ORAL ARGUMENT IS SCHEDULED FOR FEBRUARY 12, 2009.
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

AMICUS BRIEF FOR NATURAL RESOURCES DEFENSE COUNCIL, HUDSON RIVER SLOOP CLEARWATER, RIVERKEEPER, INC., AND SCENIC HUDSON IN SUPPORT OF DEFENDANTS-APPELLEES

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November 24, 2009

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Certificate as to Parties, Rulings, and Related Cases filed on April 29, 2009, by Appellee Environmental Protection Agency.

B. Ruling Under Review

References to the rulings at issue appear in the Certificate as to Parties, Rulings, and Related Cases filed on April 29, 2009, by Appellee Environmental Protection Agency.

C. Related Cases

References to the related cases at issue appear in the Certificate as to Parties, Rulings, and Related Cases filed on April 29, 2009, by Appellee Environmental Protection Agency.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, no corporation owns 10 percent or more of the stock of the Natural Resources Defense Council, Hudson River Sloop Clearwater, Riverkeeper, Inc. or Scenic Hudson.

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GLOSSARY

CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
Chamber	U.S. Chamber of Commerce
EPA	U.S. Environmental Protection Agency
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
GE	General Electric Co.
JA	Joint Appendix
NPL	National Priorities List
PCBs	Polychlorinated Biphenyls
PRP	Potentially Responsible Party
ROD	Record of Decision
SDWA	Safe Drinking Water Act
TSCA	Toxic Substances Control Act
UAO	Unilateral Administrative Order

STATEMENT OF INTEREST

Appellant General Electric Co. ("GE") seeks to undermine the ability of the U.S. Environmental Protection Agency ("EPA") to enforce the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA", also knows as "Superfund"), the most important law protecting human health and the environment from the toxic waste that contaminates the nation's lands and waters. Each of the four environmental organizations submitting this brief in support of EPA ("Environmental *Amici*") has been involved in the longstanding effort to clean up a 200-mile stretch of the Hudson River that is contaminated by polychlorinated biphenyls ("PCBs") discharged from two GE manufacturing plants.[1] Environmental *Amici* are gravely concerned that, if GE prevails here, the result will be further delays in the Hudson River cleanup process, which has already taken far too long. In addition, a ruling in GE's favor is likely to lead to further delays in other efforts to clean up many of the tens of thousands of other toxic-waste sites covered by CERCLA — over 1,000 of

[1] Authority to file this brief was granted by this Court on June 11, 2009.

which, like the Hudson River, are designated on EPA's National Priorities List ("NPL").[2]

Rather than repeating the lengthy procedural history of this case, and before addressing GE's due process argument, this brief describes the Hudson River cleanup efforts, which provide a concrete illustration of the interests at stake. The Hudson River is only one of more than 100 NPL sites to which EPA has linked GE.[3] GE trails only two other companies for the distinction of being identified as a probable polluter of the most such sites.[4]

For a thirty-year period from 1947 to 1977, GE discharged an estimated 1.3-million pounds of PCBs into the Hudson River from two manufacturing plants located in Fort Edward and Hudson Falls, New York. EPA has determined that PCBs are probable human carcinogens and pose a number of serious non-cancer health hazards to brain functions and the

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[2] *See* U.S. Environmental Protection Agency, *Superfund Sites Where You Live* (June 3, 2009), *available at* http://www.epa.gov/superfund/sites/index.htm; U.S. Environmental Protection Agency, *National Priorities List (NPL)* (November 16, 2009), *available at* http://www.epa.gov/superfund/sites/npl; *see generally* 40 C.F.R. §300.425(b)-(c).

[3] *See* Center for Public Integrity, *General Electric Company: Superfund Site Status* (2008), *available at* http://projects.publicintegrity.org/Superfund/Company.aspx?act=7949.

[4] Alex Knott, *EPA Document Lists Firms Tied to Superfund Sites*, Center for Public Integrity (April 26, 2007), *available at* http://projects.publicintegrity.org/superfund/report.aspx?aid=849.

nervous, immune, and reproductive systems.[5] Moreover, the adverse and potentially irreversible harms to developing children are especially alarming: PCBs "pose special risks to pregnant women and have been linked to premature births and lowered IQs in children."[6]

Many of GE's PCB discharges remain concentrated in "hotspots" in the sediments of the Upper Hudson, from which toxic pollution flows continuously throughout the river below Hudson Falls. Because of this contamination, EPA classified a 200-mile stretch of the Hudson River from Hudson Falls to the Battery in New York City as a Superfund NPL site in 1984.[7]

EPA estimates that cancer risks from eating PCB-contaminated fish from the Upper Hudson are 1,000 times higher than the EPA standard.[8] As a result, the New York State Department of Health has recommended severe

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[5] U.S. Environmental Protection Agency, *PCBs and Human Health* at 2 (October 19, 2009), *available at* http://www.epa.gov/hudson/humanhealth.htm.

[6] *Id*. at 2.

[7] *Hudson River PCBS: New York* at 1 (December 31. 2008), *available at* http://www.epa.gov/region02/superfund/npl/0202229c.pdf.

