ORAL ARGUMENT SCHEDULED FOR FEBRUARY 12, 2010

DOCKET NO. 09-5092

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GENERAL ELECTRIC COMPANY,

Plaintiff-Appellant,

v.

LISA PEREZ JACKSON, Administrator, United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
DOCKET NO. 1:00-CV-02855
THE HONORABLE JOHN D. BATES

BRIEF OF PLAINTIFF-APPELLANT

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Date: December 29, 2009

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties in both the district court and in this Court are plaintiff-appellant General Electric Company and defendants-appellees Lisa Perez Jackson, Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency.

The following persons participated as *amicus curiae* in the district court: American Chemistry Council, Chamber of Commerce of the United States, Hudson River Sloop Clearwater, Natural Resources Defense Council, New York Rivers United, Riverkeeper, Inc., Scenic Hudson, and Washington County CEASE, Incorporated.

The following persons are participating as *amicus curiae* in this Court: Chamber of Commerce of the United States, Hudson River Sloop Clearwater, National Association of Manufacturers, Natural Resources Defense Council, Riverkeeper, Inc., and Scenic Hudson.

B. Rulings Under Review

Appellants seek review of the final judgment of the district court entered on January 27, 2009 (Joint Appendix ("J.A.") 0091, 0092) in favor of defendants and from the rulings of the district court that formed the basis for entry of that judgment, including the following:

1. January 27, 2009 Order, *id*. at 0091, and Opinion, *id*. at 0092, of the District Court for the District of Columbia (Judge John D. Bates) in Civil Action No. 1:00-CV-02855-JDB granting defendants' motion for summary judgment and denying General Electric Company's motion for summary judgment. The memorandum opinion is reported at *Gen. Elec. Co. v. Johnson*, 595 F. Supp. 2d 8 (D.D.C. 2009).

2. March 30, 2005 Order (J.A. 0050) and Opinion, *id.* at 0053, of the District Court for the District of Columbia (Judge John D. Bates) in Civil Action No. 1:00-CV-02855-JDB granting in part defendants' motion for summary judgment with respect to General Electric Company's facial due process challenge. The memorandum opinion is reported at *Gen. Elec. Co. v. Johnson*, 362 F. Supp. 2d 327 (D.D.C. 2005).

C. Related Cases

This case was previously before the Court on appeal (docketed April 23, 2003, as No. 03-5114) under the case name *General Electric Co. v. Environmental Protection Agency and Michael O. Leavitt, Administrator, U.S. Environmental Protection Agency*. The prior appeal was resolved by opinion dated March 2, 2004, which is reported at 360 F.3d 188 (D.C. Cir. 2004). (J.A. 0038.)

Undersigned counsel are not aware of any other related cases currently pending in this or any other Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by appellant General Electric Company of the following corporate interests:

a. Parent companies of the corporation:

None

b. Any publicly held company that owns ten percent (10%) or more of the corporation:

None

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GLOSSARY

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CERCLIS	Comprehensive Environmental Response, Compensation, and Liability Information System
EPA	United States Environmental Protection Agency
GE	General Electric Company
NPL	National Priorities List
PRP	Potentially Responsible Party
ROD	Record of Decision
UAO	Unilateral Administrative Order

STATEMENT OF JURISDICTION

I. Subject Matter Jurisdiction.

The district court had jurisdiction under 28 U.S.C. § 1331 because the claims asserted arise under the Constitution, laws, or treaties of the United States.

II. Appellate Jurisdiction.

The Court has jurisdiction under 28 U.S.C. § 1291 and Fed. R. App. P. 3(a). The appeal is from the final judgment of the district court dated January 27, 2009, which resulted from opinions on March 30, 2005 and January 27, 2009 and disposed of all claims with respect to all parties. (*See* Joint Appendix ("J.A.") 0050, 0053, 0091, 0092.) General Electric Company ("GE") filed a timely Notice of Appeal on March 20, 2009.

STATUTES AND REGULATIONS

The applicable statutes are reproduced in the Addendum to this brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court, having properly recognized that unilateral administrative orders ("UAOs") impose pre-hearing deprivations that are not justified by any governmental need for expedited action, erred in failing to hold that Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606, violates procedural due process, both on its face and through the United States Environmental Protection Agency's

("EPA's") pattern and practice, because UAO recipients are not provided any hearing whatsoever prior to the deprivation of their protected property interests.

2. Whether the district court, having properly recognized that UAO recipients have "weighty" private interests, that the cost of a due process hearing would be "minimal," and that "several … abstract principles suggest the [UAO] predecisional process may result in error," erred in applying the *Mathews v. Eldridge* balancing test by (a) determining that the government interest in avoiding a hearing – but not the correlative private interest in obtaining a hearing – should be considered in the aggregate for all UAOs, and (b) holding that GE must show (in addition to a *risk* of error) an unacceptably high actual "rate of error" in EPA's decisions.

STATEMENT OF THE CASE

I. Introduction.

GE challenges EPA's failure to provide procedural due process to recipients of UAOs issued pursuant to Section 106 of CERCLA. As the district court recognized, UAOs subject targeted potentially responsible parties ("PRPs") to immediate deprivations of property without any opportunity for pre-deprivation hearings to challenge the orders before a neutral decisionmaker. The pre-hearing deprivations are imposed despite the undisputed fact – also recognized by the district court – that UAOs are not used in cases of emergency and, to the contrary,

are generally not issued until many years after EPA becomes involved at a contaminated site, thus allowing ample time for due process review. These findings alone demonstrate that Section 106 is unconstitutional, both on its face and as implemented through EPA's pattern and practice, because the Supreme Court has made clear that the government is required to provide at least *some type* of pre-deprivation hearing absent exigent circumstances, and EPA provides none.

The *specific contours* of the due process hearing required here turn on the factors articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): the balance of private and governmental interests and risk of error. The district court found that the pre-hearing deprivation imposed through EPA's exercise of its UAO authority adversely affects "weighty" private interests, that those private interests outweigh the governmental interests in avoiding a hearing with respect to any individual UAO, and that the UAO process involves numerous elements that increase the risk of error, including one-sided decisionmaking. Again, these findings should have resulted in a ruling in GE's favor and a holding that PRPs are entitled to hearings that incorporate judicial-type procedures, including the right to present evidence and cross-examine opposing witnesses before a neutral trier of fact.

The district court nonetheless granted summary judgment to EPA. This decision is unsustainable as a matter of law. In particular, the court did not address

the central failure of the government to provide UAO recipients with *any* pre-deprivation hearing, which should have been dispositive given the absence of an emergency excusing such a hearing. Further, the court improperly engrafted additional requirements onto the *Mathews* balancing test.

Accordingly, this Court should reverse the district court's judgment, direct that it enter judgment holding the UAO scheme unconstitutional on its face and as implemented by EPA's pattern and practice, and remand for further proceedings consistent with its mandate.

II. Prior Proceedings.

GE filed its initial complaint on November 23, 2000 and an amended complaint on March 14, 2001. On March 31, 2003, the district court granted EPA's motion to dismiss, holding that GE's due process challenge was precluded by CERCLA, Section 113(h), which divests federal courts of jurisdiction to hear challenges to a UAO prior to completion of an EPA response action. (*See* J.A. 0001, 0036.) On March 2, 2004, this Court reversed, holding that Section 113(h) does not apply to facial or systemic due process challenges. *See Gen. Elec. Co. v. EPA*, 360 F.3d 188 (D.C. Cir. 2004) (J.A. 0038.) In so holding, the Court relied on *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 492 (1991), in which the Supreme Court rejected a similar argument that the courts lacked jurisdiction to hear a systemic challenge to the Immigration and Naturalization Service's

"unconstitutional practices and policies" in administering an amnesty program for alien farm workers. *Gen. Elec. Co.*, 360 F.3d at 192 (J.A. 0045.) This Court explained that allowing GE's challenge to proceed would not frustrate Congressional objectives in enacting CERCLA, noting, *inter alia*, that "[a] decision on GE's due process claim that is favorable to GE would afford EPA an opportunity to provide due process review at an early stage." *Id*. at 194 (J.A. 0048.)

On remand, EPA moved for summary judgment, arguing that GE's due process challenge failed as a matter of law. On March 30, 2005, the district court granted EPA's motion with respect to GE's facial due process challenge based on two determinations that its subsequent January 27, 2009 opinion revealed were erroneous: (1) that issuance of a UAO does not result in a pre-hearing deprivation, (*see* J.A. 0070), and (2) that, even if a UAO does result in a pre-hearing deprivation, the statute is constitutional in a subcategory of cases – and therefore immune from facial challenge under *United States v. Salerno*, 481 U.S. 739 (1987) – because EPA sometimes issues UAOs to address environmental emergencies. (*See* J.A. 0079.) The district court rejected EPA's motion with respect to GE's pattern and practice claim, holding that the claim "presents a cognizable legal theory" as to which GE was entitled to discovery. *Id*. at 0065-66.

