpetuates the unconstitutional chilling effect of substantial interim penalties.[191] In light of the lack of available legislative history discussing "sufficient cause," a concrete, reliable definition appears impossible to fashion.[192]

Some Supreme Court precedent suggests that a good faith defense may overcome due process problems.[193] However, these cases share one important difference from the cases associated with Superfund: they involved parties that had received an administrative hearing before the order was issued.[194] Conse-

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186. Foster Enters. v. Germania Fed. Sav. & Loan Ass'n, 97 Ill. App. 3d 22, 30, 421 N.E.2d 1375, 1381 (1981) (using this definition in a contract case); Ennis Business Forms, Inc. v. Gehrig, 534 S.W.2d 183, 187 (Tex. Civ. App. 1976) (case arising under state retirement law).

187. Although federal agencies have operated under this standard for some time, they still fall short in the eyes of reviewing courts. *See A Fresh Look at Federal Regulatory Strategies*, 32 ADMIN. L. REV. 186, 190-91 (1980) (Panel I of the Proceedings of the National Conference on Federal Regulation: Roads to Reform, September 27-28, 1979, Washington D.C.) (comments by William F. Kennedy explaining the need for a clearer definition of "arbitrary and capricious" and other administrative law terms).

188. Collier v. Travelers Ins. Co., 97 R.I. 315, 321, 197 A.2d 493, 496 (1964) (service of process case).

189. Rova Farms Resort, Inc., v. Investors Ins. Co. of Am., 124 N.J. Super. 244, 248, 306 A.2d 77, 79 (1973), *aff'd*, 65 N.J. 474, 323 A.2d 495 (1974) (quoting Bowers v. Camden Fire Ins. Ass'n, 51 N.J. 62, 71, 237 A.2d 857, 861 (1968)).

190. McChristian v. State Farm Mut. Auto Ins. Co., 304 F. Supp. 748, 753 (W.D. Ark. 1969).

191. Reliance on judicial discretion is too uncertain and does not "sufficiently remove the chill otherwise placed on plaintiff's access to judicial review." Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 744 (D. Kan. 1985).

192. *See id.*; United States v. Reilly Tar Chem. Corp., 606 F. Supp. 412, 419 (D. Minn. 1985). Both of these courts found little in the statute or legislative history to flesh out the appropriate terms of the "sufficient cause" defense. They relied almost exclusively on the dictates of the Constitution in making the defense a "good faith" standard, in an attempt to avoid the *Young* line of precedents.

193. *See Wagner Electric*, 612 F. Supp. at 743-45 for a discussion of these cases, including Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920) and Reisman v. Caplin, 375 U.S. 440 (1964).

194. *See* Love, 252 U.S. at 335 (no administrative order may be issued except "upon due notice and a hearing"); *Reisman*, 375 U.S. at 445 (pre-order review available from

quently, the party had received due process before the threat of penalties arose. *Wagner Electric* conceded this distinction but chose not to rely upon it, finding the Court's discussion of the prior administrative hearing to be "oblique" and not dispositive of its conclusion.[195] Although this may be true, it should not obscure the fact that the Court's ruling was made in a substantially different context from that of Superfund in which no administrative hearing was granted. The Court in the earlier decisions on the adequacy of the good faith defense had recently ruled that "administrative orders, quasi-judicial in character, [were] void if a hearing was denied."[196] It is therefore not surprising that the Court at the time did not dwell upon the presence of such a well-established right. This holding on the necessity of administrative hearings has eroded over time, but that should provide reason for strengthening the other due process protections, not weakening them.[197]

Despite its seemingly strenuous attempt to justify a good faith defense under the Constitution, *Wagner Electric* could find only one decision, *Dan J. Sheehan Co. v. OSHRCA,* in which no prior administrative hearing had been granted.[198] To the extent that *Sheehan* is contrary to the basic principles underlying *Young, Ewing,* and *Armstrong,* it should be dismissed as incorrectly decided.[199] Moreover, a closer look at its facts suggests that its precedential value is limited. In *Sheehan,* the operation of penalties had already been stayed by the court and there was "no indication that the Commission will assess a per

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IRS hearing officer); Aminoil, Inc. v. EPA, 599 F. Supp. 69, 75 (C.D. Cal. 1984) (emphasizing that in Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115 (9th Cir. 1975) *cert. denied,* 426 U.S. 911 (1976), the legality of the administrative order had already been determined at the administrative level).