[8] U.S. Environmental Protection Agency, *Executive Summary Human Health Risk Assessment: Upper Hudson River* at 4-5 (August 1999), *available at* http://www.epa.gov/hudson/humanhealth.htm (follow "Executive Summary – August 1999 Human Health Risk Assessment for Upper Hudson River" hyperlink).

restrictions on eating Hudson River fish.[9] But despite these warnings and outreach efforts by concerned groups, many people, including low-income subsistence fishermen along the Hudson, have continued to catch PCB-contaminated fish and eat them with their families, placing them at risk.[10] Moreover, because of the PCB contamination, New York State has shut down once-thriving commercial fisheries on the lower Hudson, historically one of the most productive estuaries of the East Coast.[11]

In addition to illustrating the environmental harms underlying the legal issues presented in this case, the Hudson River cleanup demonstrates the rigor of the procedures that GE attacks as constitutionally inadequate. In 1990, after urging by New York State, EPA, pursuant to CERCLA, began a lengthy and comprehensive reassessment of a 1984 decision not to clean up

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[9] New York State Department of Health, *Hudson River Health Advice on Eating Sportfish 2009 - 2010* (August 2009), *available at* http://www.nyhealth.gov/environmental/outdoors/fish/hudson_river/docs/hudson_river_eating_advice.pdf.

[10] *See, e.g.,* New York State Department of Health, *Survey of Hudson River Anglers and an Estimate of Their Exposure to PCBs* (Sept. 30, 1998), *available at* http://www.atsdr.cdc.gov/HAC/PHA/hudsonri/hud_toc.html.

[11] U.S. Environmental Protection Agency, *The Hudson River (NY) an American Heritage Designated River* (October 19, 2006), *available at* http://www.epa.gov/rivers/98rivers/hudsonplan.html.

the Hudson.[12] During the ten-year reassessment project, EPA held more than 75 public meetings,[13] typically with opportunity for at least informal public comment and questioning of agency officials.

Additionally, to ensure the quality of the science behind the reassessment, EPA convened five separate peer review panels. Four of the reviews were conducted by independently chosen scientists from around the world; the fifth was conducted by the National Remedy Review Board as part of a CERCLA process.[14]

On December 12, 2000, EPA issued its proposed cleanup plan. As required by CERCLA, 42 U.S.C. §§9613(k)(2), 9617, GE and other interested parties enjoyed numerous opportunities to comment on the proposal. From December 2000 to April 2001, EPA held eleven public meetings.[15] EPA also extended its original 60-day comment period on the proposed cleanup plan to a total of 120 days.[16] EPA received and considered

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[12] U.S. Environmental Protection Agency, *Hudson River PCBs Site New York*, Record of Decision at ii (Feb 2002), *available at* http://www.epa.gov/hudson/RecordofDecision-text.pdf.

[13] *Id*. at 8-9.

[14] *Id*. at 10-12.

[15] *Id.* at 9.

[16] *Id*.

more than 70,000 comments on the proposed plan.[17] EPA's responses to those comments comprise three volumes totaling over 1,300 pages, replete with hundreds of technical figures and tables and four appendices.[18] In addition to participating in those formalized proceedings, GE met privately on multiple occasions with officials from EPA and the White House Budget Office to argue against a cleanup of the river. *New York Public Interest Research Group v. EPA*, 249 F. Supp. 2d 327, 329-30, 338 (S.D.N.Y. 2003).

On February 1, 2002, a dozen years after the reassessment began, EPA issued a Record of Decision ("ROD") under CERCLA for the Hudson River PCBs Superfund Site.[19] The ROD called for targeted dredging of 2.65 million cubic yards of sediment containing 150,000 pounds of PCBs from the Upper Hudson River.[20] Following protracted negotiations between EPA and GE, and following GE's development, under EPA supervision, of detailed engineering designs, the dredging project — originally slated to begin in 2005 — finally began in the spring of 2009.

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[17] *Id*. at vi.

[18] U.S. Environmental Protection Agency, *Hudson River PCBs: Download Responsiveness Summary and Record of Decision* (October 2, 2009), *available at* http://www.epa.gov/hudson/d_rod.htm#response.

[19] ROD.

[20] *Id*. at 91.

The remediation project involves two separate phases, with approximately 90% of the cleanup to occur in Phase 2.[21] In the federal court consent decree governing Phase 1, GE has retained the option not to perform this larger Phase 2 remediation,[22] and EPA has reserved the right to take further legal action, including issuance of a unilateral administrative order ("UAO"), to ensure completion of Phase 2.[23] As explained below, a UAO functions as a cleanup directive that is not self-enforcing and is subject to judicial review, but which a polluter ignores at its own peril. Were this Court to accept GE's arguments and require EPA to hold trial-type hearings before it issues UAOs, one likely result would be many more years of injury to public health and the environment from GE's toxic contamination of the Hudson River and at many other Superfund sites where cleanups would be further delayed.

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[21] *See* U.S. Environmental Protection Agency, *Hudson River PCBs: First phase of Hudson River dredging project complete* (November 19, 2009), *available at* http://www.epa.gov/hudson.

