

Environmental & Safety Report

U.S. EPA's Use of CERCLA Section 106 Administrative Orders Upheld

But Scope of "Sufficient Cause" Defense Potentially Broadened

U.S. EPA's weapon of choice to compel the clean-up of hazardous waste sites is the issuance under CERCLA (also known as Superfund) of an unilateral administrative order (UAO). When faced with a UAO issued pursuant to Section 106 of CERCLA, the unfortunate recipient must choose: comply with the UAO regardless of whether it is believed to be valid or fair and undertake a costly clean-up, or face the threat of significant, daily penalties and the possibility of treble damages for ignoring the UAO.

Because the consequences of non-compliance can be so great, General Electric filed suit claiming EPA's "enforcement first" practice of issuing unilateral administrative orders is unconstitutionally coercive. Following a decade of litigation, the Court of Appeals for the District of Columbia Circuit has now joined the Seventh and Ninth Circuits in concluding that it is not. *General Electric Co. v. Jackson*, No. 09-5092, June 29, 2010. General Electric argued unsuccessfully that the potential daily fines and treble damages associated with a refusal to comply with a UAO, coupled with Section 113's bar against pre-enforcement judicial review, provided the UAO recipient with an unconstitutional Hobson's choice. The UAO recipient must either face massive fines or comply with an Order that it believes to be invalid or inappropriate. The Court rejected this contention, noting that the recipient does receive a pre-deprivation hearing because only a court can impose penalties for UAO non-compliance. As such, due process is satisfied. The statute, moreover, prohibits the imposition of penalties where the recipient has "sufficient cause" for its non-compliance, and, even if sufficient cause is lacking, imposition of any penalty rests within the discretion of the court.

EPA previously construed the "sufficient cause" defense very narrowly, contending that CERCLA penalties may be avoided only if the opposing party "had an objectively reasonable basis for believing that the EPA's order was either invalid or inapplicable to it," and relying on *Solid States Circuits, Inc. v. EPA*, 812 F.2d 383, 391 (8th Cir. 1987). While not directly refuted by the General Electric decision, the D.C. Circuit concluded that "sufficient cause" would be met for any good faith challenge where "reasonable grounds to contest" exists. Because the recipient need not ultimately prevail on its defense, but need have only a good faith basis to reject the UAO, it is possible that the General Electric decision will embolden UAO recipients to refuse to comply with UAOs on a more frequent basis. This is particularly true in light of the Supreme Court's recent decision in *BNSF v. U.S.*, 129 S.Ct. 1870 (2009), which emphasized that joint and several liability is not to be applied under CERCLA where harm to the site is divisible. Reading these decisions together suggests that where a company receives EPA's standard UAO demanding investigation and remediation of an entire site, the company may properly refuse compliance if it has a factual basis to believe that the harm at a particular site is divisible. This reasonable belief that joint and several liability does not exist should constitute "sufficient cause" to refuse to comply with such an order.

In sum, although the Court in *General Electric* upheld the constitutionality of EPA's administrative compliance order authority, its broad construction of the "sufficient cause" defense should offer UAO recipients protection against the imposition of penalties and treble damages when they possess a reanable, good-faith basis for refusing to comply with its terms. To avert penalties and punitive damages, the UAO recipient need not ultimately prevail on its defense, it need have only reasonable grounds to contest the UAO.

The decision is available at <http://www.cadc.uscourts.gov/internet/home.nsf>.

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