Due Process and the Environmental Lien: The Need for Legislative Reform

Cheryl Kessler Clark
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I. INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)1 provides the United States Environmental Protection Agency (EPA) with three alternatives when the agency has determined that response action is required at a hazardous waste site. The EPA may issue an administrative cleanup order;2 file an action in federal court seeking an order compelling cleanup;3 or proceed to clean up the site with “Superfund” money and seek reimbursement from the responsible party in a subsequent cost recovery lawsuit.4 Despite the tremendous liability for damages and fines that may arise from each of these alternatives, the “potentially responsible party” (PRP) has no opportunity to seek judicial review of EPA action or raise defenses to CERCLA liability, prior to the EPA initiating an enforcement or cost recovery action.5

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2 CERCLA § 106(a), 42 U.S.C. § 9606(a).
3 Id.
4 CERCLA §§ 104(a), 107(a), 42 U.S.C. §§ 9604(a), 9607(a).
5 CERCLA § 113(h), 42 U.S.C. § 9613(h). The EPA thus wields an enormous amount of potentially unchecked power in investigating and cleaning up hazardous waste sites. The EPA itself admits that the CERCLA provision which allows it to issue an administrative order directing the PRP to take remedial action (section 106(a)) is “one of the most potent administrative remedies available to the Agency under any existing environmental statute.” Peter D. Van Cleve, Recent Development Informal EPA Action Under CERCLA: Problems of
CERCLA also authorizes the EPA to file a lien on the contaminated property to recoup its cleanup expenditures. This lien is created by operation of law as soon as the EPA spends Superfund money, and becomes effective upon filing of the notice of lien.\textsuperscript{6} CERCLA does not require that the property owner receive notice of the lien or a hearing prior to the filing of the lien.\textsuperscript{7} When considered in conjunction with CERCLA’s bar of pre-enforcement judicial review\textsuperscript{8} of EPA action, the lien provision presents serious constitutional problems.\textsuperscript{9}

Many states have enacted statutory schemes which, similar to CERCLA, authorize state environmental agencies to clean up hazardous waste sites and to seek reimbursement for expenditures.\textsuperscript{10}


\textsuperscript{6} Section 107(1) provides in pertinent part:

All costs and damages for which a person is liable to the United States . . . shall constitute a lien in favor of the United States upon all real property and rights to such property which (A) belong to such person; and (B) are subject to or affected by a removal or remedial action.

The lien imposed by this subsection shall arise at the later of the following: (A) The time costs are first incurred by the United States with respect to a response action under this chapter. (B) The time that the person referred to in paragraph (1) is provided . . . written notice of potential liability.


\textsuperscript{7} Throughout this paper, the phrase “pre-enforcement judicial review” refers to “judicial review of EPA actions prior to the time that the EPA or a third party undertakes a legal action to enforce an order or to seek recovery of costs for the cleanup of a hazardous waste site.” See Reardon v. United States, 731 F. Supp. 558, 564 n.8 (D. Mass. 1990).

\textsuperscript{8} See discussion infra part IV.C.

\textsuperscript{9} See discussion infra part II.D.2.

Twenty-one states now allow the imposition of environmental liens. Many of these state-imposed liens exceed the parameters of the CERCLA lien by attaching not only to the real property subject to cleanup, but also to revenues, personal property, and real property not related to the contaminated site. The vast majority of the state lien provisions suffer from the same lack of due process safeguards as does the CERCLA lien.

Recently, in *Reardon v. United States*, the first federal appellate court to consider the constitutionality of environmental liens declared that the CERCLA lien violates the due process clause of the Fifth Amendment. This Article analyzes the constitutionality of both federal and state environmental liens in light of *Reardon* and other cases involving due process challenges to CERCLA. Section II discusses the court opinions issued in the *Reardon* litigation. Section III analyzes the issue of whether CERCLA bars pre-enforcement judicial review of due process claims. Section IV addresses the issue of whether the CERCLA lien violates due process. Section V discusses due process and state environmental liens. In Section VI, this Article presents a model for an environmental lien statute that satisfies both due process requirements and environmental enforcement concerns.

**II. THE REARDON TRILOGY**

**A. The Facts**

The property at issue was a sixteen-acre parcel called Kerry Place, located between a residential neighborhood and a manufacturing
plant. The Reardons had purchased Kerry Place after the previous owner separated the plot from a larger twenty-five-acre parcel that contained an electrical equipment manufacturing plant. The Reardons intended to develop the land commercially. When polychlorinated biphenyl (PCB) contamination was discovered on both Kerry Place and the adjacent industrial property, the EPA conducted a CERCLA removal action on both properties. After the cleanup, the Reardons subdivided Kerry Place, sold some lots to commercial developers, and retained the rest. The EPA then notified the Reardons that, as owners of the contaminated property, they could be liable for the cost of the removal action as well as for future long-term remedial action. Four years later, the EPA filed a notice of lien on the Reardons’ remaining lots pursuant to section 107(1) of CERCLA. The Reardons filed a declaratory relief action seeking to remove the lien from their property.

B. Reardon I: The District Court

1. Statutory Claims

In their motion for a preliminary injunction requesting the court to restrain the EPA from imposing the lien on Kerry Place, the

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16 Id. at 560.
17 Id.
18 Id.
19 Id.
20 Id. After a hazardous waste site is discovered and a preliminary investigation conducted, the EPA routinely sends PRP notice letters to a wide variety of people, some of whom may not be very closely connected with the actual release, such as past owners, transporters, and generators. Barnett M. Lawrence, Comment, Pre-enforcement Review Under CERCLA: Potentially Responsible Parties Seek an Early Day in Court, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,093, 10,094 (1986). All notice letters inform the PRPs of their potential liability under section 107 to reimburse the government for any Superfund-financed activities, and of the EPA’s power under section 106 to order the PRPs to clean up the site. Id. at 10,094–95. Neither an administrative nor judicial hearing is available for contesting a PRP designation. Barmet Aluminum Corp. v. Reilly, 927 F.2d 289, 293 (6th Cir. 1991). A person may remain a PRP for years, subject to administrative orders, yet the EPA may never prosecute the PRP for cleanup implementation or reimbursement. Id.
21 Reardon, 731 F. Supp. at 561.
22 Id.
23 A discussion of the opinions by the trial court and the appellate panel is included herein to illustrate the development and analysis of issues relating to sections 113(h) and 107(l) of CERCLA.
Reardons raised two statutory challenges to the lien. First, they asserted that they were "innocent landowners" under section 107(b) of CERCLA, and as such were not liable for cleanup costs. Second, they alleged that the EPA exceeded its authority under section 107(l) of CERCLA by placing a lien on all their property rather than just the parcels affected by the cleanup.

In deciding that it had no jurisdiction to consider these claims, the United States District Court for the District of Massachusetts relied on section 113(h), which precludes judicial review of the EPA's selection of a response action prior to the EPA initiating an enforcement or cost recovery lawsuit. The court held that because the lien is an "enforcement activity" related to EPA removal or remedial actions, challenges to the validity of the lien fall within the bar of section 113(h).

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24 Reardon, 731 F. Supp. at 559. Commonly known as the "innocent landowner" defense, section 107(b) provides that a property owner is not liable for CERCLA damages caused by a third party if the owner exercised due care with respect to the hazardous substances and took precautions against foreseeable third party actions. CERCLA § 107(b), 42 U.S.C. § 9607(b).

25 Reardon, 731 F. Supp. at 559; see supra note 6 and accompanying text.

26 Reardon, 731 F. Supp. at 563-65. The court also refused to find jurisdiction under section 702 of the Administrative Procedure Act (APA). Id. at 565. The district court held that the section 702 presumption in favor of judicial review of administrative action is overcome by a statute's specific language or legislative history that precludes judicial review. Id. The court also rejected the argument that jurisdiction existed under 28 U.S.C. § 2410, which allows an individual to sue the United States in a quiet title action but does not create an independent basis for subject matter jurisdiction. Id. at 566.

27 Id. at 564. Section 113(h) provides in pertinent part:

No Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damage or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits). . . .

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

CERCLA § 113(h), 42 U.S.C. § 9613(h).

28 Reardon, 731 F. Supp. at 564–65. The court rejected the Reardons' argument that because the removal action was complete, litigation of their liability would not delay cleanup and thus not frustrate the purposes of CERCLA. The court noted that the EPA's expenditure of funds and personnel to litigate liability for prior cleanup would hamper the ongoing long-term investigation and remedial action. Id. at 565. The United States Court of Appeals for the First Circuit, sitting en banc, disagreed with this conclusion. See infra notes 39–43 and accompanying text.
2. Constitutional Claim

In addition to their statutory claims, the Reardons also raised a claim under the United States Constitution. The Reardons asserted that the lien violated their constitutional right to procedural due process as guaranteed by the Fifth Amendment. Again, the court first assessed whether, in light of section 113(h), it had jurisdiction to consider this claim. The court found that although the plain language and legislative history of section 113(h) indicate a Congressional intent to bar pre-enforcement review of all challenges to EPA actions under CERCLA, Congress does not have the power to completely deny judicial review of constitutional claims. Thus, section 113(h) does not limit the court's authority to review a constitutional claim where, as in the Reardons' situation, the alleged constitutional wrong is immediate and ongoing, and Congress has not provided another forum in which to assert the claim.