[22] Consent Decree at 11 (¶6), 19 (¶15.c), *United States v. Gen. Elec. Co.*, No. 1:05-CV-1270 (N.D.N.Y. Nov. 2, 2006).

[23] Plaintiff's Memorandum in Support of Submission Requesting Entry of Consent Decree at 16, *United States v. Gen. Elec. Co.*, No. 1:05-CV-1270 (N.D.N.Y. May 17, 2006) ("If GE opts out of Phase 2, EPA's rights are reserved to issue a unilateral administrative order. . . .).

SUMMARY OF ARGUMENT

I. Although the district court correctly rejected GE's due process argument after a thorough analysis of the factors listed in *Mathews v. Eldridge*, 424 U.S. 319 (1976), that analysis was unnecessary because GE made no showing that a UAO deprives it of a property interest. The district court recognized that a potentially responsible party ("PRP") loses no property when EPA *issues* a UAO because a PRP can choose not to comply with the order, even though the issuance of a UAO may lead to a lowering of the PRP's stock price and brand reputation. But the court indulged GE's claim that a PRP might suffer a property deprivation if it *refuses* to comply with a UAO because it might suffer "enhanced" losses. That claim was legally unsupportable. Companies have no protected interest in their stock price because stock price is simply an indicator of a company's reputation with the market — the market's expectations about the company's future profitability. Similarly, GE's brand reputation is not a protected interest because, as the Supreme Court held in *Paul v. Davis*, 424 U.S. 693, 701 (1976), there is typically no claim under the Due Process Clause for reputational injury.

II. Even if stock price and brand reputation were protected interests, GE's claim would fail because PRPs already receive numerous

opportunities to present evidence and make arguments before EPA issues a UAO. EPA is required to consider and respond to these submissions, and the agency's determinations are subject to judicial review. For that reason, a trial-type hearing pre-issuance, which would likely delay cleanup by years, would be unlikely to reduce the risk of error. Moreover, PRPs' interests in such procedures pale in comparison to the other relevant interests. The government has an enormous interest in directing companies to expeditiously clean up contaminated environmental sites like the Hudson River. EPA is authorized to issue a UAO only after determining that a site poses an "imminent … endangerment" to the public health and environment, 42 U.S.C. §9606(a), and, as the Hudson River contamination demonstrates, cleanup of Superfund sites needs to be faster, not slower. In addition, Congress protected PRPs' interests by ensuring them an opportunity for judicial review of a UAO before penalties are assessed for non-compliance and the right to avoid penalties if they had "sufficient cause" to challenge the order. *Id*. §§9613(h)(2), 9606(b)(1), 9607(c)(3). Alternatively, PRPs issued a UAO may conduct cleanup and then seek reimbursement from EPA if they can establish the UAO was issued in error. *Id*. §9613(h)(2)-(3).

III. A ruling in GE's favor would thwart the government's ability to take numerous routine actions — from conducting criminal investigations or

announcing the results of government studies to filing lawsuits and seeking indictments. Each of those actions, taken daily by scores of federal and state agencies, may affect a company's stock price or brand reputation. But it is well established that agencies are not required to hold trial-type hearings before taking such actions. Contrary to the claim of *amicus* Chamber of Commerce, the procedures governing the issuance of UAOs are not unusual — except perhaps in giving PRPs numerous opportunities to present arguments and evidence — and many courts have rejected claims that the Due Process Clause requires trial-type procedures under similar regulatory regimes.

ARGUMENT

I. Neither The Issuance Of A Unilateral Administrative Order Nor A Refusal To Comply With One Deprives A Potentially Responsible Party Of A Protected Interest.

The district court found that EPA provides PRPs with more than adequate process to justify even a serious deprivation of property. That conclusion was correct. But the district court did not need to reach the issue of how much process was due. The right to due process is triggered only when the government deprives a person of a protected property or liberty interest, and GE failed to show that PRPs are deprived of any interest protected by the Due Process Clause.

A. The Issuance Of A UAO Does Not Deprive A Party Of A Protected Interest.

A UAO does not compel its recipient to do anything. It is not self-enforcing, and its recipient is entitled to challenge the order simply by refusing to obey it. As this Court has previously explained, "If a party fails to comply [with a UAO] , EPA may file a civil action in the district court to enforce the UAO," *GE v. EPA*, 360 F.3d 188, 190 (D.C. Cir. 2004); in such an action, the district court has "jurisdiction . . . to review" the propriety of the remedy included in the UAO, on the basis of the administrative record underlying it, 42 U.S.C. §§9613(h)(2), (j), and to review, *de novo*, the liability of the particular recipient of the UAO for implementing any remedy at all. *Kelley v. EPA*, 15 F.3d 1100, 1107 (D.C. Cir. 1994); s*ee also Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1507 n.24 (11th Cir. 1996) (until a court enters an order to enforce a UAO, the UAO is merely EPA's statement in its "role as prosecutor" that the recipient "is liable under CERCLA given the facts of a particular case."). Accordingly, as numerous courts have held under CERCLA and similar statutes, the issuance of an administrative order cannot, and does not, deprive a PRP of property. *See, e.g.*, *S. Pines Assoc. v. United States*, 912 F.2d 713, 717 (4th Cir. 1990) ("Contrary to their claim, appellants' fifth amendment rights are not violated [by a pre-hearing administrative order under the Clean Water Act] because

they are not subject to an injunction or penalties until EPA pursues an enforcement proceeding."); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315-16 (2d Cir. 1986) (noting that recipient of a CERCLA UAO "can refuse to comply" and that any penalties "may be imposed only after a judicial hearing"); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217-18 (1994) (finding no prehearing deprivation because petitioner could refuse to comply with order of Secretary of Labor under the Mine Act).[24]