The parties thereafter engaged in discovery on EPA's pattern and practice in exercising its UAO authority, including discovery of internal EPA memoranda, guidances, and training materials; depositions of numerous Fed. R. Civ. P. 30(b)(6) witnesses; six expert and rebuttal expert reports; and expert depositions. On December 7, 2007, the parties filed cross-motions for summary judgment. On January 27, 2009, the district court granted EPA's motion. *Id*. at 0092. While the court ruled in favor of EPA, its analysis of EPA's pattern and practice reflected a significant shift in the court's factual understanding of the bases for GE's procedural due process claim.

First, in sharp contrast to its 2005 opinion, the district court held that "GE has demonstrated that PRPs are deprived of at least some property interests whether or not they comply with a UAO." *Id.* at 0125. The district court found that a PRP that complies with a UAO suffers an average pre-hearing deprivation of $4 million in paying the response costs ordered by the UAO, *see id*. at 0123, 0127, and that "noncomplying PRPs suffer a significant decrease in brand and market value" at the time of UAO noncompliance. *Id.* at 0127-28. The court concluded that these pre-hearing deprivations are substantial:

> [D]eprivations caused by UAOs are potentially so large – on average $4 million for complying PRPs and some substantial, unidentified amount for noncomplying UAOs – that they may have collateral effects. UAOs could put some PRPs out of business.… For other PRPs, UAOs may affect operations, like whether to bid for new

> projects or to hire additional employees.… [A]lthough the private interests are less constitutionally significant because they are primarily financial, they are sufficiently large and have enough potential collateral effects to constitute weighty private interests.

Id. at 0128.

Second, also in sharp contrast to its 2005 opinion, the district court held that the government could not defend these pre-hearing deprivations on the ground that immediate action through UAOs is necessary to address environmental emergencies. The court explained that "EPA lacks a 'special need for very prompt action' under Section 106 of CERCLA.... [T]he parties agree that EPA does not issue UAOs in true emergency situations." *Id.* at 0131. The district court thus found that EPA's governmental interest in avoiding a pre-deprivation hearing stems solely from the cost of the additional process. The district court noted, however, that for any given UAO, the cost of providing a pre-deprivation hearing would be minimal. *Id.* at 0142 ("the costs of a single hearing before a presiding officer are minimal, especially considering the size of the private interests at stake").

Third, the district court found that numerous elements of the UAO process give rise to risk of error. In particular, the court held that "the lack of a neutral decision-maker, as an abstract principle, supports GE's argument that EPA's pre-issuance process is error prone." *Id.* at 0134. The court further held that the risk of

error is increased because "EPA arguably stands to benefit by issuing UAOs because EPA has an interest in conserving Superfund resources" and because "UAOs are issued by regional EPA officials without review and approval from EPA headquarters." *Id.*

The district court's ruling in favor of EPA notwithstanding these factual findings was based on three legally erroneous premises: (1) that procedural due process can be satisfied by a post-deprivation hearing even though the government concededly does not act on an emergency basis and waits years to issue a UAO, *id.* at 0140-41; (2) that the public interest in avoiding the cost of a pre-deprivation hearing, while minimal for any given UAO, must be considered in the aggregate but not balanced against the corresponding aggregated deprivations suffered by UAO recipients, *id.* at 0142; and (3) that GE was required as a necessary element of its due process claim to establish a substantial (but undefined) *rate* of actual error – as opposed to a demonstrated *risk* of error – in EPA's issuance of UAOs. *Id.* at 0133.

STATEMENT OF FACTS

I. A Recipient Of A UAO Is Not Afforded A Hearing To Challenge A UAO Prior To Its Implementation.

Under CERCLA, when EPA determines that an environmental cleanup is required at a contaminated site, the agency has three options. First, EPA may conduct the cleanup itself and file suit against a PRP in federal district court to

recover the costs of the cleanup. *See* 42 U.S.C. §§ 9604(a), 9607(a), 9611(a), 9613. Second, EPA may file an abatement action in federal district court to compel a PRP to conduct a specified response action. *See id.* § 9606(a). Third, EPA may issue a UAO compelling a PRP to conduct a specified response action without court involvement. *See id.* As described by the district court:

> UAOs may essentially be viewed as condensed prosecutions and adjudications: they initiate adversary proceedings against a PRP, but simultaneously constitute a statement that the PRP is legally responsible for the violation and require the PRP to remedy wrongs through the fulfillment of certain responsibilities and penalties (*i.e.*, UAOs regulate conduct of PRPs).

(J.A. 0088.)

Under each of the first two options, a PRP targeted by EPA is provided with a right to a meaningful hearing before a neutral decision-maker in which it can challenge EPA's determination that the PRP is liable and EPA's selection of the response action at the site. These hearings have often resulted in findings in favor of the PRP,[1] and GE does not contest EPA's exercise of its authority under either of these two statutory alternatives.

[1] *See Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1883-84 (2009) (EPA erred in liability determination as to one PRP and refusal to apportion costs as to another); *United States v. Burlington N. R.R. Co.*, 200 F.3d 679, 694 (10th Cir. 1999) (EPA acted arbitrarily and capriciously in modification of remedy at site); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 904-08 (5th Cir. 1993) (EPA acted arbitrarily and capriciously in deciding to provide alternative water supply absent evidence of public health need); *United States v. Ottati & Goss, Inc.*, 900

A PRP that receives a UAO, on the other hand, is not provided any right to a hearing to challenge EPA's adjudicatory determinations. Under CERCLA § 113(h), federal courts lack jurisdiction to hear challenges to a UAO until all of the work required under the UAO has been completed or until EPA brings an enforcement action. *See* 42 U.S.C. § 9613(h). Further, although EPA may conduct informal conferences with PRPs following issuance of a UAO, EPA guidance documents make clear that such conferences are not due process hearings and do not afford PRPs the opportunity to challenge the UAO. (J.A. 0700) (EPA guidance explaining that the conference with PRPs "is not an evidentiary hearing. The opportunity to confer does not give PRPs the right to pre-enforcement review. The conference is not intended to be a forum for discussing liability issues or whether

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F.2d 429, 441 (1st Cir. 1990) (Breyer, J.) (rejecting, *inter alia*, EPA remedy imposing soil standard for PCBs based on assumption that "children will eat a little bit of dirt each day for 245 days per year for three and a half years"); *United States v. B & D Elec., Inc.*, No. 1:05CV63, 2007 WL 1395468, at *9 (E.D. Mo. May 9, 2007) (EPA erred in designating defendants as liable parties); *United States v. Broderick Inv. Co.*, 963 F. Supp. 951, 954-55 (D. Col. 1997) (EPA acted arbitrarily and capriciously in failing to reconsider remedy in light of changed conditions), *aff'd in part, rev'd in part*, 200 F.3d 679 (10th Cir. 1999); *United States v. Wedzeb Enters., Inc.*, 844 F. Supp. 1328, 1338 (S.D. Ind. 1994) (EPA erred in designating GE and another defendant as liable parties); *United States v. Hardage*, 750 F. Supp. 1460 (W.D. Okla. 1990) (rejecting EPA's proposed excavation remedy and adopting the PRP's proposed containment remedy), *aff'd in part, rev'd in part on other grounds*, 982 F.2d 1436 (10th Cir. 1992).

the order should have been issued."); *see also id.* at 0354-55 ¶¶143-149[2] (same); *id*. at 1011-12 (EPA affiant acknowledging that EPA does not make "any significant changes" to its remedy selection based on discussions with PRPs and is open only to "negotiations regarding comparatively minor aspects of the Statement of Work").

A PRP accordingly has only two options upon receiving a UAO. First, it can comply with the UAO, in which case it has no opportunity to challenge the UAO through a meaningful hearing until the response action is completed (a period lasting on average more than 3 years, *id*. at 0344 ¶81) and then can seek reimbursement only of a portion of its UAO-related costs. 42 U.S.C. § 9606(b). Second, the PRP can refuse to comply with the UAO, in which case it again has no opportunity to challenge the UAO through a meaningful hearing and is subject to penalties of $32,500 for each day of noncompliance and, once the response is performed by EPA, to punitive treble damages on top of the costs of the ordered response action. *Id.* §§ 9606(b), 9607(c)(3). The PRP must sit in limbo as these fines accumulate until EPA brings an enforcement action, which EPA can file at its sole discretion as late as five years after the date of the "violation." *See* 28 U.S.C.

[2] J.A. 0328-58 is GE's Statement of Undisputed Facts filed in connection with its summary judgment briefing before the District Court. For the purposes of this appeal, GE has modified the evidentiary citations in the Statement of Facts to correspond to where the previously-cited supporting evidence appears in the Joint Appendix.

§ 2462. Not surprisingly, in light of the massive and sustained contingent liability thereby created, it is undisputed that PRPs have very rarely availed themselves of the option of noncompliance. (J.A. 0355-56 ¶¶150-153.)

The magnitude of the obligations imposed on PRPs by UAOs, the unilateral nature of EPA decisionmaking in issuing the UAO, the inability of private parties to obtain timely and independent review of that EPA decisionmaking, and the extraordinarily severe sanctions for noncompliance create in UAOs a powerful enforcement tool that is unique in federal law. *See id.* at 0351 ¶124 (EPA Rule 30(b)(6) witness characterizing UAO authority "as one of the most potent administrative remedies available to the agency under any existing regulatory statute"). Because this power is unchecked and overwhelmingly coercive, EPA long ago abandoned use of the CERCLA statutory provision for judicial abatement actions, adopting instead a policy of issuing UAOs to *every* PRP that does not enter into an EPA consent decree. *Id.* at 0341 ¶64. EPA also consciously leverages its UAO power to coerce concessions from PRPs by, *inter alia*, making the terms of UAOs "ugly, onerous, and tough." *Id.* at 0342-43 ¶75. In this way, EPA makes its settlement demands appear "more attractive by making the alternatives what PRPs want least, very unpleasant." *Id.* In sum, EPA's exercise of its UAO power is the antithesis of what normally passes as due process.