29 See supra notes 24–28 and accompanying text.
30 Reardon, 731 F. Supp. at 566. The Fifth Amendment provides that no one shall "be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.
31 Reardon, 731 F. Supp. at 568. The court reached this conclusion despite the Supreme Court's recognition of a presumption that Congress does not intend to proscribe all judicial review of administrative action, particularly of constitutional claims. Id. at 566. In light of this established presumption, the Reardon court's conclusion as to legislative intent serves to emphasize the unequivocal nature of the language of section 113(h) and the absolute terms in which this section was discussed in Congress. See id. at 567.

For example, the chairman of the Senate Judiciary Committee commented that section 113(h) was intended to be comprehensive and cover "all lawsuits, under any authority," concerning EPA response actions, as well as "all issues that could be construed as a challenge to the response. . . ." Id. In addition, the Senate Environment and Public Works Committee, as well as various House committees, reported that section 113(h) was intended to codify the position that "there is no right of judicial review of the [EPA's] selection and implementation of response actions until after the response actions have been completed. . . ." Id. at 568 & n.10.

The House Judiciary Committee did voice concern that section 113(h)'s preclusion of pre-enforcement review "raises constitutional due process concerns. . . ." Id. at 568 n.11. The Committee's suggested amendments, however, did not provide for constitutional challenges and were not incorporated into the final bill. Id.

A review of the same legislative history led the United States Court of Appeals for the First Circuit, in the third opinion of the Reardon trilogy, to conclude that Congress focused its concerns "on the problems that would arise if courts reviewed the merits of particular EPA actions." Reardon v. United States, 947 F.2d 1509, 1516 (1st Cir. 1991) (emphasis in original). It is likely that Congress did not consider section 113(h)'s effect on constitutional claims before the statute was enacted. See id. at 1515–17; see also id. at 1527 (Cyr, J., dissenting) (". . . Congress did not consider the plight of innocent owners indefinitely deprived of their property rights and the right to challenge an invalid CERCLA lien.").

32 Reardon, 731 F. Supp. at 569.
33 Id. at 570.
The court noted that generally section 113(h) merely delays judicial review until after the EPA brings an enforcement action. This opportunity for review is adequate in most circumstances where the alleged constitutional wrong does not occur prior to such a lawsuit. The court distinguished the lien situation, however, because with a lien the constitutional harm occurs immediately upon the EPA incurring cleanup expenses and giving notice of the lien to the landowner. Thus, the owner's property interest is affected without any due process safeguards, either before or after the lien is created.  

The court then reviewed the due process claim on the merits and concluded that the lien does not constitute a deprivation of a substantial property interest protected by the due process clause. Although the CERCLA lien clouds title and affects the right to alienate the property, the lien does not interfere with the owners' ability to use, possess, or transfer the property. Because the lien did not violate the Reardons' due process rights and thus the Reardons were unlikely to succeed on the merits of their constitutional claim, the court denied the Reardons' request for a preliminary injunction.

C. Reardon II: The First Circuit Panel

On appeal to the United States Court of Appeals for the First Circuit, a three-judge panel reversed the district court on the ground

34 Id. at 569-70. The court relied on the Supreme Court's summary affirmance of Speilman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997 (D. Ariz. 1973), aff'd, 417 U.S. 901 (1974), in which the United States District Court for the District of Arizona held that the restriction imposed on the alienation of property by a mechanic's lien was not a significant property interest protected by the due process clause. Reardon, 731 F. Supp. at 572. In reversing the trial court's ruling on this issue, the appellate court in Reardon specifically distinguished a mechanic's lien from the CERCLA lien. See infra text accompanying notes 66-70.

35 Reardon, 731 F. Supp. at 572-73.

36 Id. at 573. The court also found that the Reardons had failed to satisfy the other three elements required for equitable relief: irreparable injury will result if the injunction is not granted; such injury outweighs the harm which granting the injunction would impose on the opposing party; and the public interest will not be adversely affected by the granting of the injunction. Id. at 570, 573.

First, the court found that the nature of the Reardons' injury was unclear, insofar as they benefited substantially from the EPA's cleanup of Kerry Place. Id. at 573. Second, the harm to the EPA in granting the injunction could be great. Id. If the EPA were enjoined from imposing the lien, it would have no secured interest against subsequent purchasers of lots at Kerry Place, and could not guarantee recovery of its expenditures. Id. Third, the public interest favors denying an injunction, because the lien gives notice of the government's interest to subsequent purchasers, the lien is part of the overall cleanup plan and remedy of a public health problem, and the lien secures expenditures of public funds and ensures that responsible parties will reimburse the public for hazardous waste cleanup. Id.
that section 113(h) does not preclude judicial review of statutory challenges to the CERCLA lien.\(^{38}\)

The court reasoned that section 113(h) does not purport to bar judicial review of all activities relating to removal or remedial actions, but only "enforcement activities" related thereto, and the removal or remedial actions themselves.\(^{39}\) Although section 113(h) does not define "enforcement activities," the court's reading of the language of other CERCLA provisions and the statutory structure as a whole led it to conclude that "enforcement" specifically refers to measures to force compliance with EPA-ordered response actions. Thus, the court decided the lien is neither a removal action, nor a remedial action, nor an enforcement activity related thereto.\(^{40}\) The court held that imposition of the lien is a step in the cost recovery process, rather than an "enforcement activity" within the scope of section 113(h).\(^{41}\)

In addition, the appellate court found that the lien clearly affects a legal right and thus is in more urgent need of judicial review than other administrative actions under CERCLA.\(^{42}\) Moreover, allowing judicial review of challenges to the lien would not affect the underlying purpose of section 113(h)—to eliminate obstacles to prompt hazardous waste cleanup.\(^{43}\) The court remanded the case for further proceedings, without ever reaching the due process issue.

**D. Reardon III: The First Circuit En Banc**

On petition for rehearing, the court of appeals, sitting *en banc*, vacated the panel's decision.\(^{44}\) In concurrence with the district court, the appellate court held that because imposition of the lien is indeed an "enforcement activity," section 113(h) bars pre-enforcement judicial review of statutory challenges to the lien.\(^{45}\) In considering the

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\(^{39}\) Reardon, 21 Envtl. L. Rep. at 20,641.

\(^{40}\) Id.

\(^{41}\) Id.

\(^{42}\) The court distinguished the lien from an EPA payment demand letter, which has no legal force or effect. *Id.* at 20,641-42.

\(^{43}\) *Id.* at 20,642. The court observed that (1) the lien litigation would cause no delay either to completed cleanup activities or to implementation of pending remedial plans; (2) in terms of financial burden, it was irrelevant whether the EPA would be required to defend the lien "now or later"; and (3) the Reardons already had engaged in voluntary cleanup, so allowing the lien action to proceed would not "hinder their impulses in that regard." *Id.*

\(^{44}\) Reardon v. United States, 947 F.2d 1509, 1512 (1st Cir. 1991).

\(^{45}\) *Id.* at 1512-14. The court reasoned that when the government files a lien on property to
Reardons' due process claim, however, the appellate court departed from the district court's opinion and held section 107(l) to be unconstitutional.46

1. Section 113(h) Does Not Bar Pre-enforcement Review of Constitutional Challenges to CERCLA.

The appellate court disagreed with the district court that section 113(h) does not bar pre-enforcement judicial review of the Reardons' due process claim.47 This holding was based on four findings.48

First, section 113(h) bars only review of challenges to the EPA's administration of CERCLA—that is, its selection of the proper response action.49 The section does not foreclose review of constitutional challenges to CERCLA itself, which do not involve the merits of any particular removal or remedial action.50 Second, section 113(h) does not express a clear congressional intent to bar constitutional challenges to CERCLA.51 Third, allowing review of the Reardons' due process claim would not frustrate the underlying purposes of section 113(h)—to avoid piecemeal litigation and potentially inconsistent results and to ensure prompt, unhampered EPA response action.52 Finally, the section's legislative history indicates that Congress focused its concern on barring judicial review of the merits of particular EPA actions and did not clearly intend to bar review of constitutional challenges.53

secure payment of liability for removal and remedial actions, it is seeking to enforce CERCLA's liability provision. Id. at 1512. Thus, filing a lien is an "enforcement activity." Id. In further support of its conclusion, the court relied on the legislative history of section 113(h). Id. During floor debate, several senators explained that this section was intended to delay contests to a party's liability for cleanup costs. Id. at 1513-14.

46 Id. at 1510, 1523-24. The sole dissenter in Reardon concluded that the CERCLA lien is not an "enforcement activity" and thus challenges to the lien are not barred from pre-enforcement judicial review. See id. at 1528 (Cyr, J., dissenting). The dissent further opined that the CERCLA lien statute reasonably could be interpreted to permit a prompt post-deprivation hearing of the Reardon's innocent landowner claim, thereby satisfying the due process analysis required by Doehr and Mathews. Id. at 1530.