B. A Party's Refusal To Comply With A UAO Does Not Constitute A Deprivation Of Property.

The district court first determined that "[n]either stock price/cost of financing impacts nor brand value depletions are protected property interests upon mere issuance of a UAO." *GE v. Jackson*, 595 F. Supp. 2d 8, 22 (D.D.C. 2009). But the court went on to find that a PRP might be deprived of property if it chose not to comply with a UAO because non-compliance

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[24] *See also Employers Ins. v. Browner*, 52 F.3d 656 (7th Cir. 1995) (rejecting challenge to UAO and judicial-review provisions in CERCLA, 42 U.S.C. §§9606(b), 9613(h)); *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 388-90 (8th Cir. 1987) (rejecting challenge to UAO and judicial review provisions in CERCLA, 42 U.S.C. §§9606(b), 9607(c)(3), 9613(h)); *Fairchild Semiconductor Corp. v. EPA*, 984 F.2d 283 (9th Cir. 1993) (rejecting challenge to CERCLA judicial review provision, 42 U.S.C. §9613(h)); *Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289, 295-296 (6th Cir. 1991) (same); *Dickerson v. EPA*, 834 F.2d 974, 978 n.4 (11th Cir. 1987) (same).

could result in immediate “damage to stock price and damage to brand value.” *Id.* at 27. That ruling is legally unsupportable.

1. A Drop In Stock Price Is Not An Injury To A Protected Property Interest.

A company’s stock price is not an asset owned by the company. Rather, it is a reflection of the market’s best guess about the company’s future profits: “the present value of anticipated future returns — dividends and other distributions.” *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 500 (7th Cir. 1989) (Easterbrook, C.J.). As a result, a company’s stock value fluctuates based on the market’s speculation about a company’s future. Stock value will decline if the market believes that the company may incur a legal liability at some time in the future. The latter scenario is what GE’s expert refers to as a “contingent liabilit[y].”[25] And while GE attempts to equate a “contingent liability” with an actual property deprivation, the ideas are distinct. A contingent liability is simply the market’s prediction that GE might be found liable at some point in the future; a property deprivation does not occur until later — when GE is found legally liable by a court or when the government actually seizes its property.

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[25] *See GE*, 595 F. Supp. 2d at 23.

In conflating a contingent liability with a property deprivation, GE's argument goes against years of cases distinguishing the two. For example, although it is well known that corporations typically suffer a decline in stock price when they become the subject of a government investigation,[26] this Court has long held that the government may initiate an investigation without implicating due-process concerns. *E.g. Sloan v. HUD*, 231 F.3d 10, 18 (D.C. Cir. 2000) (summarily rejecting claim that government investigation triggered due process). Similarly, the government is not required to hold a hearing before filing a lawsuit against a company even though the filing of a lawsuit creates a contingent liability that depresses the company's stock price. *Cf. Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1333-38 (3d Cir. 1982) (Adams, J., concurring) (explaining that the filing of a lawsuit involving land may reduce the selling price of the land). And while a company's stock price typically drops when the company is indicted (a result of the company's contingent criminal liability),[27] a corporation has

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[26]Jonathan M. Karpoff, John R. Lott and Eric W. Wehrly, *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 48 J. Law & Econ. 653, 671 (2005) ("[F]irms investigated or charged with violating environmental rules experience statistically significant and economically meaningful decreases in common share values.").

[27] Andrew Weissmann, *Why Punish? A New Approach to Corporate Criminal Liability*, 44 Am. Crim. L. Rev. 1319, 1321 (2007).

no right to present its case to the grand jury—or any government official—prior to being indicted. *E.g. United States v. Leverage Funding Sys., Inc.*, 637 F.2d 645, 648 (9th Cir. 1980). Moreover, nearly every action the government takes has potential to affect some company's stock price somewhere — and courts have not held that these actions trigger due process concerns.