II. A Recipient Of A UAO Suffers An Immediate Deprivation Of Protected Property Interests Whether Or Not It Complies With A UAO.

As the district court recognized in its 2009 opinion, a UAO causes an immediate, unavoidable, and substantial pre-hearing deprivation of constitutionally protected property interests, whether the PRP complies with the UAO or not. *See id*. at 0125.

A. A PRP That Complies With A UAO Incurs An Average $4.4 Million Deprivation In Paying For the Cost Of The Ordered Response Action.

It is undisputed that a PRP that complies with a UAO suffers deprivations through the costs imposed by the UAO. These deprivations occur prior to any hearing and are unquestionably substantial. Based on an uncontested analysis presented below of EPA's own CERCLIS database (which contains data on every UAO issued by EPA), GE's expert determined that the *average* cost of complying with a single UAO is $4.4 million dollars. (J.A. 0329 ¶2.) All told, between August 16, 1982 and May 25, 2006, PRPs incurred an aggregate of more than $5.5 billion in response costs in complying with UAOs, all without any opportunity for a pre-deprivation hearing to challenge the UAOs' validity. *Id.* Moreover, the average cost of $4.4 million does not include the additional expenses of legal and consulting fees incurred by a PRP in complying with a UAO, which cannot be recovered in post-completion reimbursement actions. *Id.* at 0447-48 ¶¶21-23, 0450 ¶29.

B. A PRP That Elects Not To Comply With A UAO Incurs Millions Of Dollars In Pre-Hearing Deprivations Due To The Impact Of UAO Noncompliance On The PRP's Market Value, Costs Of Financing, And Brand Value.

In the proceeding below, GE and EPA both proffered expert witnesses who testified to the adverse impact on a PRP of a decision not to comply with a UAO. Although the experts disagreed as to the magnitude of the impact, each averred that UAO noncompliance results in immediate harm to the value of the PRP's stock, the PRP's ability to obtain financing, and the value of the PRP's brand.

1. A Decision Not To Comply With A UAO Has An Immediate Pre-Hearing Adverse Impact On A PRP's Market Value And Cost Of Financing.

Because of the attendant risk of daily penalties and treble damages, a PRP that believes a UAO is unlawful and elects not to comply is immediately tagged with a massive contingent liability that has a correspondingly immediate impact on the PRP's market value and cost of financing. The certainty of these pre-hearing deprivations is not disputed in the record; the parties' experts disagreed only as to the magnitude of the effect.

EPA's own expert, Dr. Siegel, repeatedly conceded that "there would be some negative impact on a firm's stock price and on the costs it has to pay on its bonds following a decision not to comply with a UAO at the time the market becomes aware of that [decision]." *Id*. at 0329 ¶4; *see also id*. at 0329-30 ¶¶4-6. He also specifically noted that a "decision by GE not to comply with a UAO …

would have a negative impact on some investors' decisions whether to invest in GE." *Id.* at 0333 ¶20. GE's expert economist, Dr. Geweke, presented evidence of the magnitude of that deprivation through a detailed regression analysis of historic market and EPA enforcement data. His analysis demonstrated that a PRP's decision not to comply with a single UAO would result, on average, in an immediate drop in the PRP's market value of $76.4 million. *Id.* at 0334-35 ¶28. He also showed that a PRP that sought to challenge, through noncompliance, all UAOs it received would suffer an aggregate median decline in stock price of 9.8% and a proportionate median increase in bond yields of 3.5%. *Id.* at 0336 ¶32.[3]

Based upon this data, Dr. Geweke explained:

> These financial impacts of a decision not to comply with UAOs adversely affect the firm's conduct of its business *at the time the decision is made.* Activities including embarking on new projects or hiring more employees will be curtailed because these undertakings have become more costly: if the firm were to borrow the money to finance these activities it would now confront higher costs to service this debt; and if it were to raise the money by issuing stock, it would now have to issue more shares to do so, thereby further reducing the value of

[3] While agreeing that the impact on stock value of UAO noncompliance was significant, the district court questioned Dr. Geweke's valuation of that impact based upon the court's mistaken assumption that the $76.4 million did not take into account the fact that the market might discount potential CERCLA liabilities based on the possibility that the PRP would successfully challenge EPA's decision and avoid or minimize its payment obligation. (J.A. 0117.) As explained in his expert report, however, Dr. Geweke's valuation was based upon actual market reactions that incorporated market discounting. *Id*. at 0364.

> shares already outstanding. Were the firm already in a financially precarious position, the consequences of electing not to comply with UAOs would likely include cancellation of projects underway, and reduction of workforce. For some firms the consequence is bankruptcy.

Id. at 0336 ¶34. The district court adopted these conclusions in its 2009 opinion. *Id*. at 0128 (finding, *inter alia*, that "UAOs could put some PRPs out of business").

2. A Decision Not To Comply With A UAO Has An Immediate Pre-Hearing Adverse Impact On The Value Of A PRP's Brand.

Unrebutted testimony in the district court established that a PRP that challenges a UAO through noncompliance would suffer an additional pre-hearing deprivation due to the negative impact of that action on the value of the PRP's brand. *Id*. at 0330-34 ¶¶7-22. As with the deprivations of stock price and financing costs, this brand impact is undisputed and was confirmed by both EPA and GE experts. *Id*. at 0119 (district court: "Not even Dr. Siegel, EPA's rebuttal expert, takes issue with it").

EPA's expert, Dr. Siegel, explained that the harm to a company's brand from perceived environmental regulatory noncompliance would extend well beyond the equities and financial markets, including such deprivations as "lower product sales, [and] decreased access to talented workers," *id*. at 0331 ¶12, and impaired relationships with a variety of firm stakeholders, including customers, employees, and regulators. *Id.* ¶13.

Another GE expert, Dr. Johnston, presented evidence as well of brand impacts in the financial markets beyond those arising from contingent monetary liabilities. In one peer-reviewed study, researchers calculated that poor environmental performance (as evidenced by emissions data and environmental lawsuits) caused "a large and statistically significant loss in the value of firm intangible assets, with the average loss across all sampled firms of $362 million, or 8.4% of the average firm's asset replacement value." *Id*. at 0426. In another study, news of settlements with EPA concerning alleged environmental violations resulted in "a loss of $14.3 million in stock market value, an amount that was much larger than the $2.3 million that the average firm in the sample paid in fines and costs to EPA." *Id.* at 0427. [4]

As with the other adverse impacts incurred with UAO noncompliance, these deprivations of brand value cannot be recovered through a post-hoc ruling in favor of the PRP. *Id*. at 0333-34 ¶22.

[4] Dr. Geweke's analysis began with market reactions to PRPs' receipt of special notice letters, which are similar to UAOs in that they inform the market of EPA's determination that the PRP is liable for a particular cleanup but which do not involve any decision by the PRP not to comply with EPA's determination. Because PRPs rarely elect not to comply with UAOs, Dr. Geweke's analysis could not capture the additional negative brand impacts arising from perceptions that a PRP was defying its environmental responsibilities.

III. EPA Does Not Use UAOs To Respond To Emergencies.

EPA does not issue UAOs to address environmental emergencies. To the contrary, as the district court found and EPA ultimately conceded in the proceeding below, when an environmental emergency exists, EPA conducts the cleanup itself and seeks reimbursement from liable PRPs through a cost recovery action under CERCLA § 107(a). *Id*. at 0131.

Far from being emergency government actions, UAOs are simply one coercive step in a prolonged multi-year process of EPA involvement at a CERCLA site. The undisputed evidence below shows that EPA typically does not issue UAOs compelling longer-term remediations until eight years after it places a site on the National Priorities List ("NPL"),[5] five years after it sends out notice letters to PRPs, and four years after it selects a response action at a site in a Record of Decision ("ROD"). *Id*. at 0458-60. EPA typically does not issue UAOs compelling short-term removals until five years after it identifies the site, and the ordered response action then takes, on average, another 1.7 years to complete. *Id*. at 0458-61.

Moreover, the specific timing of EPA's issuance of a UAO is not triggered by any change in environmental conditions at a site, but instead is driven largely by

[5] The NPL is the list of hazardous waste sites in the United States eligible for long-term remedial action financed under the Superfund program. *See* 42 U.S.C. § 9605(a)(8). *See Carus Chem. Co. v. EPA*, 395 F.3d 434, 437-38 (D.C. Cir. 2005).

internal EPA performance objectives. EPA regions and individual personnel are evaluated based upon their achievement of certain enforcement goals in a given fiscal year. Nearly 24 years of EPA's own data show a dramatic jump in UAOs issued in the final days of a fiscal quarter or a fiscal year, with nearly 20% of the costs of all UAOs (nearly $1 billion) arising from UAOs issued on just three days, the last day of March (the end of the fiscal mid-year), the last day of June (the end of the fiscal 3rd quarter) and the last day of September (the end of the fiscal year). *Id*. at 0339 ¶51; *see also id*. at 0946 (EPA concession that "bean counting" affects timing of UAOs).