47 Id. at 1514.
48 See id. at 1514-15.
49 Id. at 1514.
50 Id. The court, however, emphasized that its holding does not extend to all constitutional challenges. Id. at 1514-15. A constitutional challenge to the EPA's administration of CERCLA, and thus to its selected response action, may be barred from pre-enforcement review by section 113(h). Id. at 1515.
51 Id. at 1514-15.
52 Id. But the court noted that even if its decision hampers the EPA's collection efforts, it does not "lightly assume that Congress intended to ease EPA's path even at the expense of violating the Constitution." Id.
53 Id. at 1516. The court also found support for its conclusion in McNary v. Haitian Refugee
2. Section 107(1) Violates the Due Process Clause.

In addressing the merits of the due process claim, the court first analyzed whether section 107(1) authorizes the taking of a significant property interest protected by the Fifth Amendment. In answering this query in the affirmative, the court relied primarily on Connecticut v. Doehr, in which the Supreme Court held that even the temporary or partial impairment of property rights that attachments and liens entail are sufficient to merit due process protection. Because the CERCLA lien—just as the attachment lien in Doehr—clouds title, limits alienability, and affects current and potential mortgages, the lien deprives the owner of a significant property interest within the meaning of the due process clause.

Next, in determining what process is due in the environmental lien situation, the court applied the well-established Mathews test, which requires a balancing of the following three factors: the affected private interest, the risk of erroneous deprivation, and the government’s interest.

a. The Affected Private Interest

Although the CERCLA lien does not deprive the property owner of possession and use of the property, it does affect significant interests, as enumerated in Doehr. The deleterious effects of a CER-
CLA lien on property interests include clouding title, impairing the ability to alienate or encumber the property, tainting credit ratings, and placing existing mortgages in default.60

The lien’s impact on property interests is particularly acute, in that the notice of lien may be filed well before cleanup is completed and thus does not state a definite amount of indebtedness.61 In such a situation, potential buyers or lenders are unable to identify a limit on the government’s interest and, as a result, may be reluctant to invest in the property.62

b. The Current Risk of Erroneous Deprivation and the Value of Additional Safeguards

The risk that the lien may be wrongfully filed and erroneously deprive the owner of significant property interests is great considering the extremely fact-intensive nature of the two requirements for a valid lien under section 107(1): the encumbered parcel is “subject to or affected by” the EPA’s response action, and the owner is liable for CERCLA costs.63 CERCLA, however, provides no procedural safeguards against the filing of an improper lien.64

The first hearing

60 Reardon, 947 F.2d at 1518.

61 Id. at 1519. The Reardons’ situation illustrates the prejudicial and potentially absurd result of such open-ended liability. After initially receiving notice of the lien, the Reardons requested clarification as to the amount of liability secured by the lien. The EPA responded that the Reardons’ share of cleanup costs would total $335,709. Id. at 1511. The EPA warned, however, that this amount was quoted for settlement purposes only and was not binding as to the Reardons’ potential liability. Id. Six months after giving notice of the lien, the EPA selected a long-term remedy for the site, which was expected to cost in excess of $16 million. Id. at 1511.

62 This problem is compounded in states that authorize environmental superliens. A governmental lien of unlimited amount with superpriority essentially renders all other interests in the property worthless. See infra notes 145–52 and accompanying text.

63 Reardon, 947 F.2d at 1519. See supra note 6 for the text of section 107(1). The dissenting opinion in Reardon disagreed that the CERCLA lien statute involves a “substantial risk of unwarranted deprivation” of property rights, reasoning that the CERCLA lien and the attachment lien in Doehr serve very different purposes. Reardon, 947 F.2d at 1528–29 (Cyr, J., dissenting). The Doehr attachment lien could issue on a showing that there is probable cause to believe that judgment will be rendered for the plaintiff, based on the plaintiff’s “one-sided, self-serving, and conclusory submission.” Id. at 1528. The potential for unwarranted attachment in that situation is great. Id. at 1529. The CERCLA lien, however, is based on an administrative determination that a contaminated site needs cleanup and the investment of public resources at the site. See id. Moreover, elaborate statutory safeguards and administrative procedures for selecting response actions afford protection against an unwarranted lien. Id.

64 Possible procedural safeguards include a pre-attachment judicial hearing, an immediate post-attachment hearing, a probable cause requirement, a bond requirement, or an authorization of actions against the government for double damages for wrongful liens. Id. at 1519–20.
the property owner is likely to receive is at the EPA-initiated enforcement proceeding or cost recovery action, which may be too far in the future to satisfy due process requirements.\textsuperscript{65}

c. The Government's Interest

Due process requirements may be relaxed if the lienor has a pre-existing interest in the property, if there are exigent circumstances, or if additional procedural requirements would entail undue fiscal or administrative burdens.\textsuperscript{66} None of these exceptions, however, justifies section 107(l)'s failure to require notice and a hearing prior to the filing of the lien.

Where the lienor has a heightened interest in the property, the court may uphold procedures that are otherwise suspect under a due process analysis.\textsuperscript{67} Thus, for example, traditional due process requirements may be excused for attachments pursuant to vendor's or mechanic's liens, where, according to a voluntary agreement between the contracting parties, the lienor owns or has worked to improve the property sought to be encumbered.\textsuperscript{68} Where the lienor has indisputedly rendered the contracted service, the landowner is presumed to be liable.\textsuperscript{69} In contrast, at the time the CERCLA lien attaches, the parties have no contractual relationship and no court has determined that the government has a valid lien on the property. The EPA has no prior judicially recognized interest in the attached property and thus may not avoid providing the property owner with notice and a hearing.\textsuperscript{70}

Likewise, exigent circumstances, such as the imminent transfer or encumbrance of the property, may allow the postponement of a

\textsuperscript{65} An enforcement or cost recovery action may be brought several years after the notice of lien is filed. See id. "Since the government may take its own sweet time before suing, and since the removal or remedial action may itself take years to complete, the lien may be in place for a considerable time without an opportunity for a hearing." Id. In that event, the owner's property is encumbered for years without ever having a judicial determination as to liability or validity of the lien. Id. Another serious injury may occur if the EPA files a lien and many years later decides not to sue the owner for cleanup costs.

\textsuperscript{66} Id. at 1520–23.

\textsuperscript{67} Id. at 1520–21.

\textsuperscript{68} Id. at 1520–22.

\textsuperscript{69} Id. at 1522.

\textsuperscript{70} Id. at 1521. The dissenting opinion disagreed. It noted, "[u]nlike the plaintiff in \textit{Doehr}, whose 'only interest in attaching the property was to ensure the availability of assets to satisfy his judgment if he prevailed on the merits of his action,'" the government in \textit{Reardon} had invested in cleanup and expected to spend millions of dollars more at the site. Id. at 1530 (Cyr., J., dissenting)(quoting \textit{Doehr}, 111 S. Ct. at 2115). The EPA thus had a legitimate interest in any increase in property value as well as recovery of its costs. Id.
hearing until the attachment is effected.\textsuperscript{71} CERCLA, however, does not require that exigent circumstances exist at the time of filing the lien, nor was there any evidence in \textit{Reardon} suggesting that a transfer or encumbrance of the property was imminent.\textsuperscript{72} Finally, the minimum additional procedural requirements of notice of an intention to file a notice of lien and provision for a hearing, if the property owner claimed that the lien was invalid, would impose "significant, but not overwhelming, administrative burdens on the government."\textsuperscript{73}

In conclusion, the \textit{Reardon} court found that section 107(1) provides far less process than the state of Connecticut provided in the attachment law declared unconstitutional in \textit{Doehr}. In that case, a judge considered the merits \textit{ex parte} before authorizing the attachment, the plaintiff could attain an immediate post-attachment hearing, and a double damage remedy was available to compensate for error. "Here, there is no prior neutral proceeding, no double damage remedy, and no post-attachment review for what may be many years."\textsuperscript{74} To pass constitutional muster, the CERCLA lien must provide, at the least, notice and a pre-attachment hearing.\textsuperscript{75}

\textsuperscript{71} \textit{Id.} at 1522.

\textsuperscript{72} \textit{Id.} The court noted that under CERCLA, even an imminent transfer rarely would constitute an exigency because a subsequent owner who knew of the contamination would also be liable for cleanup costs, and the property could be sold to satisfy a judgment against the second owner. \textit{Id. Cf.} Outboard Marine Corp. v. Thomas, 773 F.2d 888, 889 (7th Cir. 1985) (although section 106 gives EPA broad power in emergencies, it does not authorize EPA to enter private property for response-planning operations in nonemergency situations); Indus. Park Dev. Co. v. EPA, 604 F. Supp. 1136, 1145 (E.D. Pa. 1985) (unilateral administrative action under section 104 to enter site and effect cleanup should be saved for extreme emergencies, such as where site is abandoned; where PRP is known, prompt hearing is appropriate).

\textsuperscript{73} \textit{Reardon}, 947 F.2d at 1523.\textsuperscript{76} In comparison with the number of administrative orders and PRP notice letters the EPA issues every year, the use of the CERCLA lien is a relatively rare occurrence. For example, according to the EPA, approximately 10,000 PRP letters were outstanding nationwide in 1987. \textit{In re Combustion Equip. Assoc.}, Inc., 838 F.2d 35, 40 (2d Cir. 1988). \textit{See Voluntary Purchasing Groups, Inc. v. Reilly}, 889 F.2d 1380, 1390 (5th Cir. 1989) (discussing magnitude of administrative problem if PRPs are allowed to maintain declaratory relief actions challenging PRP designation). In contrast, in that same time period during the first year after the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA), the EPA filed only 22 CERCLA liens nationwide. Robert S. Bozarth, \textit{Environmental Liens and Title Insurance}, 23 U. RICH. L. REV. 305, 314 (1999). Because of the relative infrequency of CERCLA liens, the tremendous burden of time and expense that would result from pre-enforcement judicial review of other EPA activities under CERCLA is simply not a real threat in the lien context. Considering the substantial harm that may result from an erroneous environmental lien, any relatively minor burden on the government must yield to due process requirements. \textit{See Reardon}, 947 F.2d at 1523.