The district court initially recognized — correctly — that a drop in stock price is not the sort of injury protected by due process, explaining that "[d]amage to stock price and brand value could occur anytime any agency takes any action that the market interprets as adverse against a company." *GE*, 595 F. Supp. 2d at 22. But the court ultimately concluded that a loss in stock price *becomes* a property deprivation when a PRP chooses not to comply with a UAO because that choice "enhances the harm to stock price" and "supposedly exposes PRPs to greater penalties." *Id.*

Neither of these "differences" transforms a drop in stock price into damage to a protected property interest. The first supposed consequence — that GE suffers "enhance[d]" harm when it refuses to comply with a UAO — may or may not be true, but it is irrelevant to whether stock price *is* a property interest. Since, as the district court rightly found, stock price is not a protected property interest, an "enhanced" harm to stock price is not a

property deprivation, either. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570-571 (1972) ("to determine whether due process requirements apply . . . look not to the 'weight' but to the *nature* of the interest at stake"). Moreover as EPA points out, it makes little sense to conclude that GE's purely private decision to ignore a UAO triggers due process concerns, while the government's conduct alone (issuance of a UAO) does not. *See* EPA Br. 59-60. The second consequence — that EPA may seek increased penalties in future actions if a company refuses to comply with a UAO — has nothing to do with whether the decrease in GE's *stock price* is a protected property interest. And in any event, the risk that EPA may in the future exercise its *discretion* to seek higher penalties is not a protected interest. *See Fried v. Nat'l Transp. Safety Bd.*, 78 F.3d 688, 692 (D.C. Cir. 1996) (agency discretion in performing a particular function defeats claim of property right).

GE does not even attempt to defend the district court's reasoning. Instead, GE principally attempts to analogize a UAO to the *ex parte* prejudgment attachment at issue in *Connecticut v Doehr*, 501 U.S. 1 (1991). In *Doehr*, the Court followed a long line of precedent holding that "state procedures for creating and enforcing attachments, as with liens, 'are subject to the strictures of due process.'" *Id.* at 12 (citation omitted). The logic

behind these cases is that attachments and liens directly encumber property by giving a second person an interest in the property at issue. No second party obtains an interest in a PRP's property when EPA issues a UAO. While "attachment ordinarily clouds title," *id.* at 11, the issuance of a UAO does not.

GE asserts that, under *Doehr*, property is taken whenever government action "reduce[s] the market value of the plaintiff's property." GE Br. 27. But *Doehr* holds nothing of the sort. As the concurring opinion in *Doehr* emphasized, government action may reduce the market value of property without triggering due process concerns. For example, the filing of a *lis pendens* — a notice of the filing of a suit to enforce an alleged property interest — does not amount to a property deprivation, even though it reduces the market value of the affected property, because the "*lis pendens* itself creates no additional right in the property." 501 U.S. at 29 (Rehnquist, C.J., and Blackmun, J., concurring). Numerous decisions post-*Doehr* have recognized this principle. *United States v. Register*, 182 F.3d 820, 836-37 (11th Cir. 1999) (Although the filing of a *lis pendens* makes it "virtually impossible to sell or mortgage the property," such a filing "does not constitute a 'seizure' and does not affect property interests to an extent significant enough to implicate the Due Process Clause of the Fifth

Amendment."); *United States v. Property Identified as Lot Numbered 718*, 20 F. Supp. 2d 27, 36 (D.D.C. 1998) (filing of a *lis pendens* does not amount to a seizure of property because it "merely places others on notice of the pendency of a lawsuit"); *see also Indus. Safety Equip. Ass'n, Inc. v. EPA*, 837 F.2d 1115, 1121-22 (D.C. Cir. 1988) (publication of EPA report reduced fair market value of plaintiff's property but did not deprive plaintiff of property for due process purposes).

2. A Corporation's "Brand Value" Is Not A Protected Property Interest.

GE's claim for damage to its "brand value," which may raise its cost of capital, is equally meritless. In this argument, GE asserts a due process violation on the theory that a UAO damages its reputation with customers, potential workers, and creditors. GE Br. 16-17. But the Supreme Court and federal appellate courts have long held that a party ordinarily may not assert a claim under the Due Process Clause for injuries to its reputation. *See Paul v. Davis*, 424 U.S. at 701.

GE attempts to skirt this well-established legal principle by characterizing its alleged injury as damage to its "brand value" rather than its "reputation." But courts routinely look past such attempts to recharacterize damage to reputation as damage to some other interest. As the Sixth Circuit has explained, businesses often try to characterize claims

for reputational injury as claims for damage to various intangible property interests, like goodwill. *Med Corp., Inc. v. City of Lima*, 296 F.3d 404, 416 (6th Cir. 2002) ("An injury to a business's reputation could always be presented as a claim for lost goodwill, since the latter is partly a function of reputation and public prejudices."). Nevertheless, courts properly treat these claims not as claims for lost property but as claims for damaged reputation. *Id.*; *see also WMX Techs., Inc. v. Miller*, 197 F.3d 367, 375 (9th Cir. 1999) (damage to business's property interest in its goodwill is reputational injury).