SUMMARY OF ARGUMENT

CERCLA's UAO provisions violate due process both on their face and through EPA's pattern and practice because PRPs are not provided with *any* hearing before a neutral decision-maker prior to incurring the substantial deprivations imposed by UAOs. Because EPA provides PRPs with *no* "process" at all in the constitutional sense before depriving them of protected property interests through its non-emergency UAOs, the Court need not even apply the three-part balancing test set forth in *Mathews*, 424 U.S. at 335, to conclude that the UAO statutory scheme violates procedural due process. Neither this Court nor the Supreme Court has ever countenanced or "balanced away" the core right to some type of pre-deprivation hearing absent emergency circumstances.

Analysis of EPA's exercise of its UAO authority under the *Mathews* balancing test provides further confirmation of the constitutional invalidity of the UAO scheme and serves to define the parameters of the pre-deprivation procedures necessary to satisfy the constitutional requirements of due process. As the district court properly recognized, UAOs implicate substantial private interests that for any given UAO outweigh the governmental interest in avoiding the costs of a hearing, and the UAO process carries with it significant risk of error due to the lack of any neutral decision-maker, EPA's financial stake in issuing UAOs, and the delegation of UAO authority to subordinate regional EPA employees. Due process thus requires that UAO recipients be provided pre-deprivation hearings that incorporate judicial-type procedures, including the right to present evidence and cross-examine opposing witnesses before a neutral trier of fact.

The district court erred in its legal application of the *Mathews* balancing test by aggregating the governmental interests, but not the corresponding private ones. The court also erred by imposing an additional and admittedly novel requirement that GE present evidence of a substantial actual "rate of error," a requirement inconsistent with Supreme Court precedent. The district court's *sua sponte* imposition of this "rate of error" requirement is particularly inappropriate here because EPA has succeeded through its coercive pattern and practice in preventing virtually any challenges to UAOs from which such an error rate might be derived.

STANDARD OF REVIEW

The Court reviews "the district court's grant of summary judgment *de novo* and may affirm only if, viewing the evidence in the light most favorable to [the responding party] and giving him the benefit of all permissible inferences, [it] conclude[s] that no reasonable jury could reach a verdict in [the party's] favor." *Jones v. Bernanke*, 557 F.3d 670, 674 (D.C. Cir. 2009).

ARGUMENT

I. EPA's Failure To Provide UAO Recipients With *Any* Pre-Deprivation Hearing Violates Procedural Due Process.

A. The Absence Of Any Pre-Deprivation Hearing Violates Procedural Due Process, Without Regard To The *Mathews* Factors.

The Court's analysis of the procedural due process issues raised in this case must start with three key factual findings of the district court that were conceded by EPA or its expert below. First, UAOs impose significant deprivations on UAO recipients, either through the costs of the ordered response action if they comply or through the impacts on the PRP's market value, cost of financing and brand value if they do not. (J.A. 0329-30 ¶¶3-7, 0331-32 ¶10, ¶¶12-17, 0333 ¶¶20-21, 0113-19, 0123, 0125.) Second, UAO recipients do not have any opportunity for a hearing before a neutral decision-maker to challenge UAOs before these deprivations occur. *Id*. at 0700, 0354-55 ¶¶143-149, 1011-12, 0134. Third, the government has no emergency need to issue UAOs that would justify dispensing with the ordinary due process requirement of a pre-deprivation hearing. *Id*. at 0131. Because the

first two of these findings arise from the face of CERCLA and the third arises from EPA's acknowledged construction of the statute, these three district court findings are equally relevant to both GE's "pattern and practice" due process challenge and its facial due process challenge. *See Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 (1989) ("Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis, for in evaluating a facial challenge to a [statute], a federal court must … consider any limiting construction that … [an] enforcement agency has proffered."); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (same); *Hill v. Jackson*, 64 F.3d 163, 167 (4th Cir. 1995) (same in context of procedural due process challenge). Indeed, when juxtaposed against the district court's 2005 opinion granting EPA's motion to dismiss GE's facial challenge, the district court's own 2009 findings make clear that its previous 2005 ruling was erroneous and should be reversed. (*See* J.A. 0070, 0079) (basing dismissal of facial challenge on incorrect predicates that UAOs do not impose pre-hearing deprivations and are used in emergencies).[6]

[6] The district court's 2009 findings of pre-hearing deprivation and lack of emergency also demonstrate the error of other courts that have rejected due process challenges to UAOs based upon the same predicate misunderstandings. *See United States v. Capital Tax Corp.*, No. 04 C 4138, 2007 WL 488084, at *3 (N.D. Ill. Feb. 8, 2007) (the UAO "statutory scheme is set up so that no *deprivation* occurs until after a judicial hearing"); *Employers Ins. of Wausau v. Browner*, 848 F. Supp. 1369, 1374 (N.D. Ill. 1994) ("a PRP is fully entitled to obtain judicial review of the EPA's order prior to being deprived of its property"), *aff'd*, 52 F.3d 656 (7th Cir. 1995); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315 (2d Cir. 1986) (in

Having concluded that UAOs impose pre-hearing deprivations absent any emergency need for government action, the district court need not have gone any further. These undisputed findings compel a holding that EPA's UAO regime is unconstitutional.

The district court nonetheless proceeded to apply the three-part balancing test set forth in *Mathews v. Eldridge*. This was error because the purpose of the *Mathews* balancing test is to determine *what type* of pre-deprivation hearing is required in a given case, not to decide whether *any* hearing is required. *See Mathews*, 424 U.S. at 334-35 (balancing factors relevant to determine "specific dictates of due process" in given case); *see also Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570 (1972) ("a weighing process has long been a part of any determination *of the form of hearing* required in particular situations by procedural

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providing for UAOs, "Congress envisioned a procedure that permits the EPA to move expeditiously in the face of a potential environmental disaster"). As with the district court in its 2005 opinion, these courts issued their opinions without the benefit of an evidentiary record. The other courts thus also did not have the record evidence of EPA pattern and practice that informs the procedural due process analysis at issue here. In addition, the Ninth Circuit's decision in *City of Rialto v. W. Coast Loading Corp.*, No. 08-55474, 2009 WL 2477625 (9th Cir. Aug. 14, 2009), which declined on jurisdictional grounds to permit a pattern and practice claim against the CERCLA UAO scheme to proceed at all, is unpersuasive and in any event inapposite since the court there concluded that the claim presented was "nothing more than a request for direct review of the validity of [a specific] UAO," *id.* at *10, and therefore barred by Section 113(h) of CERCLA. This Court, of course, has already held that GE's facial and pattern and practice claims are not precluded by Section 113(h).

due process") (emphasis added). As *Mathews* explains, the Supreme Court "consistently has held that *some sort of hearing is required* before an individual is finally deprived of a property interest." *Mathews*, 424 U.S. at 333 (emphasis added). "[H]owever weighty the governmental interest may be in a given case, the amount of process required can never be reduced to zero – that is, the government is never relieved of its duty to provide *some* notice and *some* opportunity to be heard prior to a final deprivation of a property interest." *Propert v. District of Columbia*, 948 F.2d 1327, 1332 (D.C. Cir. 1991). Because the government does not provide any pre-deprivation hearing in connection with UAOs, CERCLA § 106 – both on its face and as implemented through EPA's pattern and practice – violates the procedural due process rights of UAO recipients.

"[T]he root requirement of the Due Process Clause" is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (citations omitted); *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993). "Although the Court has held that due process tolerates variances in the form of a hearing appropriate to the nature of the case … the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (internal citations and quotations omitted).

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). The CERCLA UAO scheme violates this basic principle.

The government may avoid the requirement of a pre-deprivation hearing only in extraordinary situations – which EPA admits are not present here – where immediate government action is "necessary to secure an important governmental or general public interest" and there is a "special need for very prompt action." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678 (1974). "[I]t is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate (a protected) interest . . ., it must afford notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective." *Roth*, 408 U.S. at 570 n.7; *see also James Daniel Good*, 510 U.S. at 53 ("We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event.").

This Court thus need not even consider the *Mathews* factors in order to hold the CERCLA UAO scheme unconstitutional. Because EPA does not issue UAOs in emergencies, the absence of a pre-deprivation hearing is a fatal constitutional flaw in the scheme, both on its face and as implemented through EPA's pattern and practice.

B. EPA's Arguments To Avoid Its Pre-Deprivation Hearing Obligation Have No Merit.

EPA's contrary contention below that the UAO regime is constitutional despite the lack of any timely hearing was based on two arguments: (1) the deprivations conceded by EPA's own expert are not of the sort entitled to due process protection and (2) a UAO recipient's ability to talk to the EPA enforcement personnel who made the decision whether to issue the UAO satisfies the pre-deprivation hearing requirement. Neither argument has merit.