\textsuperscript{74} \textit{Reardon}, 947 F.2d at 1523.

\textsuperscript{75} \textit{Id.} Because due process may be tailored to fit the situation, the pre-attachment hearing
Prior to *Reardon*, no court had analyzed the constitutionality of the CERCLA lien, although numerous courts had considered due process challenges to other aspects of CERCLA. By necessity, *Reardon* has departed from much of this precedent, due to the unique nature of the interests affected by the lien and the lien's immediate and irreparable harm. The following two sections compare *Reardon* with prior case law and demonstrate the soundness of the circuit court's holding.

III. PRE-ENFORCEMENT REVIEW OF DUE PROCESS CLAIM UNDER CERCLA

A. The Pre-SARA Controversy

Prior to the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA),\(^76\) CERCLA did not expressly prohibit pre-enforcement judicial review of EPA actions. Despite the presumption in favor of federal court jurisdiction to review actions of federal administrative agencies,\(^77\) the majority of courts faced with pre-enforcement CERCLA challenges refused to assert jurisdiction over such claims, primarily because of two factors: the public health nature of the statute, and the lack of harm to PRPs from the denial of early review.\(^78\)

In focusing on congressional intent, courts paid great deference to CERCLA's purpose to authorize prompt response to environmental emergencies without the need to await judicial determination of may require that the EPA merely show probable cause to believe that the subject property falls within the parameters of section 107(1)(1). *See id.* at 1522.


\(^77\) Wagner Seed Co. v. Daggett, 800 F.2d 310, 314 (2d Cir. 1986).

\(^78\) *See id.* at 314–15. *See also* Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1386 n.10 (5th Cir. 1989); Dickerson v. Adm'r, EPA, 834 F.2d 974, 977 (11th Cir. 1987). A few courts rejected subject matter jurisdiction over pre-enforcement claims due to lack of finality and ripeness, prerequisites for judicial review of agency action under the Administrative Procedure Act. *See, e.g.*, Pacific Resins & Chem., Inc. v. United States, 654 F. Supp. 249, 254 (W.D. Wash. 1986); B. R. Mackay & Sons, Inc. v. United States, 633 F. Supp. 1290, 1297 (D. Utah 1986). For example, in *Pacific Resins*, the United States District Court for the Western District of Washington held that a PRP notice letter is not reviewable agency action because the letter has no legal force, and the PRP can suffer no harm until the EPA pursues an enforcement action. *Pacific Resins*, 654 F. Supp. at 252. Such an analysis creates a virtual bar to all pre-enforcement review, in that all administrative activity under CERCLA prior to completion of cleanup falls short of final agency action.
liability. Courts believed pre-enforcement review of EPA response action would frustrate that purpose by delaying the cleanup process, increasing response costs, and discouraging voluntary cleanup. In effect, the courts acknowledged that Congress had given its blessing to the EPA to act first and litigate later.

The courts' rejection of CERCLA claims perhaps was rendered more palatable by their concomitant conclusion that barring pre-enforcement review did not prejudice the rights of PRPs or expose them to irreparable harm. To the contrary, the PRPs would have adequate opportunity, during a later EPA-initiated lawsuit, to present defenses to liability and challenges to the cost efficiency of the EPA's chosen remedial action. Neither liability nor penalties could accrue prior to judicial review.

Several important pre-SARA decisions, however, did find that although CERCLA implicitly barred pre-enforcement review of challenges to the merits of EPA action, the courts did have jurisdiction, pursuant to section 113(b) of CERCLA, to consider due process challenges to CERCLA itself. Although these decisions offer no

79 See, e.g., Wagner Seed, 800 F.2d at 315 (pre-enforcement review of EPA's remedial action is contrary to CERCLA's policies).


81 See, e.g., Lone Pine, 777 F.2d at 885–86. The Lone Pine court noted that section 104 of CERCLA allows the EPA to proceed without an express judicial identification of responsible parties. Id. at 886. The ultimate determination of liability may not be reached until after lengthy judicial proceedings, during which the environmental threat or damage may increase. Id. "To delay remedial action until the liability situation is unscrambled would be inconsistent with the statutory plan to promptly eliminate sources of danger to health and the environment." Id. This concern not to disturb CERCLA's purpose overshadowed consideration of APA requirements. See id. at 886–88. At least one court held that in light of CERCLA's structure, statutory scheme, objectives, and legislative history, pre-enforcement judicial review even of final agency action was prohibited. B. R. Mackay, 633 F. Supp. at 1297 (no review where EPA had completed cleanup and referred case to Department of Justice for collection, but cost recovery action had not yet been filed).

82 See, e.g., United States v. Outboard Marine Corp., 789 F.2d 497, 506 (7th Cir. 1986).

83 Pacific Resins, 654 F. Supp. at 253–54 (challenge to PRP notice letter not reviewable because letter does not require PRP to take action, is not final determination of liability, and had no legal force; penalties or liability accrue only after cost recovery or enforcement action).

84 See Wagner Seed, 800 F.2d at 315; Wagner Elec. Corp. v. Thomas, 612 F. Supp. 736, 738
substantive analysis of the issue, they do indicate that pre-enforcement review is available where the PRP may suffer irreparable harm if judicial review is delayed.\(^85\)

Thus, the courts in pre-SARA cases consistently held that CERCLA barred pre-enforcement review of EPA action, based on the courts’ reluctance to frustrate the statute’s important public health purposes, as well as the adequate opportunity for PRPs to raise defenses and constitutional claims in the later enforcement action. Where the courts did find jurisdiction over pre-enforcement due process claims, the PRP potentially faced irreparable harm that a later judicial hearing could not remedy.\(^86\)

**B. The Post-SARA Controversy**

SARA amended CERCLA to include section 113(h), which codified judicial precedent prohibiting pre-enforcement review of EPA action under CERCLA.\(^87\) Post-SARA decisions, however, are still split as to whether section 113(h) bars pre-enforcement review of constitutional claims. In reasoning analogous to that of pre-SARA opinions, courts that have refused to review such claims relied predominantly on the following factors: the language of section 113(h) does not explicitly except constitutional claims from the pre-enforcement review bar;\(^88\) SARA’s legislative history indicates an intent to prohibit...
pre-enforcement review of all claims;99 pre-enforcement review thwarts prompt responses to environmental hazards, encourages piecemeal litigation, and wastes the EPA's limited resources;90 and the bar does not prejudice PRPs because section 113(h) merely delays judicial review, constitutional challenges may be raised at a later hearing, and no penalties may arise prior to judicial review of constitutional claims.91

C. Reardon Correctly Decides the Issue

In holding that section 113(h) does not bar pre-enforcement review of due process claims, the Reardon court addressed the same four factors but reached directly opposite conclusions as to each of them.92 Most fundamental to the due process analysis are the circuit court's findings that pre-enforcement review will not frustrate CERCLA's purpose and will prevent irreparable harm to the PRP.

First, pre-attachment review of a due process challenge to the lien will not hamper the cleanup of hazardous substances. The resulting invalidation or modification of the lien, at worst, may hamper the EPA's collection efforts.93

Second, a bar to pre-attachment review irreparably prejudices the PRP. Upon the filing of the lien, the property is encumbered immediately and the owner is immediately subject to injury. For ex-

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99 See, e.g., Barrnet, 927 F.2d at 293.
91 See Barrnet, 927 F.2d at 295 (“The CERCLA statutory scheme merely serves to effectuate a delay in plaintiff’s ability to have a full hearing on the issue of liability and does not substantially affect the adequacy of such a hearing.”); Precision Nat'l Plating Serv., Inc. v. United States EPA, No. 90-6813, 1990 WL 191968, at *3 (E.D. Pa. Nov. 29, 1990) (barring pre-enforcement review of due process challenge to CERCLA's penalty provisions did not prejudice plaintiff even where plaintiff had cooperated with state environmental agency for 18 years, took remedial action, and had data indicating contamination levels did not create emergency); South Macomb, 681 F. Supp. at 1252.
92 See supra notes 48–53 and accompanying text.
93 See Reardon v. United States, 947 F.2d 1509, 1513, 1515 (1st Cir. 1991). Neither will such review run counter to section 113(h)'s purpose to avoid piecemeal litigation and inconsistent results, because resolution of a due process claim is a purely legal issue. Id.
ample, the lien may destroy credit ratings, sale or lease opportunities, or potential loan transactions. A subsequent judicial hearing invalidating an erroneous lien cannot recompense this harm.\textsuperscript{94} Thus, whereas section 113(h) merely affects the timing of judicial review in other situations, in the lien context, the section acts as a complete preclusion of meaningful access to the courts.