195. *Wagner Electric,* 612 F. Supp. at 746.

196. ICC v. Louisville & Nashville Ry., 227 U.S. 88, 91 (1913).

197. Obviously, a prior administrative hearing at which parties are permitted to present evidence and at which the agency must present substantial evidence to justify its order would help protect the rights of subject parties. In this context, denial of further pre-enforcement review seems more reasonable, as the *Love* and *Reisman* decisions explain. It is a major leap of precedent to rely on these cases where there was no prior hearing because to do so would deny parties *any* pre-enforcement review, with the ever-present threat of substantial non-compliance penalties.

198. Dan J. Sheehan Co. v. OSHRC, 520 F.2d 1036, 1042 (5th Cir. 1975), *cert. denied,* 424 U.S. 965 (1976) (upholding an OSHA penalty scheme comparable to that found in Superfund).

199. This is especially true because the case contains relatively little discussion of these precedents and no consideration of the significance of the absence of an administrative hearing prior to the order's issuance.

diem non-abatement penalty against the employer for taking [even] a bad faith appeal."[200] This decision may be distinguished as one where there was no actual threat of penalties or chilling effect, and it has been so interpreted.[201]

Indeed, any defense, short of one that is always successful, will be insufficient to provide due process protection in an enforcement action. There is an ineluctable "zero sum" trade-off between the guarantee of no chilling effect on due process rights and the government's ability to impose penalties to encourage compliance with administrative orders. Unless the defense is unambiguously certain to succeed in a subsequent enforcement action, the subject of an administrative order faces the risk that it will be penalized for exercising its due process right of review.[202] If the defense is automatically successful, the penalty provisions of Superfund are rendered meaningless, a fact both recognized and lamented by *Wagner Electric*.[203]

Although this analysis alone should suffice to demonstrate the inadequacy of a good faith or sufficient cause defense to satisfy due process rights, an even more intractable problem exists with such an approach, a problem that is totally unrecognized in either *Reilly Tar* or *Wagner Electric*. Superfund administrative orders typically require government access to the affected party's property.[204] However, the Act creates no automatic right to such access,[205] and in the absence of pre-enforcement judicial review, a party subject to an administrative order lacks any op-

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200. 520 F.2d at 1039. Indeed, the attachment of penalties was stayed by the court pursuant to specific authority in the Occupational Safety and Health Act. Hence, it is not at all clear that there was any threat of the chilling effect in question, and there are serious questions about *Wagner Electric*'s interpretation of this decision.

201. A subsequent decision has interpreted *Sheehan* as simply finding no "case or controversy" on the facts presented. Savina Home Indus. v. Secretary of Labor, 594 F.2d 1358, 1366 (10th Cir. 1979).

202. As the risk of penalties is precisely what causes the chilling effect, any residual risk carries some of the proscribed chill. *See supra* notes 108, 184.

203. *Wagner Electric* noted that without the threat of penalties, "respondents to EPA cleanup orders might make it a practice to withhold compliance with those orders" and "undermine the intent of Congress in enacting CERCLA." Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 749 (D. Kan. 1985).

204. The question of site access and control over the nature of cleanup operations may be of substantial concern to private parties. *See* Industrial Park Dev. Co. v. EPA, 604 F. Supp. 1136, 1140-41 (E.D. Pa. 1985), where this question was central to the company's litigation.

205. *See* Outboard Marine Corp. v. Thomas, 773 F.2d 883, 889 (7th Cir. 1985) (holding that in some instances EPA lacks authority to enter private property for pre-cleanup activity under section 104), *vacated*, 107 S. Ct. 638 (1986).

portunity to vindicate this right. Nor may a party later recover damages under the Act, if such access is subsequently found unlawful.[206] Significantly, this issue of access carries its own constitutional dimension because unwarranted invasion of private property implicates the "takings" clause of the Constitution.[207] Yet another insufficiency of a post facto good faith defense is that a party may suffer interim damage to its reputation as a result of the government's determination that it is unlawfully obstructing cleanup of a hazardous waste site.[208]

In sum, the good faith defense is an inadequate solution to the chilling effect of Superfund administrative orders on due process rights. Some form of pre-enforcement review, other than injunctive relief, must be granted to satisfy due process.[209] The only way to reconcile current procedures with the dictates of due process is to construct a defense so formidable that it will always succeed, thereby destroying the very purpose of the statutory non-compliance penalties.[210] Such a system also ignores the problems of site access and reputational damage which the good faith defense cannot address.