EPA conceded that a PRP that complies with a UAO suffers a pre-hearing deprivation of its constitutionally protected interest in the costs of the ordered response action, but argued that there is no constitutional protection for a non-complying PRP's property interest in its stock price, costs of financing, and brand value because those deprivations are purportedly consequential and intangible, rather than direct and concrete. The district court properly rejected this argument,

explaining that it is squarely contrary to the Supreme Court's opinion in *Connecticut v. Doehr*, 501 U.S. 1 (1991). (J.A. 0109-11.)[7]

Doehr involved a prejudgment attachment of real estate that, like a UAO, reduced the market value of the plaintiff's property. *See Doehr*, 501 U.S. at 12 ("By definition, attachment statutes premise a deprivation of property on one ultimate factual contingency – the award of damages to the plaintiff which the defendant may not be able to satisfy."). As EPA did here, the government in *Doehr* argued that the attachment did not give rise to an actionable deprivation of property because the "effects do not amount to a complete, physical, or permanent deprivation of real property." *Id.* The Supreme Court rejected that argument, explaining that an attachment deprives individuals of protected property interests because it "ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; [or] reduces the chance of obtaining a home

[7] The district court also correctly noted that the Supreme Court has long recognized that "[i]ntangible assets, like a brand name, may receive due process protection." (J.A. 0118) (citing *Del., Lackawanna & W. R.R. Co. v. Pennsylvania*, 198 U.S. 341, 359 (1905)); *see also Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) ("The assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a 'deprivation' under the Fourteenth Amendment."); *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993) ("Realistically appraised," government action "branding an airline unsafe" "had to work a significant deprivation of Reeve's constitutionally cognizable interest in avoiding the loss of government contracting opportunities based on stigmatizing charges").

equity loan or additional mortgage." *Id.* at 11; *see also Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 85 (1988) (lien that impairs "ability to mortgage or alienate" property imposes deprivation); *Reardon v. United States*, 947 F.2d 1509, 1518, 1523-24 (1st Cir. 1991) (en banc) (CERCLA lien provision unconstitutionally deprives recipient of protected property interest because it "cloud[ed] title, limit[ed] alienability, [and] affect[ed] current and potential mortgages."); *cf. United States v. Welch*, 327 F.3d 1081, 1108 (10th Cir. 2003) ("The Supreme Court recognized long ago that property defined in the 'ordinary, everyday sense[]' is not only the tangible 'thing which is the subject of ownership' but also 'the owner's [intangible] right to control and dispose of that thing.'") (quoting *Crane v. Comm'r*, 331 U.S. 1, 6 (1947) and citing *Doehr*).

EPA's second argument – that a UAO recipient's purported ability to complain to the same EPA officials who decided to issue the UAO qualifies as a due process "hearing" – also fails. As an initial matter, this argument is contrary to the record evidence of EPA's pattern and practice *not* to afford UAO recipients an opportunity to contest the UAO even before EPA enforcement personnel. (*See* J.A. 0700, 0354-55 ¶¶143-149, 1011-12.) In any event, even if UAO recipients could contest the UAO before EPA officials, this opportunity would in no way satisfy the requirement of due process. "The constitutional requirement of some kind of hearing means, at a minimum, that the affected individual must have a

meaningful opportunity to present his case before a neutral decisionmaker." *Propert*, 948 F.2d at 1333 (citing *Fuentes*, 407 U.S. at 83 and *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)). "Before one may be deprived of a protected interest … one is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge … which might lead him not to hold the balance nice, clear and true." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617-18 (1993); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) ("due process requires a neutral and detached judge in the first instance") (quoting *Concrete Pipe*)**.**

The district court correctly recognized that EPA does not provide UAO recipients with a pre-deprivation hearing before a neutral decision-maker. (J.A. 0134.) The district court erred however in relying on *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980), for the proposition – contrary to the precedent cited above – that due process can be satisfied by providing an opportunity to be heard by the same officials who issued the UAO. *Old Dominion* stands for no such proposition. In *Old Dominion*, the Court discussed this issue only in the context of *agreeing with the plaintiffs' argument* that the government had violated his due process rights when it failed even to provide such an opportunity. *See id.* at 968. The Court did not resolve the

question of what type of hearing must be provided, and it certainly did not hold that a hearing before the initial government decisionmaker would satisfy due process. *See id.* at 969 (remanding to district court with direction "to devise an appropriate remedy").

More informative is the Third Circuit's opinion in *Khouzam v. Attorney General*, 549 F.3d 235 (3d Cir. 2008). In *Khouzam*, the government – making the same argument as EPA here – contended that it had provided a resident alien with a sufficient hearing before initiating deportation because the alien could have sent a response to the officials who made the deportation decision explaining why he thought the decision was wrong. The Third Circuit squarely rejected this argument in terms equally applicable here:

> We refuse to regard the general ability of an alien to correspond with an agency as sufficient to satisfy due process, particularly after the agency has decided the pertinent issue. In addition to whatever other flaws may exist in this purported opportunity to argue, we note that [appellant] would not have had the benefit of a neutral and impartial decisionmaker.

Id. at 257-58; *see also Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259 (2009) ("no man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity") (quoting The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison); *Tri County Indus., Inc. v. District of Columbia*, 104 F.3d 455, 461 (D.C. Cir. 1997)

(procedures whereby a party could appeal the suspension of permit to the same official who made the decision "do not advance the ball").

Because UAO recipients are not provided a hearing of any type before a neutral decision-maker prior to the government action depriving them of their protected property interests, the Court should hold that CERCLA § 106 violates procedural due process, both on its face and through EPA's pattern and practice, and remand the case back to the district court for further proceedings on the nature of the pre-deprivation hearing that is required by the *Mathews* balancing test.

II. An Appropriate Balancing Of Private Interests, Governmental Interests, And Risk Of Error Requires That UAO Recipients Be Provided A Pre-Deprivation Hearing With Judicial-Type Procedures.

Where – as here – government action results in a deprivation of constitutionally protected property interests, *Mathews* instructs that three factors determine the contours of the pre-deprivation hearing that is required to satisfy due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. While the Court need not conduct this inquiry to find that due process has been violated here – because the statutory scheme provides no pre-

deprivation hearing at all – the *Mathews*' "ultimate balance" informs the precise nature of the pre-deprivation hearing that must be provided, that is, whether "under our constitutional system, *judicial-type procedures* must be imposed upon administrative action to assure fairness." *Id.* at 348 (emphasis added). Because the district court's application of *Mathews* was erroneous in key respects discussed below, review of this issue by the Court will materially advance the final resolution of this case, which is approaching its tenth year of litigation.

In its 2009 opinion, the district court correctly identified many of the key facts affecting the *Mathews* balance in this case, including that the private interests of a UAO recipient outweigh the governmental interest in avoiding a pre-deprivation hearing and that the UAO process imposes inherent risks of error due to the lack of any neutral review, the delegation of UAO authority to subordinate regional officials, and EPA's budgetary interest in issuing UAOs. The district court erred, however, in its legal analysis applying the *Mathews* balancing factors to the facts at issue. Correcting for these legal errors, the *Mathews* analysis clearly demonstrates that EPA must provide UAO recipients with a pre-deprivation hearing that incorporates "the procedures which have traditionally been associated with the judicial process," *Hannah v. Larche*, 363 U.S. 420, 442 (1960), including the right to present evidence and cross-examine opposing witnesses before a neutral trier of fact.

A. The District Court Correctly Held That The Pre-Hearing Deprivations Resulting From UAOs "Constitute Weighty Private Interests."

A UAO recipient's private interest in a pre-deprivation hearing dwarfs by orders of magnitude the private interests the Supreme Court has found to give rise to due process violations in other cases.[8] As the district court concluded based upon a fully developed record below, a UAO recipient can expect to incur pre-hearing deprivations totaling many millions of dollars, whether or not it complies with the UAO, and those deprivations will have collateral impacts on ongoing business operations that can never be recovered through any putative post-deprivation hearing right. (J.A. 0128.) The record evidence demonstrates that a UAO, on average, causes a pre-hearing deprivation of $4.4 million if a PRP complies and a pre-hearing deprivation of $76.4 million in market value, plus additional significant impacts on costs of financing and brand value, if a PRP does not comply. *Id*. at 0328-36 ¶¶1-35.

The district court correctly rejected EPA's argument that the UAO recipient's private interests "are less constitutionally significant because they are primarily financial," noting that the deprivations "are sufficiently large and have enough collateral effects to constitute weighty private interests." *Id*. at 0128. The

[8] *Sniadach v. Family Fin. Corp*., 395 U.S. 337 (1969), for example, involved a personal debt on a promissory note and the *ex parte* deprivation, by garnishment, of the use of $31.59 in wages. Likewise, *Fuentes*, 407 U.S. 67, involved the replevin of a stove and stereo valued at $500.00.

district court explained that "deprivations caused by UAOs are potentially so large … [that they] could put some PRPs out of business." *Id.* For these companies, of course, the private interest in securing a pre-deprivation hearing is not only weighty, it is existential. This deprivation cannot be remedied through a post-deprivation hearing, and EPA cannot cite to any other case in which a court has balanced away a company's very existence under a *Mathews* analysis. Further, the district court recognized that "[f]or other PRPs, UAOs may affect operations, like whether to bid for new projects or to hire additional employees." *Id.* Business opportunities lost during years of lower stock prices and higher finance costs cannot be recovered by a post-hoc finding that the UAO was improperly issued many years earlier. Likewise, the adverse impacts on brand value are irreparable and cannot be remedied through a later, delayed challenge to the UAO. *Id.* at 0333-34 ¶22.[9]

[9] In any event, the possibility that a PRP might recover some of its losses in a post-deprivation hearing does not excuse EPA of its obligation to provide PRPs with a hearing before the deprivation occurs. The Supreme Court has held that "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Fuentes*, 407 U.S. at 82 (citation omitted and alteration in original). "In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Zinermon v. Burch*, 494 U.S. 113, 132 (1990).