The strength of \textit{Reardon}’s analysis of the pre-enforcement review issue lies in its distinction from the rationale of courts which denied pre-enforcement review of due process claims,\textsuperscript{95} and its consistency with the thinking of courts which felt compelled to consider constitutional claims due to the threat of irreparable harm.\textsuperscript{96}

\section*{IV. CERCLA AND DUE PROCESS}

Litigants have asserted claims of due process violations in various contexts in CERCLA litigation. The two predominant challenges are that CERCLA’s bar of pre-enforcement judicial review of agency action and its penalty and treble damages provisions violate the due process clause. In analyzing these claims, courts have allowed consideration of the public’s interest in environmental cleanup to override that of the PRP’s constitutional right to notice and a hearing. The CERCLA lien, however, presents its own unique factors which prohibit a departure from traditional due process requirements.

\subsection*{A. Procedural Due Process\textsuperscript{97}}

The Fifth Amendment guarantees that “no person shall be deprived of life, liberty or property without due process of
Due process requires that a party have the opportunity to be heard whenever the government seeks to deprive it of a constitutionally protected interest. The courts have recognized, however, that the procedural requirements of notice and hearing may vary depending on the circumstances. Particularly in the public health area, due process does not require access to the courts prior to final agency action. It is sufficient that there is at some stage an opportunity for hearing and judicial determination. This tenet is consistent with the accepted principle that public welfare statutes are to be interpreted broadly to accomplish their regulatory purpose.

A review of the two main contexts in which courts have analyzed procedural due process challenges to CERCLA illustrates that as long as PRPs have their day in court at some time prior to suffering legal deprivation, the overriding public health and environmental cleanup concerns allow the EPA to act without judicial supervision and without offending due process.

imposition of liability under CERCLA do not offend substantive due process. See, e.g., United States v. NEPACCO, 579 F. Supp. 823 (W.D. Mo. 1984). In reaching the same conclusion regarding the retroactivity of the New Jersey Spill Act, one court stated, "due process does not prohibit retroactive civil legislation unless the consequences are particularly harsh and oppressive. Although retroactive application may impair property rights, when the protection of the public interest so clearly predominates over that impairment, the statute is valid." Kessler v. Tarrats, 476 A.2d 326, 330 (N.J. 1984). Thus, the public interest in environmental cleanup predominates over substantive, as well as procedural, due process concerns.

Due process not offended by EPA’s written request for information and notice that failure to respond might subject PRP to penalties.

To exemplify this proposition, the Lone Pine court cited Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S. 264 (1981), which upheld the government’s right under the Surface Mining Control and Reclamation Act of 1977 to close a mining operation when it threatened public health and imminent environmental damage. Lone Pine, 777 F.2d at 885. Allowing the mining company to challenge the government’s action after mining had ceased satisfied due process requirements. Id. at 885.

In emergency, due process may require only a hearing after governmental action. By analogy, public emergencies justified denial of a hearing in cases involving consumer protection from impure food products, seizing articles used in the commission of a crime, and avoiding disruption of public schools. Cross, supra note 99, at 942–43.

United States v. Laughlin, 768 F. Supp. 957, 965 (N.D.N.Y. 1991) (due process does not require that government prove defendant’s knowledge in criminal prosecution for alleged illegal storing and disposing of hazardous waste).

See infra notes 105–30 and accompanying text.
B. Due Process Challenges to CERCLA

1. Bar of Pre-enforcement Review

Parties seeking to enjoin EPA action under CERCLA have argued that section 113(h) violates due process because it denies them a hearing prior to the EPA's selection of remedy, compilation of the administrative record, expenditure of funds, or implementation of cleanup. Because CERCLA limits judicial review in the later enforcement action to the administrative record, without pre-enforcement review PRPs have no meaningful opportunity to challenge EPA actions. This results in irreparable harm where, for example, the EPA selects a remedial action which is not the most effective or cost-efficient. In such a situation, if the PRP is unable to place its own studies in the administrative record, the reviewing court will not be apprised of information necessary to the PRP's defense.

The courts have overwhelmingly rejected claims that the lack of pre-enforcement review violates the due process clause. First, the PRP can suffer no legal deprivation until after the judicial determination of liability, award of damages, or imposition of fines. Second, at the delayed hearing, the PRP has the opportunity to raise all defenses to liability, including the argument that the EPA action

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107 See, e.g., Cooper, 775 F. Supp. at 1035 (plaintiff unsuccessfully tried to enjoin EPA from adopting remedial action plan and issuing record of decision until plaintiff allowed to place its own studies into record). To ensure public participation in the development of the administrative record on which the selection of response actions and judicial review are based, SARA added requirements of notice of the proposed response plan, opportunity to comment, public meetings, and administrative response to comments. CERCLA § 113(k), 42 U.S.C. § 9613(k). An administrative hearing at which PRPs may appear to present evidence and contest the EPA's proposed plan, however, is not required.

108 Barnet, 927 F.2d at 294; Dickerson, 834 F.2d at 978; Cooper, 775 F. Supp. at 1035–36.

109 Cooper, 775 F. Supp. at 1035–36.

110 See infra notes 111–13 and accompanying text.

111 J. V. Peters, 767 F.2d at 266; Cooper, 775 F. Supp. at 1039.
was not consistent with the National Contingency Plan and thus not reimbursable.\textsuperscript{112} Finally, the PRP is not foreclosed completely from presenting additional materials to supplement the administrative record during judicial review.\textsuperscript{113}


A PRP who fails to comply with an administrative cleanup order without sufficient cause may face the imposition of daily fines and punitive damages of up to three times the amount of actual EPA cleanup expenditures.\textsuperscript{114} Prior to SARA, litigants challenged these penalty provisions as violative of due process. For example, a PRP who complied with a cleanup order but was later determined not to be liable under CERCLA had no right to sue the EPA for reimbursement of its expenditures.\textsuperscript{115} Because there was no opportunity to raise defenses to liability at a pre-enforcement hearing, the PRP was faced with the Hobson’s choice of disobeying the cleanup order and risking fines and punitive damages, or complying with the order.

\textsuperscript{112} Barmet, 927 F.2d at 294; Dickerson, 834 F.2d at 978; Cooper, 775 F. Supp. at 1039.

\textsuperscript{113} Barmet, 927 F.2d at 294; Cooper, 775 F. Supp. at 1039. Although section 113(j) of CERCLA limits judicial review of EPA action to the administrative record, it also provides that “applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.” CERCLA § 113(j), 42 U.S.C. § 9613(j).

At least one court has concluded that limiting judicial review to the administrative record violates due process. In United States v. Hardage, the United States District Court for the Western District of Oklahoma’s application of the three-prong Mathews test weighed in favor of de novo review of the EPA’s preferred remedy. 663 F. Supp. 1280, 1283 (W.D. Okla. 1987). The affected private interest was great where the remedy potentially would cost $70 million; the risk of erroneous deprivation was high where the PRPs were limited in their opportunity to investigate the site, develop data to rebut the EPA’s conclusions, and review administrative records; the public interest was better served by de novo review where the same EPA staff members selected the remedy and evaluated the PRPs’ comments. Id. at 1288–89. Cf. United States v. Seymour Recycling Corp., 679 F. Supp. 859, 863–64 (S.D. Ind. 1987) (due process does not require de novo review of EPA’s remedy selection because CERCLA provides public comment period after publication of feasibility study and before remedy selection).

See also Kristin M. Carter, Note, Superfund Amendments and Reauthorization Act of 1986: Limiting Judicial Review to the Administrative Record in Cost Recovery Actions by the EPA, 74 CORNELL L. REV. 1132, 1153–54 (1989), for an excellent analysis of why section 113(j) violates the due process clause by depriving PRPs of a meaningful right to challenge the EPA’s selected remedial action. This note observes that courts erroneously assume that the hearing requirements of SARA afford PRPs an opportunity to submit effective presentation. Id. at 1172–73. The author proposes that without allowing cross-examination of agency personnel during the cost recovery action, PRPs are unable to rebut the presumption of agency expertise and will rarely be able to prove that the EPA acted arbitrarily or capriciously. Id. at 1174.

\textsuperscript{114} CERCLA §§ 106(b)(1), 107(c)(3); 42 U.S.C. §§ 9606(b)(1), 9607(c)(3).

and expending cleanup money.\textsuperscript{116} The PRP then had no right to reimbursement from the Superfund, if the PRP was judicially determined not liable and there were no other solvent, locatable, or determinable responsible parties.\textsuperscript{117} In such a situation, it was argued, the delayed judicial review of liability or of the EPA's choice of remedial action did not prevent the irreparable harm from risking noncompliance penalties or expending nonrecoverable cleanup funds.\textsuperscript{118}

This position was based on \textit{Ex parte Young}\textsuperscript{119} and its progeny. This line of cases held that due process guarantees the right to contest the validity of an administrative order without the challenging party necessarily having to face substantial penalties if the suit is lost.\textsuperscript{120} Regardless of the ultimate determination on the merits, due process requires some real opportunity to challenge administrative action. Such an opportunity does not exist where penalties are so great that noncompliance and judicial review cannot be risked.\textsuperscript{121} The result is the same as if the law provided for no judicial review at all.\textsuperscript{122}

Confronted with this argument, the courts found the CERCLA penalty provisions troubling, at best.\textsuperscript{123} To preserve CERCLA's constitutional integrity, the courts looked to the Supreme Court's qualification of \textit{Young}, which established that providing a good faith defense to a statute that penalizes noncompliance with an administrative order cures any potential due process violation.\textsuperscript{124} Thus, the

\textsuperscript{116} Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 388–89 (8th Cir. 1987).