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206. It appears to be uniformly accepted that the Act creates no provision for recovering damages from the government in these circumstances. *See Wagner Electric*, 612 F. Supp. at 739; United States v. Reilly Tar & Chem. Corp., 606 F. Supp. 412, 416 (D. Minn. 1985); Aminoil, Inc. v. EPA, 599 F. Supp. 69, 73-74 (C.D. Cal. 1984).

207. The Supreme Court has found that the "right to exclude" is a "fundamental element" of an owner's basic property rights. Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979).

208. It is certainly plausible to assume that a private company that refuses to comply with a government administrative order, even summarily issued, may be pilloried for environmental obstruction. Such harm to reputation, without any opportunity for vindication through a hearing, may invoke a corporate liberty interest that is protected by the due process clause. *See* Old Dominion Dairy Prods. v. Secretary of Defense, 631 F.2d 953, 963-66 (D.C. Cir. 1980). *See also* A.O. Smith v. FTC, 417 F. Supp. 1068, 1083 (D. Del. 1976) ("Loss of public confidence as a function of non-compliance" with administrative order may violate due process protections.).

209. The well established criteria for preliminary injunctive relief seem insufficiently protective of the due process rights of parties subject to administrative orders. For example, to obtain such relief a party must show a "substantial likelihood that the movant will eventually prevail on the merits." *Wagner Electric*, 612 F. Supp. at 741. This requirement fails to lift the chilling effect from parties with less than a substantial likelihood of ultimately succeeding and thereby violates *Armstrong*'s rule that the hearing right not be biased for the government. *See supra* notes 171-75 and accompanying text. Additionally, the preliminary injunction requirements typically take into account the "public interest." As such, the party's constitutional right to a hearing would be contrary to the due process clause. *See supra* note 181.

210. *See supra* notes 110-13, 126-29, 203 and accompanying text.

3. The proposed reconciliation of penalties and due process

It is possible to protect the due process rights of those subject to Superfund administrative orders while still preserving some role for the penalty provisions. To do so simply requires the opportunity for an affected party to receive pre-enforcement review.[211] This procedure tracks that already approved by the Supreme Court in cases distinguishing the *Ex Parte Young* line of decisions.[212] Arguably, this procedure may hamper the operation of section 106 administrative orders by delaying their effectiveness until after completion of judicial review.[213] However, compromises may be necessary to guarantee constitutional rights. Furthermore, if a real health emergency exists, the government may proceed under its section 104 cleanup authority and seek later recovery under section 107's liability provisions.[214] This would protect public health and due process rights, and would be even more faithful to the original congressional intent than is the present system.[215] Although this proposed reconciliation may undermine the effectiveness of Superfund, it preserves the fundamental attributes of the Act, in contrast to the four district court opinions discussed above.[216]

There is, however, an even better solution to Superfund's constitutional dilemma. This solution is the procedure urged by *Wagner Electric,* that EPA voluntarily grant pre-order adminis-

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211. Allowing pre-enforcement review on the merits ensures that a private party will not be intimidated out of fear of substantial penalties in an enforcement action into forgoing legitimate challenges to an administrative order. If the administrative order is upheld in court, the statutory penalties then may attach to the party. This fulfills the penalty's role of encouraging private cleanup.

212. *See supra* notes 193-197 and accompanying text. Because due process has already been granted the private parties under this system, the "sufficient cause" defense in an enforcement action may be restricted.

213. This, of course, is the reason why courts have been reluctant to grant such review. *See* Aminoil, Inc. 599 F. Supp. 69, 70 (C.D. Cal. 1984).

214. Concededly, this alternative may not be preferred because it requires expenditure of government resources. *See* Industrial Park Dev. Co. v. EPA, 604 F. Supp. 1136, 1144 (E.D. Pa. 1985); Clark, *supra* note 11, at 389-90. Under the existing system, however, with a broad good faith defense in enforcement actions, Superfund resources may be required even more often because private parties simply will not comply with administrative orders.

215. Section 104 government cleanup was intended to be the primary attribute of Superfund, with section 106 only of secondary importance. *See supra* notes 10-11, 28-32 and accompanying text.