The harms to these weighty private interests are compounded by the long delay before a PRP can obtain any kind of post-deprivation review of a UAO. In addition to the magnitude of deprivation, "the possible length of wrongful deprivation" also "is an important factor in assessing the impact of official action on the private interests." *Mathews*, 424 U.S. at 341. As established from data in EPA's CERCLIS database, a PRP that complies with a UAO faces an average delay of five years for UAOs requiring remediations and 1.7 years for UAOs requiring removals before being able to seek a post-completion hearing. (J.A. 0344 ¶82.) For a PRP that elects not to comply with a UAO, the delay could be even longer, because the PRP would be forced to wait not only until the ordered response action is completed (by EPA or by other PRPs), but also potentially for the full length of the statutory limitations periods for EPA to bring an enforcement or cost recovery action (5 years for an enforcement action, 28 U.S.C. § 2462; 3 or 6 years after completion of specified site activities for an EPA cost recovery action, 42 U.S.C. § 9613(g)(2)). The period of the deprivation would thus extend for years regardless whether, as the district court queried, there was evidence that EPA would intentionally delay cost recovery or enforcement proceedings.

In *Reardon*, the *en banc* First Circuit (including then-Judge Breyer) held in circumstances analogous to this case that the likelihood of delay before any EPA

enforcement hearing weighed heavily in favor of pre-deprivation review of EPA decisions to impose liens for Superfund liability:

> The first hearing the property owner is likely to get is at the enforcement proceeding, or the cost recovery action, brought by EPA …. 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.… Indeed, in this respect the CERCLA scheme resembles the replevin statutes in *Fuentes v. Shevin*, where the Court held that a debtor may not be "left in limbo to await a hearing that might or might not 'eventually' occur." *Mitchell v. W.T. Grant Co.*, 416 U.S. at 618, 94 S.Ct. at 1905 (discussing *Fuentes v. Shevin*).

947 F.2d at 1519-20. A PRP who receives a UAO is similarly "left in limbo." While waiting for "a hearing that might or might not eventually occur," the PRP has no ability to escape the continuing adverse impacts on its business operations occasioned by the UAO.

The district court's holding that GE bore the burden of establishing that EPA has in fact delayed enforcement proceedings was improper in any event because the coercive nature of the UAO process is such that it is very rare for a PRP to elect not to comply with a UAO. (J.A. 0355 ¶150.) The threat of treble penalties and accumulating fines of $32,500 per day for UAO noncompliance "impos[e] such conditions upon the right to appeal for judicial relief as work an abandonment of the right." *Ex Parte Young*, 209 U.S. 123, 147 (1908). Accordingly, the

CERCLIS database only contains *three* instances in which EPA was required to pursue an enforcement action for UAO noncompliance. (J.A. 0356 ¶153.) In one of those actions resulting in a published opinion, EPA delayed bringing its enforcement action more than five years after the UAO was issued and three years after the Agency asserted the PRP had failed to comply. *United States v. Barkman*, No. Civ. A. 96-6395, 1998 WL 962018, at *16 (E.D. Pa. Dec. 17, 1998). The court ultimately ordered the PRP to pay daily penalties for a period exceeding five years. *Id.* at *18.

A UAO recipient's private interest in avoiding multi-million-dollar deprivations and prolonged disruption to ongoing business operations is clearly "weighty" and moves the *Mathews* scales strongly towards judicial-type procedural protections in a pre-deprivation hearing.

B. The District Court Correctly Held That The Governmental Interest In Avoiding A Pre-Deprivation Hearing On A Specific UAO Is "Minimal."

As the district court properly recognized, two factors are paramount in identifying the governmental interest under the *Mathews* analysis. "The first is whether the government has 'a special need for very prompt action.'" (J.A. 0130) (quoting *Fuentes*, 407 U.S. at 91). "The second factor is the financial and operational cost of additional process and the need to conserve 'scarce fiscal and

administrative resources.'" (J.A. 0130-31) (quoting *Mathews*, 424 U.S. at 347-348).

As detailed above, EPA does not have any special need for very prompt action in issuing UAOs because EPA does not use UAOs for emergencies. To the contrary, the undisputed evidence demonstrates that UAOs are not issued for years following EPA's identification of a site and of PRPs and that the timing of UAOs is driven by internal management factors rather than site conditions. Thus, there is more than ample time for pre-deprivation UAO hearings within the ordinary course of events at a CERCLA site, and providing such hearings would cause no meaningful adverse impact on the timeliness of site cleanups. *See Loudermill*, 470 U.S. at 544 (finding due process violation where providing pre-deprivation hearing would not impose "intolerable delays").

The *only* government interest upon which EPA can rely here in arguing against a pre-deprivation hearing is the same interest that the government can always assert against providing due process: such a hearing would cost money. But as this Court has recognized, "while cost to the government is a factor to be weighed in determining the amount of process due, it is doubtful that cost alone can ever excuse the failure to provide adequate process." *Propert*, 948 F.2d at 1335. This is because, as the Supreme Court has explained, while "[a] prior hearing always imposes some costs in time, effort, and expense, and it is often

more efficient to dispense with the opportunity for such a hearing.… these rather ordinary costs cannot outweigh the constitutional right." *Fuentes*, 407 U.S. at 92 n.22; *see also INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution").

In any event, as the district court properly recognized, the cost to the government of providing a pre-deprivation hearing to UAO recipients will vary depending upon the degree of process that is ultimately deemed necessary. The district court explained, for example, that "[f]or any given UAO, a hearing before a presiding officer would add only weeks or a few months to an issuance process that usually takes years.… Moreover, the costs of a single hearing before a presiding officer are minimal, especially considering the size of the private interests at stake." (J.A. 0142.) Likewise, the district court concluded that EPA "has a lower interest in avoiding the less formal process before an ALJ." *Id.* at 0132.

Having reached this proper factual conclusion, however, the district court erred by making a one-sided adjustment to the *Mathews* scale and concluding that the cumulative cost to the government of providing additional process for *all* UAOs would create a governmental interest sufficient to avoid any pre-deprivation hearings. This conclusion was premised on the district court's speculation that if

such a hearing right were provided, "most PRPs would contest the UAO," *id*., notwithstanding the absence of any record evidence on the point. The district court also overlooked the facts that such hearings would require additional PRP expenditures and that many PRPs are "repeat players" who must also consider their ongoing relationship with the EPA. Moreover, the district court's conjecture was at odds with our constitutional tradition of ensuring that every citizen receives the fundamental protection of due process. The government routinely provides private parties with due process to challenge official government action in all areas of its operations without being inundated with meritless claims.

Even accepting the district court's speculative reasoning, moreover, its logic founders because if UAO hearings are to be considered cumulatively, then the court should aggregate the private litigants' interests as well. *See* Gerald L. Neuman, *The Constitutional Requirement of 'Some Evidence*,' 25 San Diego L.R. 631, 700 (1988) ("If the government's interest is to be taken in the aggregate, then the private interest must be defined as including all the erroneously rejected claims"). The final relative balance should thus remain the same. Indeed, were the Court to accept the district court's one-sided adjustment, the (aggregated) governmental interest would virtually always outweigh the private interest at stake, and the procedural due process protections currently required in all manner of government operations would be placed in jeopardy.

That the government can provide pre-deprivation hearings without significant burden to the governmental interest is demonstrated by the numerous other environmental and public health regimes in which EPA routinely provides such hearings. For example, under the Safe Drinking Water Act, EPA may issue emergency orders based on a finding of "imminent and substantial endangerment to health," but nothing in the statute precludes immediate judicial review, and courts have concluded that such review must be provided. *See* 42 U.S.C. § 300i; *W.R. Grace & Co. v. EPA*, 261 F.3d 330, 338 (3d Cir. 2001); *Trinity Am. Corp. v. EPA*, 150 F.3d 389, 394 (4th Cir. 1998); *Imperial Irrigation Dist. v. EPA*, 4 F.3d 774, 774 (9th Cir. 1993). Under the Toxic Substances Control Act, if EPA confronts an imminent hazard it must commence a civil judicial action seeking an order seizing the imminently hazardous chemical substance or other relief against persons distributing such substances. 15 U.S.C. § 2606. Under the Federal Insecticide, Fungicide and Rodenticide Act, if EPA makes a finding of "imminent hazard," it can issue an order suspending the registration of a pesticide, which effectively halts its use, but the recipient has five days to request an expedited hearing of the suspension order, during which time the order is held in abeyance, and following the hearing the recipient may seek full judicial review of the order. 7 U.S.C. § 136d(c).[10] Given the ability of EPA to operate within the constraints of

[10] Note that if EPA makes a finding of "emergency," the suspension order is not

due process even in emergency situations (which are not present here), EPA cannot reasonably maintain that it needs a special exemption from the Constitution in the context of CERCLA UAOs. In sum, EPA's interest in avoiding a hearing on its UAOs is nothing more than a convenience that is not available in other settings.