At its core, GE's claim is that UAOs damage a PRP's reputation for environmental compliance — that they create "perceived environmental regulatory noncompliance." GE Br. 16. Indeed, GE's own expert equates this perceived noncompliance with "reputational risk."[28]

Nor is it relevant whether PRPs suffer financially from this reputational injury. Any injury to a business's reputation is likely to have negative financial repercussions. Yet there is no due process injury "so long as such damage flows from injury caused by the defendant to a plaintiff's reputation." *Trifax Corp. v. District of Columbia*, 314 F.3d 641, 643 (D.C. Cir. 2003) (*quoting Siegert v. Gilley*, 500 U.S. 226, 234 (1991)). Although courts have occasionally recognized a due process claim for damage to

[28] *See* R. 149 Att. 8 at 72 (¶16) and 84 n.35.

reputation when that damage has the "practical effect" of "formal exclusion from a chosen trade or profession," GE's claim of reputational injury is a far cry from meeting that standard. *Trifax*, 314 F.3d at 644. GE's claim is simply that a PRP that refuses to comply with a UAO is less attractive to potential clients and employees — that the damage to its brand reputation leads to "lower product sales, [and] decreased access to talented workers." GE Br. 16. Such an injury is not protected by the Due Process Clause. *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1269 (10th Cir. 1989) (claim that government's conduct made plaintiff "less attractive to potential clients" was not cognizable under the Due Process Clause).[29]

II. Even If UAOs Affected A Protected Property Interest, GE Receives More Than Sufficient Process Before The Issuance Of A UAO.

GE repeatedly suggests that CERCLA's UAO provisions violate due process because the EPA affords a PRP no process before issuing a UAO. This claim is a gross distortion. As the Hudson River cleanup described above illustrates, the process leading up to a UAO often takes years, during which EPA provides numerous opportunities for PRPs to present evidence

[29] Although GE and its *amici* repeatedly suggest that a small PRP might be put out of business if it decides not to comply with a UAO, *see*, *e.g.*, Chamber Br. 18-19, all of those suggestions are notable for their failure to cite any instance of such an event.

relating to liability, to review the Agency's proposed remedies, and to present arguments about any part of the proposal with which they disagree, to which EPA is compelled to respond. Moreover, PRPs may obtain judicial review by declining to comply with a UAO or by complying and then seeking reimbursement. 42 U.S.C. §§9613(h)(2) and (3). These involved procedures are more than sufficient to meet EPA's burden under *Mathews v. Eldridge*.

A. Prior To Issuing A UAO, EPA Provides Numerous Opportunities For PRPs To Review Its Proposed Remedies And To Offer Evidence And Argument, To Which EPA Is Required To Respond.

Before the EPA issues a UAO ordering a cleanup, it must determine what type of cleanup is appropriate and what party is responsible for cleanup.

On the first issue — the type of cleanup necessary — CERCLA and EPA's implementing regulations afford numerous safeguards, including multiple opportunities to present evidence and arguments. Before EPA selects a remedy, it conducts an in-depth "[f]easibility study" to determine the range of cleanup methods available. 40 C.F.R. §300.430(e). EPA must give PRPs numerous opportunities to present evidence, view the agency's proposed plans, and address these plans with evidence or arguments. By statute, EPA must "establish[] procedures" to allow interested parties to

participate in "the development of the administrative record on which the President will base the selection of removal actions." 42 U.S.C. §9613(k)(2)(A). Similarly, EPA "shall provide for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the President will base the selection of remedial actions." *Id.* §9613(k)(2)(B). Specifically, before selecting a remedy EPA must give "[n]otice to potentially affected persons and the public, which shall be accompanied by a brief analysis of the plan and alternative plans that were considered." *Id.* §9613(k)(2)(B)(i). It must give PRPs and the public "[a] reasonable opportunity to comment and provide information regarding the plan." *Id.* §9613(k)(2)(B)(ii). It must provide an "opportunity for a public meeting in the affected area," *id.* §9613(k)(2)(B)(iii), and respond "to each of the significant comments, criticisms, and new data submitted in written or oral presentations," *id.* §9613(k)(2)(B)(iv). In selecting a remedy EPA must state "the basis and purpose" of its choice. Id. §9613(k)(2)(B)(v); *see also* 42 U.S.C. §9617 (providing detailed requirements for public participation in development of remedy). These procedures for identifying a remedy that may later become the subject of a UAO comport fully with established legal norms of agency decisionmaking, *see, e.g.*, *Pension Benefit Guaranty Corp. v. LTV Corp.*,

496 U.S. 633, 653-656 (1990); *Louisiana Energy & Power Authority v. FERC*, 141 F.3d 364, 371 (D.C. Cir. 1998), and the resulting remedy selection is subject to judicial review, based on the administrative record, *Kelley*, 15 F.3d at 1107.

As for EPA's decision to direct a particular party to implement a selected remedy, it bears emphasis that EPA's decision is not final, nor is it entitled to any deference; rather, it is merely the agency's position in its role as a prosecutor about a party's liability, which is ultimately subject to judicial determination. *Kelley,* 15 F.3d at 1107 (EPA's "position on liability when a party disputes claims" is not entitled to deference). Nevertheless, beginning with EPA's initial investigation, PRPs have numerous opportunities to present evidence and arguments regarding who should be responsible for cleanup. One opportunity comes early in the investigation, when EPA issues requests for information to potentially liable parties and conducts interviews. R. 147 Att. 1 at 3 (¶5). As GE conceded in the district court, in responding to such information requests and to subsequent "general notice" letters informing a party that EPA believes it may be liable for cleanup, "PRPs can provide EPA with information that they believe is relevant for purposes of assessing CERCLA liability or determining how [a] site should be cleaned up." *Id*. at 3-4 (¶¶ 6, 8, 9). Similarly, EPA can and

often does provide PRPs with a "special notice" letter, which triggers a statutorily mandated negotiation period and yet another opportunity for a PRP to present evidence. R. 147 Att. 1 at 7 (¶20); *see* 42 U.S.C. §9622(e). As GE also conceded, "PRPs often take advantage of these opportunities to provide information that they want EPA to consider in making decisions with respect to their liability and CERCLA remedies." R. 147 Att. 1. at 4 (¶10).