216. Each of the four district court opinions undermines the administrative order authority in some significant way. *See supra* notes 68-74 (*Aminoil*), 94-97 (*Industrial Park*), 109-15 (*Reilly Tar*), 124-130 (*Wagner Electric*) and accompanying text.

trative hearings to affected parties.[217] This could avoid the need for pre-enforcement judicial review[218] and, at the same time, validate the constitutionality of even a relatively strict sufficient cause defense. However, for this procedure to work, the agency's hearing would have to offer the fundamental minima required by due process.[219] Even with these added procedures the hearing still would be under the control of EPA, which could conduct the hearing expeditiously when necessary.[220]

Although EPA has, not surprisingly, been reluctant to provide procedures beyond those explicitly required by the statute, such action may be necessary in order to protect more important powers, such as the ability to use administrative orders backed up by the threat of penalties for non-compliance.[221] Recognition of this point should provide sufficient incentive for EPA to offer hearings. Such a procedure would also benefit those potentially responsible parties who genuinely want to comply with their legal requirements under the Act.[222] Courts can and should encourage the development of such a procedure by revealing to

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217. Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 749 (D Kan. 1985).

218. *See supra* notes 193-197 and accompanying text (discussing Supreme Court authority for allowing penalty provisions in enforcement actions where pre-order administrative hearings are available).

219. Obviously, a pro forma administrative hearing will not adequately protect due process rights. Where administrative hearings have been found wanting, courts have extended full de novo judicial review. *See, e.g.*, Chandler v. Roudebush, 425 U.S. 840, 863 n.39 (1976) (de novo review available where there was no impartial administrative review); Camp v. Pitts, 411 U.S. 138, 141-42 (1973) (de novo review where agency "fact finding procedures" are "inadequate"); Brown v. United States, 396 F.2d 989, 996-97 (Ct. Cl. 1968) (de novo review available for lack of "adversary hearings" at administrative level).

220. EPA administrative hearings could be limited to the minimum requisites of due process rather than the full panoply of rights present in judicial trials. For example, EPA could limit the availability of continuances, otherwise readily available in judicial hearings. In the absence of such an administrative hearing, the judicial forum becomes a party's only due process opportunity and a review would presumably be de novo. *See* United States v. Reilly Tar & Chem. Corp., 606 F. Supp. 412, 421 n.5 (D. Minn. 1985). *See also* Jones v. Freeman, 400 F.2d 383, 390 (8th Cir. 1968) ("plaintiffs will be entitled to a trial *de novo* if there is no administrative hearing").

221. As discussed throughout this article, the only constitutional alternatives to administrative hearings are (1) pre-enforcement judicial review, which may be unacceptably dilatory, and (2) post-enforcement review with a broad "good faith" defense for non-compliance, which preserves little incentive for voluntary private compliance with the order.

222. The proposed system would enable such a party to test its legitimate legal arguments against the order and, if they are found wanting, to meet its statutory duty. *See* Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 749 (D. Kan. 1985).

EPA the deficiencies of the alternative systems of due process protection.[223]

IV. Conclusion

Superfund's administrative order authority has created a dilemma between the need for prompt cleanup of hazardous waste dumps and the constitutional requirement that parties not be deprived of their property rights without due process. When the dilemma is irresolvable, the goal of prompt cleanup must give way to the constitutional requirement of due process. Ordinarily, however, the Constitution and statutes provide sufficient flexibility to accomplish the public policy objectives while retaining protection of individual rights, and Superfund is no exception.

Although district courts have struggled to find such a compromise between these needs, their solutions have so far been unsatisfactory. The decisions to date have either disemboweled the administrative order provisions of section 106 or have undervalued private parties' hearing rights. The tension between the two goals remains because the courts uniformly have proceeded from a mistaken and unnecessary assumption—that no pre-enforcement review is available under Superfund.[224]

A solution that effectively balances the interest in timely toxic waste cleanup and due process rights protection does exist. The solution requires that the affected party be given the opportunity to receive pre-enforcement review of the terms of the cleanup order. A pre-enforcement review under the control of EPA would resolve the current dilemma by achieving society's goal of toxic waste cleanup while safeguarding procedural due process rights.

V. Postscript

After this article was completed, Congress reauthorized and revised the Superfund legislation in the Superfund Amendments

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223. The decision in *Wagner Electric* has already initiated this process. If other courts begin providing pre-enforcement judicial review, then in order to facilitate the operation of section 106, EPA should soon recognize its interest in offering administrative hearings.