EPA's argument fails here as well because EPA maintains – albeit based on a dubious record – that it provides PRPs with adequate post-deprivation opportunity to challenge a UAO through a § 106(b) reimbursement petition or an EPA enforcement action. Thus, EPA's argument is not that UAO recipients should not be provided a hearing, but that the hearing constitutionally can be delayed. But a meaningful UAO hearing would not impose any greater costs on the government if provided before, rather than after, the deprivation. As the Supreme Court explained in *Connecticut v. Doehr*, "the State cannot seriously plead additional financial or administrative burdens involving predeprivation hearings when it already claims to provide an immediate post-deprivation hearing." 501 U.S. at 16; *see also James Daniel Good*, 510 U.S. at 59 ("[f]rom an administrative standpoint it makes little difference whether that hearing is held before or after the seizure").

EPA's argument also ignores a countervailing governmental interest in favor of a pre-deprivation hearing. As the Court noted when the case was previously before it on appeal, a "decision on GE's due process claim that is favorable to GE

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stayed pending the expedited hearing. 7 U.S.C. § 136d(c)(3).

would afford EPA an opportunity to provide due process review at an early stage." *Gen. Elec. Co.*, 360 F.3d at 194 (J.A. 0048); *see also Reardon*, 947 F.2d at 1523 ("we do not believe that EPA has a legitimate interest in exceeding the limits of its authority under CERCLA"). Not only will pre-deprivation hearings provide an opportunity for EPA to correct erroneous determinations as to liability, but also they will afford EPA an opportunity to correct erroneous remedy selections before they are implemented. These opportunities are completely lost in the current regime, which "impos[es] such conditions on the right to appeal for judicial relief as work an abandonment of the right." *Ex Parte Young*, 209 U.S. at 147.

In sum, the governmental interest in avoiding pre-deprivation hearings is minimal and is not entitled to substantial weight in the *Mathews* analysis.

C. Having Correctly Recognized The "Abstract" Risks Of Error Inherent In The UAO Regime, The District Court Erred In Holding That GE Was Obligated To Establish A Substantial Actual Rate Of Error And In Failing Properly To Weigh The Historical Evidence Of EPA Erroneous Remedy Selections At CERCLA Sites.

1. The Lack of Procedural Protections Afforded UAO Recipients Gives Rise to An Unacceptable Risk of Error.

The central premise of due process is that "no better instrument has been devised for arriving at truth" than the notice and hearing requirement. *Doehr*, 501 U.S. at 14 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)); *see also Gray Panthers v. Schweiker*, 652 F.2d 146, 161 (D.C. Cir. 1980) (same).

> (T)he fair process of decisionmaking that (the requirement of notice and an opportunity to be heard) guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantially unfair and simply mistaken deprivations of property can be prevented.

Schweiker, 652 F.2d at 162 (quoting *Fuentes*, 407 U.S. at 81). As the Supreme Court recently explained, "even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error … inherent in any process that … is closed and accusatorial." *Boumediene v. Bush*, 128 S. Ct. 2229, 2270 (2008).

The district court properly identified three characteristics of EPA's exercise of its UAO authority that increase the risk of error. First, EPA affords UAO recipients no opportunity to challenge a UAO before a neutral decisionmaker.[11]

[11] While the district court correctly recognized that the lack of a neutral decisionmaker increases the risk of error, it erred in failing to recognize that this deficiency gives rise to a due process violation independent of the *Mathews* balancing test. As one court explained:

> If the only problem with biased decisionmakers was the likelihood of error, it would make sense to apply the *Mathews* balancing test in cases involving allegation of biased decisionmakers and to subsume the problem of bias under the "risk of erroneous deprivation" prong of the three-part test. However, the requirement of an impartial decisionmaker transcends concern for diminishing the likelihood of error.

Instead, such recipients may present objections only to the very EPA officials who decided to issue the UAO in the first instance. (J.A. 0134); *see supra* at 10-11, 28-31; *see also Amos Treat & Co. v. SEC*, 306 F.2d 260, 266 (D.C. Cir. 1962) ("We are unable to accept the view that a member of an investigative or prosecuting staff may initiate an investigation, weigh its results, perhaps then recommend the filing of charges, and thereafter become a member of that commission or agency, participate in adjudicatory proceedings, join in commission or agency rulings and ultimately pass on the possible amenability of the respondents to the administrative orders."). Second, EPA has delegated its UAO authority away from headquarters to subordinate officials at EPA regional branches, meaning that UAO recipients are deprived even of meaningful internal review of erroneous UAO decisions. (J.A. 0134)*; see James Madison Ltd. ex rel. Hecht v. Ludwig*, 82 F.3d 1085, 1100 (D.C. Cir. 1996) (risk of error ameliorated, *inter alia*, through oversight by senior and central government officials). Third, EPA "stands to benefit by issuing UAOs because EPA has an interest in conserving Superfund resources." (J.A. 0134); *see James Daniel Good*, 510 U.S. at 55-56 & n.2 (finding increased risk of error where, as here, government action is influenced by budgetary constraints); (J.A.

United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128, 138 (3d Cir. 1986), *abrogated in part on other grounds, Concrete Pipe & Prods.*, 508 U.S. 602 (1993).

0340-41 ¶¶58-62) (EPA guidance calling for increased use of UAOs due to budgetary constraints).

The history of EPA's pattern and practice reveals once again why the Supreme Court has prohibited regulatory schemes that "in effect … close up all approaches to the courts, and thus prevent any hearing upon the question whether [the government's decision was] invalid." *Ex Parte Young*, 209 U.S. at 148. In the early 1990s, recognizing that its UAO authority was effectively unreviewable, EPA adopted an "enforcement first" policy under which it issues UAOs at every site at which a PRP has not agreed to enter into a consent decree. (J.A. 0341 ¶¶64-66.) Further, EPA responded to PRP objections to its model consent decree by using its UAO authority to coerce PRPs into compliance. *See id.* at 0611 (discussing "recommendations for methods by which PRPs can be encouraged to choose the model consent decree by making the UAO an unattractive alternative"); *id*. at 0342-43 ¶¶74-80. Rather than being tied strictly to environmental need, UAOs thus are used as: (1) negotiation sledge hammers, with Superfund personnel trained to make the terms of UAOs "ugly, onerous, and tough" and "very unpleasant," *id.* at 0342-43 ¶75, (2) bullets in EPA's chamber for dealing with large groups of PRPs, whom Superfund personnel are trained to threaten with games of "Russian Roulette," *id.*, and (3) "beans" that can improve Superfund personnel's individual job evaluations. *Id.* at 0338-40 ¶¶48-57. EPA has

increasingly shielded itself from even the most limited challenges to its decisions by eliminating UAO review during UAO conferences with EPA staff, *id*. at 0354-55 ¶¶143-149, and it candidly acknowledges that it "is open to negotiations regarding [only] comparatively minor aspects of the Statement of Work." *Id*. at 1011-12. This is not a regime that is calculated to correct errors; it can only prevent their detection and correction.

2. The District Court Erred As A Matter of Law In Requiring GE To Establish An "Unacceptable Rate of Error" As A Prerequisite To A Due Process Hearing.

Having properly recognized the *risk* of error in UAO decisionmaking, the district court erred as a matter of law in holding that "GE must also demonstrate that the current procedures in fact would result in an unacceptable *rate* of error." *Id*. at 0133 (emphasis added). The district court cited no legal authority to support its imposition of a "rate of error" requirement, and this added requirement lacks precedential support. While some other courts have considered rate of error evidence when presented by the parties, no court has ever *required* a party to establish that the government has in fact acted in error as a prerequisite for securing due process rights.

To the contrary, as the Supreme Court explained in *Mathews*, "procedural due process rules are shaped by the risk of error *inherent in the truthfinding process*." 424 U.S. at 344 (emphasis added). Accordingly, the Supreme Court

consistently has focused on the nature of the procedural protections afforded in determining whether the risk of error was too steep, not on demanding evidence of actual error. And the Court has repeatedly held that even procedures far more protective than those afforded to UAO recipients present an unacceptable risk. In *Doehr*, for example, the Court found the risk of error too great even where a judge reviewed a complaint and affidavit prior to the attachment because there was no independent review of potentially "one-sided, self-serving and conclusory submissions." 501 U.S. at 13. Similarly, in *James Daniel Good*, the Court held that allowing the government to effect a deprivation of property via an *ex parte* probable cause hearing before a neutral magistrate suffered from an unacceptably high risk of error. *See* 510 U.S. at 55. In *United States v. E-Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008), this Court held that an *ex parte* emergency order seizing $1.5 million of assets of an illegal business violated procedural due process because of the absence of a post-deprivation hearing. This Court explained: "The inherent risk in allowing the deprivation of a property interest through *ex parte* proceedings accounts for the general rule that a prior adversary hearing is required, absent special circumstances." *Id.* at 418 (quoting *United States v. Monsanto*, 924 F.2d 1186, 1195 (2d Cir. 1991)). The district court's approach cannot be reconciled with any of these decisions.[12]

[12] Far from requiring evidence of actual error, the Supreme Court has held that

The district court compounded its legal error by constructing a "rate of error" in this case out of whole cloth. Because Section 106 precludes any meaningful opportunity to challenge UAOs, there is no record of neutral review of UAOs from which to calculate an error rate, and neither GE nor EPA made any effort below to do so. Indeed, the extraordinary immediate impacts of a PRP decision not to comply with a UAO are so severe that they have intimidated PRPs from exercising the purported option of electing not to comply with a UAO so as to test an order's validity, giving rise to an independent due process violation under *Ex Parte Young*, 209 U.S. at 147 (a statutory scheme violates due process if "the penalties for disobedience are by fines so enormous … as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation"); *see also MedImmune Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (government may not "require, as a prerequisite to testing the validity of the law … that the plaintiff bet the farm, so to speak, by taking the violative action").