B. EPA's Procedures Are More Than Sufficient Under *Mathews v. Eldridge*.

Assuming *arguendo* that GE has described a protected property interest, this Court must weigh the factors in *Mathews v. Eldridge* to determine whether the procedures described above comport with due process. Although GE asks this Court to bypass those factors on the theory that *Mathews* does not determine *whether* a hearing is due, that claim is wrong for at least two reasons. First, as described above, the issue is not *whether* a PRP is entitled to a pre-deprivation hearing because PRPs in fact receive a hearing before EPA issues a UAO. GE tries to gloss over this fact by equating a "hearing" with a trial-type proceeding, but *Mathews* itself rejects that logic, noting that a hearing does not usually mean a full "evidentiary hearing" or a "hearing closely approximating a judicial trial." 424 U.S. at 333. Second, even if the issue were whether GE is entitled to

any hearing, binding circuit precedent holds that the Court must apply the *Mathews* factors to "determine *whether* due process demands a pre-deprivation hearing." *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996) (emphasis added). EPA's pre-UAO procedural safeguards are more than sufficient to meet the due process requirements of *Mathews v. Eldridge* because they provide PRPs the "opportunity to present reasons, either in person or in writing, why proposed action should not be taken." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

1. The Government's Interest In Remedying Environmental Damage Is Exceedingly Strong.

By statute, a UAO can be issued only when EPA determines that there is an "imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance" and that such an order is "necessary to protect public health and welfare and the environment." 42 U.S.C. §9606(a). In such a case, expeditious cleanup is essential to prevent potential loss of human life and further damage to the environment.

GE's core argument is that the government cannot have an interest in expeditious cleanup because EPA often takes years to determine what cleanup remedy is appropriate. But the urgency of cleanup is a separate issue from the time necessary to identify an environmental hazard and

determine how it can be safely remedied. Determining what cleanup process is safest and most feasible is an involved process requiring extensive scientific study, in part because a cleanup, if done improperly, can itself cause substantial environmental damage. Nevertheless, once the appropriate method is identified, there is no justification for further delaying cleanup of a site that poses an "imminent and substantial" risk to the population. *Cf. James Madison Ltd.*, 82 F.3d at 1099-1100 (recognizing the government's "substantial interest in moving quickly" to seize and liquidate a bank's assets even though the government took three years to decide that seizure and liquidation were appropriate); *United States v. Barkman*, Nos. 96-6395 and 98-1180, 1998 U.S. Dist. LEXIS 20248 at * 47 (E.D. Pa. Dec. 17, 1998) ("The fact that implementation may take a protracted time does not justify a finding that the threat to public health is any less imminent nor that commencement of the correction process should be delayed."). Indeed, it is more than a bit ironic that GE would complain about the time it takes EPA to determine the proper remedy and issue a UAO. No small part of the delay is from the extensive procedural safeguards EPA uses to ensure the appropriate party will use the safest, most effective cleanup method.[30]

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[30] GE cites the Safe Drinking Water Act ("SDWA"), Toxic Substances Control Act ("TSCA"), and Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") as purported examples of statutes where the government is

2. GE's Interest In A Formal Hearing Is Negligible Compared To The Government's Interest In Fast Cleanup.

Against the government's weighty interest in a fast cleanup, GE fears a temporary, speculative loss to its stock value and brand reputation. As explained already, harms to these interests do not trigger the *Mathews* analysis. But even if they did, they would be negligible compared to the public interest in an expeditious cleanup. First, any loss caused by an erroneous UAO would likely be only temporary; GE's stock price would rebound if it is determined that GE is not liable for cleanup, as would its reputation. Temporary property deprivations like this one are entitled to less weight than permanent ones. *See Kropat v. FAA*, 162 F.3d 129, 134 (D.C. Cir. 1998) ("'Providing the [petitioner] the relevant supporting evidence and

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able to provide "pre-deprivation hearings" for emergency orders to abate "imminent" endangerment to public health, "without significant burden to the governmental interest." GE Br. 40-41. The SDWA cases GE cites, however, merely provide examples of *post*-deprivation judicial review of such orders; and, as GE concedes, the cited FIFRA provision likewise concerns *post*-deprivation hearings (in that case, before both the agency and a federal court). Further, while the cited provision of TSCA authorizes emergency orders only by judicial enforcement – *i.e.*, following a pre-deprivation, formal, adjudicatory hearing – the fact that Congress required such a hearing under TSCA does not mean that one would have been constitutionally required had Congress not provided for it, nor that one is constitutionally required under CERCLA.

a chance to meet informally with the investigator, to submit statements from witnesses and to argue its position orally, satisfies the constitutional requirement of due process for … temporary deprivation' of a protected interest, even without the provision of a full evidentiary hearing.") (citation omitted).