224. Indeed, if this assumption is reversed, the constitutional problems with the administrative order authority disappear. *See supra* notes 211-216 and accompanying text. Nor is this assumption necessitated by statutory text or legislative history of Superfund. *See supra* notes 49-51, 179-81 and accompanying text.

and Reauthorization Act of 1986.[225] In so doing the legislature modified the provisions dealing with administrative orders, penalties and judicial review.

Under a new provision, Congress specified that federal courts would have no jurisdiction over private party challenges but could only hear a government action "to enforce an order issued under section 106(a) or to recover a penalty for violation of such order."[226] This new restriction institutionalized the findings of the various district courts that no such private pre-enforcement review of adminstrative orders was available.[227] No longer is such judicial review available to save Superfund's administrative order authority from due process shortcomings.

In an apparent attempt to alleviate potential due process problems, Congress amended other provisions of Superfund as well. Section 106 is amended to include expressly the "sufficient cause" defense employed in *Reilly Tar* and *Wagner Electric*.[228] Moreover, the new section 106 also gives subjects of administrative orders certain reimbursement rights if they comply with the orders. Such a party may petition the government for reimbursement from the fund,[229] if the party can "establish by a preponderance of the evidence that it is not liable" for the costs incurred in compliance with an order,[230] or if the party "can demonstrate, on the administrative record, that the President's decision in selecting the response action was arbitrary and capricious or was otherwise not in accordance with law."[231] The conference report on the amendments provides no explanation of the intended scope of the new statutory sufficient cause defense, nor does it elaborate on the new reimbursement authority.[232]

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225. Pub. L. No. 99-499, 1986 U.S. CODE CONG. & ADMIN. NEWS 1628 (to be codified at 42 U.S.C. § 9601 *et seq.*).

226. § 113(h)(2).

227. At first blush, pre-enforcement review may seem to be available under the fifth avenue for judicial review—"an action under section 106 in which the United States has moved to compel a remedial action." § 113(h)(5). Examination of the legislative history dispels this conclusion however. The Conference Report explains that this provision derives from the prior House of Representatives provision contained in H.R. 2817. H.R. Rep. No. 926, 99th Cong., 2d Sess. 224 (1986). The House Report on this provision makes clear that it applies only to the injunctive authority of section 106, not the administrative order authority. H.R. Rep. No. 253, Part 5, 99th Cong., 1st Sess. 25 (1985).

228. § 106(b)(2), amending sec. 106(b)(1).

229. § 106(b)(2)(A).

230. § 106(b)(2)(C).

231. § 106(b)(2)(D).

232. H.R. Rep. No. 962, at 202-203, describing the amendments to section 106.

While the 1986 Superfund amendments alter the factual setting somewhat for constitutional analysis of administrative orders and penalties, they do not alter the basic conclusions of this article. The deficiencies of the sufficient cause or good faith defense have already been discussed,[233] and the amendments do nothing to resolve the uncertainty and residual chilling effect accompanying such a vaguely-defined defense to penalties. The reimbursement authority has potential for remedying the due process problems attendant to Superfund administrative orders, but these provisions currently suffer their own fatal defects. In a reimbursement action, the amendments shift the burden of proof on liability from the government to the affected private party to demonstrate its non-liability, with a preponderance of the evidence. Precisely this form of burden-shifting was disapproved by the Supreme Court in *Armstrong v. Manzo*.[234] An even more unfair system applies to parties attempting to limit their liability based on the government's selection of an improper or unreasonably expensive remedy, contained in the adminstrative order. Here, the private party must show that the government's action was arbitrary and capricious, based on the administrative record. Because the affected party may receive no opportunity to present evidence to the agency, it may be shut out from the administrative record, which may therefore be "rigged" against the private party. Once again, the affected party loses its right to an impartial, evenhanded review of its claims of non-liability.

At bottom, the 1986 amendments do not mitigate, but actually exacerbate, the due process problems of Superfund's administrative order and penalty authority. Under this new system, there are yet stronger grounds for urging pre-order administrative hearings upon EPA. Were the agency to provide such hearings in a fair and even-handed manner, due process could be safeguarded, and the new reimbursement provisions would complement and support the constitutionality of this Superfund authority. Consequently, the administrative hearings recommended herein[235] are increasingly necessary to preserve both the constitutionality and the effectiveness of Superfund administrative orders.

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233. *See supra* notes 185-203.
234. *See supra* notes 171-173.
235. *See supra* notes 217-222.