\textsuperscript{117} Wagner Seed Co. v. Daggett, 800 F.2d 310, 312 (2d Cir. 1986); Wagner Elec., 612 F. Supp. at 741.

\textsuperscript{118} Solid State, 812 F.2d at 388–90; Wagner Seed, 800 F.2d at 312; Wagner Elec., 612 F. Supp. at 742–43.

\textsuperscript{119} \textit{Ex parte Young}, 209 U.S. 123 (1908).

\textsuperscript{120} Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1119 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976); Wagner Elec., 612 F. Supp. at 743.

\textsuperscript{121} Brown, 527 F.2d at 1119.

\textsuperscript{122} Wagner Elec., 612 F. Supp. at 743 (citing \textit{Young}, 209 U.S. at 147).

\textsuperscript{123} One court actually enjoined the EPA from assessing penalties and treble damages under sections 106(b) and 107(c)(3) of CERCLA. See Aminoil, Inc. v. United States EPA, 599 F. Supp. 68, 76 (C.D. Cal. 1984). The court's ruling was based on its conclusion that the PRP was likely to succeed on the merits of the claim that CERCLA's penalty and treble damages scheme violates due process. \textit{Id}. The statutes provide no opportunity for a hearing prior to the issuance of an administrative order, and there is no procedure through which the PRP can challenge the validity of the order or penalties. \textit{Id}. In the PRP's subsequent motion for summary judgment on the due process issue, the court denied the motion, finding that section 107(c)(3) is constitutional because it provides for a good faith defense. Aminoil, Inc. v. United States, 646 F. Supp. 294, 299 (C.D. Cal. 1986). \textit{See infra} notes 124–27 and accompanying text for a discussion of how the good faith defense cures due process defects.

\textsuperscript{124} Wagner Elec., 612 F. Supp. at 743–44.
courts interpreted CERCLA's penalty provisions to allow assertion of a good faith defense to the imposition of punitive damages.\(^\text{125}\) As a result of this interpretation, fines and treble damages may not be assessed against a PRP who fails to comply with an EPA order in the reasonable belief that he or she has a valid defense to the order.\(^\text{126}\) Moreover, due process is not offended, because the imposition of penalties is subject to judicial discretion and may occur only after the EPA prevails in an enforcement or cost recovery action.\(^\text{127}\)

Thus, PRPs do not suffer irreparable harm where they refuse to comply with an EPA cleanup order and successfully raise a good faith defense in the later enforcement action. Similarly, PRPs no longer face irreparable harm where they choose to comply first and challenge administrative orders later.\(^\text{128}\) SARA amended CERCLA to provide that a PRP who complies with an EPA order may file suit to seek reimbursement from the Superfund on the grounds that the PRP is not liable for response costs or that the EPA-ordered response action was arbitrary and capricious.\(^\text{129}\)

The good faith defense and the provision for reimbursement from the Superfund in all likelihood cured the due process concerns relating to CERCLA's penalty provisions. The courts' analyses of these issues, however, illustrate again that in the context of a public health statute such as CERCLA, delayed judicial review does not offend

\(^{125}\) The good faith defense is based on the “sufficient cause” language of sections 106(b) and 107(c)(3) of CERCLA. \textit{Solid State}, 812 F.2d at 390–91; Wagner Seed Co. v. Daggett, 800 F.2d 310, 316 (2d Cir. 1986); \textit{Wagner Elec.}, 612 F. Supp. at 744–45; United States v. Reilly Tar & Chem. Corp., 606 F. Supp. 412, 418–19 (D. Minn. 1985).

Section 106(b) allows the imposition of fines on “any person who, without sufficient cause, willfully violates, or fails or refuses to comply with” an administrative order issued under CERCLA. CERCLA § 106(b), 42 U.S.C. § 9606(b). Similarly, section 107(c)(3) authorizes the award of punitive damages against “any person . . . liable for a release or threat of release of a hazardous substance [who] fails without sufficient cause to properly provide removal or remedial action” as ordered under CERCLA. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3).

\(^{126}\) \textit{Solid State}, 812 F.2d at 391; \textit{Wagner Seed}, 800 F.2d at 315–16; \textit{Wagner Elec.}, 612 F. Supp. at 745. The court in \textit{Wagner Electric}, however, held that providing a good faith defense satisfies due process requirements only if the reviewing court is not limited to the administrative record. 612 F. Supp. at 747–48. This qualification addresses concerns raised about the constitutionality of section 113(j), which limits review of EPA response actions to the administrative record. \textit{See supra} note 111 and accompanying text, for a discussion of due process challenges to section 113(j).

\(^{127}\) \textit{Wagner Seed}, 800 F.2d at 316.

\(^{128}\) \textit{See infra} note 129 and accompanying text.

\(^{129}\) CERCLA § 106(b)(2), 42 U.S.C. § 9606(b)(2). Thus, “parties wishing to avoid treble liability may apparently perform any required cleanup, with the assurances that if recovery is unavailable from a third party and they are not a responsible party, recovery may be had from Superfund.” \textit{Solid State}, 812 F.2d at 389 n.9.
due process as long as all defenses may be raised at that time and no legal deprivation may occur prior to the hearing. 130

C. The CERCLA Lien Violates Due Process

The same reasoning that led courts to conclude that CERCLA's pre-enforcement review and penalty provisions do not violate due process mandates the opposite conclusion when applied to CERCLA's lien provision. The lien is distinguishable in two important aspects from other CERCLA provisions that have been unsuccessfully challenged on due process grounds: the lien affects significant property interests, not merely financial interests; and the lien's impact is immediate and irreparable. Although the landowner may challenge the lien's validity if the EPA initiates a subsequent enforcement or cost recovery action, such delayed judicial review cannot vitiate the harm that arises upon the filing of the lien. 131

As the Reardon court noted, the adverse effects of the CERCLA lien are numerous. 132 The lien clouds title, impairs the ability to alienate the property, taints credit, imperils opportunities for loans and mortgages, and may place an existing mortgage in default. 133 This harm is compounded considerably where the lien is for an indefinite amount and encompasses future unknown expenditures, or where the lien remains in effect for years until the EPA decides not to pursue a cost recovery action against the owner or merely allows the statute of limitations to run. 134 Thus, an owner who has a valid defense to CERCLA liability or to the scope of the lien may never be able to raise that defense before a court while the land remains unjustifiably encumbered and the owner remains susceptible to loss of commercial opportunities, damage to credit or goodwill, financial loss, or even loss of the property by foreclosure. 135 A subsequent hearing, if one ever occurs, cannot alleviate this harm.

The due process analysis in Reardon is not inconsistent with the thinking of other courts which have reviewed CERCLA due process claims. Even though courts have been willing, in the face of CERCLA's important public health purpose, to relax strict due process requirements, they have been careful to ensure that PRPs still have

130 See supra notes 124–28 and accompanying text.
132 Id. at 1518.
133 Id. at 1518 (quoting Doehr, 111 S. Ct. at 2113).
134 Id. at 1519.
135 See generally id. at 1518–23.
an opportunity for a judicial hearing prior to facing deprivation of legal rights. The nature of the CERCLA lien renders it impossible to provide such an opportunity after the lien has attached. The Reardon court recognized this fatal distinction and properly declared the lien provision unconstitutional.

V. DUE PROCESS AND STATE ENVIRONMENTAL LIENS

Currently, twenty-one states authorize liens to secure cleanup costs incurred by state environmental protection agencies. The general format of the majority of these statutes mimics section 107(l)—the lien arises upon the state’s expenditure of cleanup funds, and it becomes immediately effective when notice of the lien is filed in the county where the property is located. Many of the state lien provisions impose much more onerous burdens on property owners than does the federal lien. For example, state liens may attach to noncontaminated property or take priority over all previously perfected encumbrances. Most of the state statutes, however, do not meet the minimum due process requirements set forth in Reardon. The Reardon court’s well-reasoned opinion should serve as a warning to numerous state legislatures that their environmental lien provisions may not pass constitutional muster and should be reformed.

A. State Superliens

Several states authorize environmental liens with “superpriority” status. These liens assume priority over all other existing, as well as subsequent, liens, encumbrances, and security interests on the property. The liens may attach to the hazardous waste site, as well as to all other property owned by the liable party including noncontaminated realty, personal property, and business reve-

136 See supra notes 112, 113, & 127 and accompanying text.
137 See Reardon v. United States, 947 F.2d 1509, 1518–20 (1st Cir. 1991); see also Doehr, 111 S. Ct. at 2118.
138 See statutes cited supra note 11.
142 See statutes cited supra note 141.
None of the superlien statutes requires pre-attachment notice or hearing. Under the Reardon analysis they all violate due process. This is particularly problematic, because the superlien statutes provide no period of time in which the state must recognize that a claim for cleanup costs exists and file the lien. In fact, the state may file the lien many years after the pollution occurred or was cleaned up. Also, the existence of a superlien affects a secured lender's ability to ensure repayment of the loan. Foreclosing on a lien is ineffective if a superior environmental lien is large enough.