Regardless, GE admitted in securities filings from 1997 to 2000 that, even in the worst-case scenario, its environmental liabilities "'would not be material to GE's financial positions, results of operations or liquidity'" — even though GE received "multiple UAOs" and was "involved in 'numerous remediation actions.'" R. 147 Att. 1 at 15 (¶45) (citation omitted). In short, GE's interest in a lengthy trial prior to the issuance of a UAO pales in comparison to the continuation (and often exacerbation) of the "imminent and substantial" threats to human life and the environment that result from delays in cleaning up toxic waste sites.

3. A Trial-Type Hearing Would Have Little Effect On The Error Rate.

As this Court explained in *James Madison Ltd.*, a pre-deprivation trial is unlikely to substantially reduce the risk of error when the owner of the seized property has "many opportunities to express its views" informally to government officials. 82 F.3d at 1100. In that case, the officers of a bank seized by the government had informal opportunities through "memoranda

and meetings" to present evidence and argument to bank examiners, and the bank's officers "met repeatedly with members of the examination team, as well as with the Deputy Comptroller for Special Supervision and the Senior Deputy Comptroller for Bank Supervision Operations." *Id*. Given these numerous opportunities, this Court held that a formal evidentiary hearing was not necessary because the risk of error was already low enough. So too here.

III. A Ruling in GE's Favor Would Lead To Government Paralysis By Undermining Numerous Other Statutes and Regulations That Have Been Upheld.

Amicus Chamber of Commerce argues that a ruling in GE's favor would have no effect on other regulatory regimes because CERCLA §106 is "an aberration in administrative law." Chamber Br. 17. Not so. Numerous environmental statutes other than CERCLA establish regimes in which an agency orders an entity to comply with a statute without prior-trial-type hearings or, in many cases, immediate subsequent review. *See, e.g.*, 42 U.S.C. §7413 (Clean Air Act); 33 U.S.C. §1319 (Clean Water Act); 42 U.S.C. §§6934, 6973 (Resource and Recovery Act). A ruling in GE's favor

would conflict with numerous decisions holding that those provisions comply with due process.[31]

A ruling in GE's favor would also be contrary to the Supreme Court's decision in *Thunder Basin Coal*, 510 U.S. at 204, which involved a provision authorizing the Secretary of Labor to "compel immediate compliance with Mine Act provisions through the use of mandatory civil penalties, discretionary daily civil penalties, and other sanctions." The petitioner claimed that these provisions violate the Due Process Clause because they allow the Secretary to assess penalties without any pre-assessment hearing. But the Supreme Court rejected that claim: "Although the Act's civil penalties unquestionably may become onerous if petitioner chooses not to comply, the Secretary's penalty assessments become final and payable only after full review by both the Commission and the appropriate court of appeals." *Id.* at 218. That logic is even stronger here. Although a

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[31] *See Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 566 (10th Cir. 1995) (Clean Water Act); *S. Pines*, 912 F.2d at 717 (Clean Water Act); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 569-70 (7th Cir. 1990), *vacated on other grounds by* 975 F.2d 1554 (7th Cir. 1992) (Clean Water Act); *Child v. United States*, 851 F. Supp. 1527, 1535-36 (D. Utah 1994) (Clean Water Act); *Ross Incineration Servs. v. Browner*, 118 F. Supp. 2d 837, 845-46 (N.D. Ohio 2000) (Resource Conservation and Recovery Act); *Armco, Inc. v. EPA*, 124 F. Supp. 2d 474, 478 (N.D. Ohio 1999) (Resource Conservation and Recovery Act); *Union Elec. Co. v. EPA*, 593 F.2d 299, 305-06 (8th Cir. 1979) (Clean Air Act).

PRP may be subject to penalties if it *unjustifiably* refuses to comply with a UAO, these penalties are not even assessed until a court determines whether the PRP's noncompliance was justified, and CERCLA permits the imposition of penalties only where the PRP refused to comply "without sufficient cause." 42 U.S.C. §§9606(b)(1), 9607(c)(3). The Mine Act, in contrast, contains no "sufficient cause" defense. Also unlike CERCLA, it does not give defendants a right that to recover compliance costs if the order is later found to have been in error. *See Id.* §9606(b)(2).

If accepted, the novel argument advanced by GE and the Chamber would lead to governmental paralysis. As explained above, every time the government files a complaint in a civil action or obtains an indictment in a criminal action, a corporate defendant is likely to suffer a drop in its stock value and harm to its reputation. Indeed, such harm is likely to follow even from the publication of an adverse government report. But it is well established that due process does not require a trial-type hearing before the government files a complaint, obtains an indictment, or issues a report, and it could hardly be otherwise. The process EPA conducts before issuing a UAO far exceeds the mandatory process preceding the issuance of a complaint, an indictment (against a corporation), or a report. And a PRP that believes a UAO is unwarranted may obtain judicial review by refusing to comply or by

complying and filing suit for reimbursement in district court. These procedures are more than adequate under the Due Process Clause.

CONCLUSION

The judgment of the district court should be affirmed, but on the alternative grounds presented above.

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