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even proven *non-error* cannot excuse a due process violation: "[w]here a person has been deprived of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in this particular case due process of law would have led to the same result because he had no adequate defense on the merits.'" *Peralta*, 485 U.S. at 86-87 (quoting *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915)); *see also Fuentes*, 407 U.S. at 87 ("To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result.") (citation omitted).

Although the Court need not reach the *Ex Parte Young* issue to resolve this appeal, the factual record developed below demonstrates that EPA's coercive practices have been so effective that EPA's Rule 30(b)(6) designee was able to identify only two cases in which a PRP had elected at the outset not to comply with a UAO, both dating back to the 1980s (J.A. 550-51), and EPA's CERCLIS database identifies only three instances since 1982 when the agency was required to bring an enforcement action against a noncomplying PRP. *Id*. at 0356 ¶153.[13] Thus, the district court's rate of error requirement was not only legally unfounded but, on the facts of this case, imposed upon GE an impossible burden.[14]

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[13] In addition to the coercive practices discussed elsewhere herein, the record below demonstrates that EPA intimidates PRPs from challenging UAOs by, *inter alia*, maximizing the threat of noncompliance penalties by asserting that different violations of a single UAO could result in multiple $32,500 daily penalties (a position that led EPA to threaten one PRP with $90 million in penalties for alleged noncompliance with a single UAO over a 17 month period) (J.A. 0352-53 ¶133) and by refusing to provide guidance on what would constitute "sufficient cause" for UAO noncompliance to relieve a PRP of the risk of penalties, notwithstanding the Eighth Circuit's clear admonition over two decades ago that EPA should do so. *See Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 392 (8th Cir. 1987); (J.A. 0353-54 ¶¶135-142.)

[14] Instead, pursuant to *Mathews*, GE established that EPA's pattern and practice increased the *risk* of error, and it presented evidence in its opening brief relating to six specific UAOs to illustrate the real-world consequences of these EPA practices. Contrary to the district court's speculation (J.A. 0139-40), GE made clear in its briefing that it did not engage in an exhaustive search for errors at all of its UAO sites. *See id.* at 1037. That GE did not engage in such a search is amply demonstrated by the fact that, when EPA identified 3 *different* UAOs in its opposition brief, GE demonstrated EPA errors with those UAOs as well. *Id.*; *see also id.* at 0138 (district court concluding that EPA had committed errors at Vega

The district court's improper focus on an *ex post* "rate of error" also led the court mistakenly to dismiss evidence that the complex nature of EPA's decisions in selecting response actions required under its UAOs renders them highly prone to error. In *Ottati & Goss, Inc.*, 900 F.2d at 441 (Breyer, J.), the First Circuit found that EPA erred in selecting a response action to "achieve EPA's cancer goal" because the selected remedy "amount[ed] to a very high cost for very little extra safety." *Ottati & Goss* arose in the context of a CERCLA Section 106(a) judicial abatement action and, as noted above, EPA very shortly thereafter adopted its "enforcement first" policy under which it abandoned abatement actions in favor of the blanket use of UAOs. While EPA thus avoided further neutral review of its remedy selections, a subsequent EPA-funded study proffered into evidence by GE in the proceeding below (the "Viscusi study") demonstrates that the same risk of error found in *Ottati & Goss* continues to define EPA's remedy selection process under its "enforcement first" regime.

In particular, using EPA's own assessment of remedial costs and site risks, the Viscusi study found that EPA-selected remedies imposed a median cost of $388 million per case of cancer averted (the primary measure in EPA risk assessment), with wide discrepancies between site remedies such that the cost at

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Alta and Solvent Savers sites, which were not discussed by GE until identified in EPA's opposition brief).

roughly one-third of the sites exceeded $1 billion per each cancer avoided. (J.A. 0347-48 ¶¶108-109.) The study also demonstrated that the driving factor behind EPA's remedy selections were not environmental conditions at the site but rather political and public relations considerations. *Id.* at 0349 ¶¶113-114.

These study results demonstrate that site-specific remedy selections – which are an integral part of UAOs – involve the complex types of "highly factual" questions that give rise to an unacceptably high risk of error. *See Doehr*, 501 U.S. at 8; *Reardon*, 947 F.2d at 1519 ("[w]hether the response costs were incurred consistently with the national contingency plan is an issue which may be highly factual"); *see also Tri County Indus., Inc.*, 104 F.3d at 461-62 ("high" risk of error in "complex technical" environmental analysis). Rather than properly weighing this evidence of the risk of error, however, the district court rejected it out-of-hand because the Viscusi study was not limited to UAO sites and therefore "does not show that EPA errs in issuing UAOs." (J.A. 0137.) Thus, the district court's faulty "rate of error" focus blinded the court to the due process implications of the heightened risk of error arising both from the lack of procedural protections and from the complexity of the EPA decisions at issue in its UAOs.

III. EPA Cannot Justify Its Deprivation Of UAO Recipients' Due Process Rights By Reliance On *Salerno*.

In *United States v. Salerno*, the Supreme Court instructed that parties challenging a statute as facially unconstitutional cannot prevail based upon

hypothetical or imaginary applications of the statute: "The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." 481 U.S. at 745; *see also United States v. Raines*, 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."). In its most recent elaboration of *Salerno*, the Supreme Court noted:

> While some members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a plainly legitimate sweep.… In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases.… Exercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretation of statutes in areas where their constitutional application might be cloudy.

Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190-91 (2008).

In its effort to defend CERCLA § 106, EPA below completely subverted the meaning of *Salerno*, arguing that: (1) GE's facial challenge must be rejected if EPA can offer any hypothetical scenario in which the statute would be constitutional, and (2) the Supreme Court's concern about "premature interpretation of statutes" in facial challenges should be extended to GE's pattern

and practice challenge, despite the nearly 30-year history of EPA's actual application of Section 106. EPA's arguments are without merit.

EPA's reliance on *Salerno* in response to GE's facial challenge fails at its inception because – even if *Salerno* allowed the government to defend a statute with a plainly illegitimate sweep based upon a hypothetical constitutional application – EPA cannot point to such an application here. In its 2005 opinion, the district court concluded that *Salerno* required dismissal of GE's facial challenge because "the Court can envision at least one scenario whereby Section 106 would be constitutional – true emergency situations." (J.A. 0079.) But that "envisioned" constitutional application of Section 106 has now been shown to be a mirage because UAOs are not used in emergencies. Even if EPA could proffer some alternative scenario in which Section 106 would be constitutional, however, that would not justify the continued violation of UAO recipients' due process rights in the ordinary application of the statute. EPA's overreaching interpretation of *Salerno* runs directly contrary to a solid line of precedent that requires partial invalidation of statutes in these circumstances:

> It is axiomatic that a statute may be invalid as applied to one state of facts and yet valid as applied to another. Accordingly, the normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may … be declared invalid to the extent that it reaches too far, but otherwise left intact.

Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 330 (2006) (internal quotations omitted) (citing cases).

EPA's invocation of *Salerno* to defend against GE's pattern and practice claim is even more strained. *Salerno* arose out of the concern that facial statutory challenges often rest on speculation and are presented before there is a history of actual statutory implementation. Facial challenges thus "raise the risk of premature interpretation of statutes on the basis of factually barebone records" and "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance … nor formulate a rule of constitutional law broader than is required." *Wash. State Grange*, 128 S. Ct. at 1191. GE's pattern and practice challenge, however, is based upon a voluminous record drawn from EPA's 30-year history in exercising its UAO authority. Moreover, facial challenges are premised on arguments that a statute would be unconstitutional in other cases involving third parties not before the court. *See City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (describing "the threshold for facial challenges" as "a species of third party (*jus tertii*) standing"). In sharp contrast, in its pattern and practice challenge, GE is asserting its own rights as a PRP that has been and remains subject to numerous UAOs.

Salerno accordingly has no application in this case.

CONCLUSION

For the reasons set forth herein, CERCLA § 106 violates UAO recipients' right to procedural due process, both on its face and as implemented through EPA's pattern and practice. The judgment of the district court should be reversed and the case remanded for further proceedings consistent with the Court's opinion.

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Certificate of Compliance with Rule 32(a)

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,963 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14 Font.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 29, 2009, two copies of the foregoing General Electric Company's Appellate Brief were served on the following counsel of record by Federal Express Overnight delivery.

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