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144 See Reardon v. United States, 947 F.2d 1509, 1517-24 (1st Cir. 1991); see also supra notes 73-75 and accompanying text.

145 Johnine J. Brown, Superfunds and Superliens: Super Problems for Secured Lenders, 3 Toxics L. Rep. (BNA) 1131, 1134 (Mar. 16, 1988); PLI Real Estate Law & Practice Course Handbook Series No. 322, Impact of Environmental Regulations on Business Transactions, 1988, at 445, 454. It has been suggested that the lender protect its interests by requiring the borrower to covenant not to permit environmental liens to be placed on the property. See id. at 460; Breach of this covenant would constitute a technical default and enable the lender to accelerate the loan. Id. This proposal, however, does not protect the lender from the lien's priority status and its threat to full repayment of the loan.

146 Richard L. Epling, Environmental Liens in Bankruptcy, 44 Bus. Law. 85, 87 (1988). A title search will not reveal the potential existence of the superlien, even though the property may be subject for many years to an ongoing governmental investigation and hazardous substance cleanup, during which a lien could be imposed at any time. The presence of hazardous material on land, and the concomitant possibility of governmental liens, does not constitute a title defect covered by a title insurance policy. See Lick Mill Creek Apartments v. Chicago Title Ins. Co., 283 Cal. Rptr. 231, 236 (Cal. Ct. App. 1991); Chicago Title Ins. Co. v. Kumar, 506 N.E.2d 154, 156 (Mass. App. Ct. 1987).

This problem is alleviated in states which require the government to record notice as soon as it designates the property as a contaminated site or begins to expend funds to investigate or clean up the property. See, e.g., Tenn. Code Ann. § 68-212-209 (1992).

147 Brown, supra note 145, at 454. Proponents of superliens justify this result on the theory that the contaminated property is virtually worthless until it is cleaned up. Bozarth, supra note 72, at 322. A lender with a security interest in the land should not receive a windfall when the state spends its money to finance the cleanup. Id. This rationalization fails to justify the superpriority of liens on personal property and business revenues. See id.
Furthermore, the superlien may upset traditional business expectations, such as bankruptcy proceedings.148 Where the environmental lien takes priority and depletes the estate in its entirety, the claims of perfected, secured creditors—ordinarily paid first—are worthless.149

Real estate developers, investors, lenders, and title insurers have all become more cautious in property transactions as a result of the environmental lien.150 The title insurance industry, for example, has responded to the existence of superliens by revising standard contract forms, expanding title searches, and receiving from the EPA periodic lists of properties on which CERCLA liens have been filed.151

As with the CERCLA lien, the potential harm from improper imposition of a superlien is immediate and irreparable. Without provisions for pre-attachment notice and hearing, the superlien statutes are unconstitutional.152

B. State Lien Provisions Relating to Due Process

Although none of the state lien statutes is constitutionally perfect, various provisions do provide some procedural due process safeguards and illustrate useful elements of a model environmental lien statute.

1. Pre-attachment Judicial Determination

Maryland authorizes an environmental lien only as to penalties that have been assessed in a civil action or in an administrative action subject to judicial review.153 Similarly, the Montana lien arises only as to “costs, penalties, and natural resource damages for which a person has been judicially determined to be liable to the state.”154

149 Id.
150 Norman R. Newman, How to Counsel the Land Developer on Superfund and Superliens, 34 PRAC. LAW, No. 7, at 13, 22–26 (1988).
151 Bozarth, supra note 72, at 313–14.
152 Interestingly, the trend toward superliens has faltered recently. Since 1988, Arkansas and Tennessee deleted superlien provisions from their cleanup statutes, and efforts to create environmental superliens in Kansas, New York, and Pennsylvania were defeated. Id. at 324.
In a unique provision, the Ohio lien arises only upon breach of the reimbursement provisions of a voluntary agreement between the landowner and the state. These lien provisions do not have due process problems, because the liens serve merely as collection tools for judicially determined or voluntarily assumed debts.

2. Pre-attachment Administrative Hearing

Similar to the CERCLA lien, Minnesota's environmental lien attaches as soon as the state incurs cleanup costs, notifies the owner in writing of potential cleanup liability, and files the lien notice. The state statute, however, is more protective of due process rights than is CERCLA, because the state may not file the lien until the owner has been notified of the state's intention to file the lien, and has had an opportunity to appear before the state environmental protection agency, which must approve or disapprove the lien within thirty days. Although this procedure gives the owner a pre-attachment opportunity to challenge liability or the validity of the lien, without a provision allowing for judicial review of the agency's decision, the lien does not satisfy the Reardon due process standard.

3. Time Limitation for Filing Lien

Three states set time limits within which the government may file a lien for environmental cleanup costs. In Arkansas, the notice of lien must be filed within thirty days of the state's last cleanup act performed on the property. Likewise, Tennessee law requires the state to file its lien within one year of cleanup completion. In Iowa, the state perfects the lien by filing a statement of claim within 120 days after costs are incurred. By setting a definite time frame within which the property may be encumbered, these provisions

158 The Minnesota Environmental Compensation and Liability Act does not specifically provide for judicial review of administrative actions taken under the Act. See Minn. Stat. Ann. §§ 115B.01-.37 (West 1990). Thus, a challenge to the lien must be asserted in accordance with the state's Administrative Procedure Act, which allows judicial review only of final agency action. See Minn. Stat. Ann. §§ 14.001-69 (West 1990).
avoid the harsh consequences possible under CERCLA of a lien filed many years after the pollution or cleanup occurs.162

4. Post-attachment Review

The state statutes vary in their approaches to providing for administrative or judicial review of the filing of an environmental lien. The most severe restriction of post-attachment review is imposed in Michigan and Pennsylvania.163 Both states follow section 113(h), absolutely prohibiting judicial review of agency action prior to the state initiating an enforcement or cost recovery lawsuit.164 Due to the similarity between these state statutory schemes and CERCLA, it is likely that the same challenge may be asserted successfully against the states’ bar of pre-enforcement review of due process claims as was addressed in Reardon.165

Other states have no specific provisions within their CERCLA counterparts regarding judicial review of administrative action.166 In these jurisdictions, challenges to environmental liens must be asserted in accordance with the states’ administrative procedure acts, which generally allow judicial review only of final agency action and after the exhaustion of administrative remedies.167 Whether the filing of a lien constitutes final, and thus reviewable, agency action must be determined according to each state’s laws.

Environmental cleanup statutes that provide an opportunity for a post-attachment administrative hearing to challenge agency action and for immediate judicial review following the administrative hearing offer greater due process safeguards.168 In Kentucky, for exam-

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162 See supra notes 142 & 143 and accompanying text.
165 See Reardon v. United States, 947 F.2d 1509, 1517–24 (1st Cir. 1991); see also supra notes 52–75 and accompanying text.
167 See statutes cited supra note 166.
ple, a PRP has the right to an administrative hearing within ten days after receiving a pollution abatement order from the state environmental agency. The administrative hearing decision then may be appealed to the state court within thirty days.

Despite providing for prompt administrative and judicial review of agency action, this latter group of statutes still fails the Doehr and Reardon constitutionality test. Post-attachment review may satisfy due process requirements only where the state has shown that exigent circumstances justify a departure from pre-attachment notice and hearing.

The state environmental liens for the most part are very similar to the CERCLA lien and are part of state statutory schemes modeled after CERCLA. An analysis of their comportment with due process is therefore exactly the same as that applied to the CERCLA lien in Reardon. Under this analysis, the vast majority of the state statutes will fall to a due process challenge. State legislatures should accept the inevitability of constitutionally mandated lien reform.

VI. THE MODEL ENVIRONMENTAL LIEN STATUTE

It is not difficult to envision an environmental lien statute that satisfies due process without unduly burdening governmental efforts to promptly, effectively, and efficiently clean up hazardous waste sites. This model statute arises from a consideration of due process safeguards that courts have analyzed in CERCLA cases, procedures suggested by Reardon, and selected provisions already extant in state lien statutes.


169 KY. REV. STAT. ANN. § 224.071 (Baldwin 1982).
171 See supra notes 71–72 and accompanying text.
172 See Reardon v. United States, 947 F.2d 1509, 1517–24 (1st Cir. 1991); see also supra notes 54–75 and accompanying text.
173 To date, not one state lien statute has been challenged on due process grounds. The dearth of reported cases regarding environmental liens may be the result of the lien not being used frequently by environmental agencies. See supra note 73 and accompanying text. Moreover, some environmental lien statutes are relatively new and thus have not been on the legislative books long enough to have sparked reported litigation. In one exception, Kessler v. Tarrats, the New Jersey superlien was challenged as an unconstitutional impairment of contract and taking of property without compensation. 476 A.2d 326 (N.J. 1984). The lien provision was upheld. See id. at 331–32.
174 See infra Appendix for a suggested model environmental lien statute.
The lien statute must provide, at the minimum, pre-attachment notice and hearing, at which the owner may challenge the validity of the lien.¹⁷⁵ In accordance with the notion that due process is flexible, especially in the public health arena, a full trial is not required.¹⁷⁶ In the noticed hearing before a judge, the government need only establish probable cause to believe that the owner is liable for cleanup costs and the land is subject to the cleanup action.¹⁷⁷ To further streamline the hearing process, discovery is limited. The owner has the right to present evidence of a defense to liability for cleanup costs or to the scope of the proposed lien. This provides the owner with judicial review prior to agency action and thus prior to any legal deprivation of property rights. It provides greater due process safeguards than the ex parte procedure struck as unconstitutional in Doehr,¹⁷⁸ yet it does not burden the government with a protracted and expensive pre-enforcement trial.

Alternatively, the statute may provide for a pre-attachment administrative hearing, at which the owner has the opportunity to personally appear and challenge the propriety of the proposed lien.¹⁷⁹ The government may find it more cost-effective to consider the owner’s objections to the proposed lien in an administrative proceeding, prior to deciding whether to further pursue the lien in court.¹⁸⁰ In conjunction with the pre-attachment administrative hearing, however, the statute should provide for judicial de novo review of the administrative decision. During judicial review, the owner may present evidence and cross-examine witnesses.¹⁸¹

¹⁷⁵ See Reardon, 947 F.2d at 1523–24. The Michigan lien statute provides a model for a pre-attachment hearing. MICH. STAT. ANN. § 13.32(16a) (Callaghan Supp. 1992). If the state determines that the automatic lien on the contaminated site is insufficient to protect the state’s interest in recovering cleanup costs, the state may petition the court for a lien on other property owned by the responsible party. Id. The court may order such a lien only after notice to the owner and a hearing on the merits of the government’s petition. Id.

¹⁷⁶ Reardon, 947 F.2d at 1522.

¹⁷⁷ Id.

¹⁷⁸ Id. at 1523.

¹⁷⁹ See, e.g., MINN. STAT. ANN. § 514.673 (West 1990).

¹⁸⁰ At least two courts have suggested that administrative hearings held early in the CERCLA process not only would alleviate due process concerns but also would promote more effective enforcement of CERCLA. See Solid State Circuits v. EPA, 812 F.2d 383, 392 (8th Cir. 1987)(informal administrative hearings to enable PRP to challenge validity of EPA cleanup order will “best protect interests of all concerned and promote faster more efficient cleanup while making certain that liability remains with those responsible”); Wagner Elec. Corp. v. Thomas, 612 F. Supp. 736, 749 (D. Kan. 1985) (expedited administrative hearing at which EPA presents evidence of party’s responsibility would promote rational public policy).

¹⁸¹ De novo review will avoid due process problems arising from restricting judicial review
The model lien statute provides an exception to the hearing requirement in the event of exigent circumstances, such as the imminent bankruptcy of the landowner or transfer of the property. This exception is strictly limited to the government's showing, through sworn affidavit or testimony under oath, that an emergency exists that will jeopardize the government's right to recover cleanup costs. After a judge makes an ex parte determination that the government may file the lien, an immediate post-attachment judicial hearing must be held. This provision protects due process by requiring evidence of an emergency prior to unilateral administrative action, yet it also protects the public interest in empowering the government with emergency response powers and in guaranteeing reimbursement of public funds. To guard against abuse of the emergency exception, the statute provides for the owner's recovery of damages and costs in the event that a judge determines that either there was no reasonable basis to believe an emergency existed or that the ex parte lien is otherwise invalid.

Finally, to avoid indefinite exposure to potential governmental attachment of private property, the statute prohibits liens for an indefinite amount and sets a time limit within which the government must file the lien.

VII. CONCLUSION

The judiciary consistently has been reluctant to find merit in due process challenges to CERCLA. This is not surprising considering the potentially devastating environmental problems CERCLA was enacted to remedy. The environmental lien, however, presents a situation distinguishable from that considered in prior CERCLA due process cases. The delayed judicial review that satisfied other due process concerns simply is not adequate in the environmental lien context.

The CERCLA lien provision, as well as most state lien provisions, apparently were enacted with a legislative eye to assisting governmental cost recovery activity and without considered analysis of due process requirements. Environmental liens carry the potential for to the administrative record and possibly foreclosing the opportunity to fully present defenses to the court. See supra note 113 and accompanying text.

182 See Reardon, 947 F.2d at 1521–22.
183 Id. at 1522.
184 Id. at 1520.
185 See supra notes 159–62 and accompanying text.
burdensome interference with commercial transactions and irreparable consequences to landowners. In light of the compelling reasoning of Reardon, Congress and many state legislatures should reform their respective environmental lien provisions to provide the appropriate procedural safeguards, both satisfactory to due process and compatible with effective hazardous waste cleanup.
APPENDIX

MODEL ENVIRONMENTAL LIEN STATUTE

1. Lien: All costs of removal or remedial action for which a person [hereinafter "owner"] is liable to the [federal or state] government shall constitute a lien in favor of the government upon all real property [hereinafter "property"]
   a. that is owned by the person at the time the lien notice is filed; and
   b. upon which the removal or remedial action is undertaken.
2. Attachment: The lien attaches when:
   a. costs are incurred by the government with respect to a removal or remedial action;
   b. the owner is provided by certified or registered mail with written notice of potential liability;
   c. a petition for lien has been granted in accordance with subsection 7; and
   d. notice of lien has been filed as provided in subsection 3.
3. Notice of Lien:
   a. Contents: The notice of lien must include:
      (1) the name of the record owner of the real property where the lien attached;
      (2) the legal description of the real property where the lien attached;
      (3) the amount of the lien;
      (4) a statement that a removal or remedial action under [the applicable federal or state statute], for which costs have been incurred, has been undertaken on the property;
      (5) a statement that an environmental lien has attached to the property; and
      (6) a copy of the order of the court granting the petition for lien.
   b. Filing: All documents required to be filed under this subsection must be filed in the office of the county recorder where the property is located. A copy of the notice of lien shall be sent by certified or
registered mail, to each person of record holding an interest in the property.

4. **Lien Priority**: The lien is subject to the rights of any other person, including an owner, purchaser, holder of a mortgage or security interest, or judgment lien creditor, whose interest is perfected before a notice of lien has been filed pursuant to subsection 3.

5. **Release**: The government shall execute and file a release of an environmental lien when
   a. the lien is satisfied;
   b. after the lien is issued pursuant to *ex parte* order, a court determines that the lien is unenforceable; or
   c. a legally enforceable agreement has been executed by the owner relating to taking the response action or reimbursing the government for cleanup expenditures.

6. **Duration**: A lien created under this section continues until the earlier of:
   a. full discharge and satisfaction of the lien;
   b. expiration of 10 years from the creation of the lien, unless an action to foreclose on the lien is pending; or
   c. release of the lien.

7. **Judicial Determination**: No lien shall attach or be modified except upon order by the [federal or state] court as provided in this subsection.
   a. **Petition for lien**: Within one year of the date the government incurs costs with respect to a removal or remedial action, and after the owner is provided by certified or registered mail with written notice of potential liability for said costs, the government may file a petition in the court with jurisdiction over the county in which the property is located, seeking a lien upon the property in favor of the government. A petition submitted pursuant to this subsection shall include:
      (1) a description of the property to be attached;
      (2) an Affidavit of Expenditures setting forth the total amount of the lien and itemizing the expenditures;
      (3) with as much specificity as possible, the facts upon which the government believes that there is probable cause to issue the lien; and
      (4) proof of personal service of the petition and supporting documents on the owner.
   b. **Probable cause hearing**:  
      (1) Upon receipt of a petition under this subsection, the court shall promptly schedule a hearing to determine whether the petition should be granted.
(2) Notice of the hearing shall be provided to the owner and any persons holding liens or perfected security interests in the property.

(3) The owner shall have the right to be present at the hearing, to present evidence and cross-examine witnesses, and to present argument and legal briefing to the court. The [applicable federal or state] rules of evidence and of civil procedure shall apply; except that the right of discovery shall be limited to those documents relied upon by the opposing party during the hearing.

(4) The court may grant the petition only upon a showing by the government that there is probable cause to believe that the owner is liable to the government for removal or remedial costs under [the applicable federal or state statute]; and the property to be attached is subject to the action for which costs have been incurred.

(5) The amount of the lien shall not exceed that amount set forth in the Affidavit of Expenditures.

c. Ex parte order: A lien may attach upon ex parte order by the court within one year of the date the government incurred costs with respect to a removal or remedial action, and after the owner has been provided by certified or registered mail with written notice of potential liability for said costs. An ex parte order may be issued only upon a showing by the government by sworn affidavit or testimony under oath that there is probable cause to believe that:

(1) exigent circumstances exist such that the interest of the government in obtaining reimbursement for cleanup costs will be jeopardized, if a probable cause hearing as provided in this subsection is held;

(2) the owner is liable to the government for costs under [the applicable federal or state statute]; and

(3) the property to be attached is subject to the removal or remedial action for which costs have been incurred.

d. Within 15 days after an ex parte order is issued authorizing the lien to attach, a probable cause hearing must be held pursuant to this subsection.

e. Modification of lien: A lien filed pursuant to this section may be modified to include subsequently incurred costs only in accordance with the procedures set forth in this subsection.

8. Damages: If a lien is filed pursuant to an ex parte order and the court later determines that the lien is invalid or otherwise unenforceable, the owner may be awarded damages, costs, and attorneys fees incurred as a result of the attachment of the lien.