

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 *AMICUS CURIAE* OF
NATIONAL ASSOCIATION OF MANUFACTURERS
IN SUPPORT OF PLAINTIFF-APPELLANT**

Martin S. Kaufman
ATLANTIC LEGAL FOUNDATION
2039 Palmer Avenue, Suite 104
Larchmont, New York 10538
Telephone: (914) 834-3322
Attorneys for *Amicus Curiae*

Of Counsel:
Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004-1790
(202) 637-3000

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by *amicus curiae* National Association of Manufacturers 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.

TABLE OF CONTENTS

	<i><u>Page</u></i>
Table of Authorities.....	iii
Interest of <i>Amicus</i>	1
Statement of the Case.	2
Statement of Facts.	2
Summary of Argument.	8
Argument.....	10
I. EPA's Failure To Provide PRPs With A Pre-Deprivation Hearing Violates Procedural Due Process..	10
A. The Lack of Any Pre-Deprivation Hearing Violates Procedural Due Process.....	10
B. The “emergency situation” exception does not apply.	15
II. A Balancing of Private and Governmental Interests, and Risk of Error Requires That EPA Provide A Pre-Deprivation Hearing Before a Neutral Decision-Maker.....	17
Conclusion.....	27
Certificate of Compliance	

TABLE OF AUTHORITIES

Page

Cases

<i>Bd. of Regents of State Colleges v. Roth</i> , 408 U.S. 564.	12, 15, 16
<i>Boddie v. Connecticut</i> , 401 U. S. 371 (1971).	12
<i>Calero-Toledo v. Pearson Yacht Leasing Co.</i> , 416 U.S. 663 (1974).	15
<i>Caperton v. A.T. Massey Coal Co.</i> , ___ U.S. ___, 129 S. Ct. 2252 (2009). ...	12, 13
<i>City of Los Angeles v. David</i> , 538 U.S. 715 (2003).	20-21
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532 (1985).	11
<i>Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.</i> , 508 U.S. 602 (1993).	13
<i>Connecticut v. Doeher</i> , 501 U.S. 1 (1991).	24, 25, 26
* <i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972).	11, 12, 21, 22, 26
* <i>General Electric Company v. Jackson</i> , 595 F.Supp.2d 8 (D.D.C. 2009).	4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 18, 19, 20, 22, 23, 24, 25, 26
<i>General Electric v. Johnson</i> , Civil Action No. 00-2855 (JDB), Memorandum Opinion, Sept. 12, 2006 (JA 0087-88).	3, 14
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970).	12
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004).	13
* Authorities on which the National Association of Manufacturers principally relies are marked with an asterisk	

TABLE OF AUTHORITIES (cont'd)

Page

Cases (cont'd)

<i>INS v. Chadha</i> , 462 U.S. 919 (1983).....	21
<i>Marshall v. Jerrico, Inc.</i> , 446 U.S. 238 (1980).....	14
* <i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).	12, 17, 18, 19, 20, 23, 25, 26
<i>Peralta v. Heights Med. Ctr., Inc.</i> , 485 U.S. 80 (1988).	26
<i>Propert v. District of Columbia</i> , 948 F.2d 132 (D.C. Cir. 1991).....	21
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927).....	12
* <i>United States v. James Daniel Good Real Prop.</i> , 510 U.S. 43 (1993).	11, 15, 24, 26

Statutes

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9606.	2
42 U.S.C. § 9604(a).....	2, 24
42 U.S.C. § 9606(a).....	2, 3, 24
42 U.S.C. §§ 9606(b).....	4
42 U.S.C. § 9607(a).....	2, 24
42 U.S.C. § 9607(a)(2).	19

* Authorities on which the National Association of Manufacturers principally relies are marked with an asterisk

TABLE OF AUTHORITIES (cont'd)

Page

Statutes (cont'd)

42 U.S.C. § 9607(c)(3).	4
42 U.S.C. § 9611(a).	2, 24
42 U.S.C. § 9613.	2, 24
42 U.S.C. § 9613(h).	3

Miscellaneous

L. Carroll, ALICE'S ADVENTURES IN WONDERLAND, Chapter XI.	14
D. R. Clay, Assistant Administrator of EPA for Solid Waste and Emergency Response, "Guidance on CERCLA 106(a) Unilateral Administrative Orders for Remedial Design and Remedial Action," (JA 0700).	4, 15
A. Gilbert and W. S. Gilbert, <i>The Mikado</i>	14
Small Business Administration, "Employer Firms, Establishments, Employment, Annual Payroll and Receipts by Receipts Size of Firm and Major Industry using NAICS, 2002" at http://www.sba.gov/advo/ research/us_rec_mi.pdf . (last accessed 09-20-2009).	6

INTEREST OF *AMICUS*¹

The National Association of Manufacturers (“NAM”) is the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM’s mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth in the United States and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America’s economic future and living standards. Many of its members will be affected by the decision in this case.

¹ Counsel for *amicus* timely served the notice required by Circuit Rule 29(b) on counsel of record for the parties. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae* and their counsel, made a monetary contribution to its preparation or submission. General Electric Company (“GE”) is a member of NAM, but did not participate in the decision of NAM to file this *amicus* brief and made no contribution to the costs of preparing this *amicus* brief.

STATEMENT OF THE CASE

I. Introduction.

GE challenges EPA's failure to provide procedural due process to recipients of unilateral administrative orders (“UAOs”) issued pursuant to Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9606.

Amicus curiae believes that there is a significant disconnect between several significant, correct, and dispositive findings of fact made by the district court and the district court’s legal conclusions so fundamental as to require reversal.

STATEMENT OF FACTS

Amicus defers to Appellant’s statement of the facts. We will here highlight those facts which we believe mandate reversal of the district court’s judgment.

Under CERCLA, when EPA determines that an environmental cleanup is required at a contaminated site, it has three options: first, EPA may conduct the cleanup itself and file suit against a “potentially responsible party” (“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 action in federal district court to compel a PRP to conduct a specified response action, *see* 42 U.S.C. § 9606(a); third, EPA may issue a UAO compelling a PRP to conduct a specified response action without court

involvement, 42 U.S.C. § 9606(a). As described by the district court at an earlier stage in this case, “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).” *See General Electric v. Johnson*, Civil Action No. 00-2855 (JDB), Memorandum Opinion, Sept. 12, 2006 (JA 0087-88).

If EPA avails itself of one of the first two options, a PRP has a right to an immediate hearing before a neutral decision-maker in which it can challenge EPA's determination that the PRP is liable and the appropriateness of EPA's selection of the response action. GE does not contest EPA's exercise of its authority under either of these two statutory alternatives.

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), 42 U.S.C. § 9613(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. Further, although EPA officials may conduct informal conferences with PRPs following issuance of a UAO, EPA's own guidance documents make it clear that such conferences are not due process hearings and do

not afford PRPs the opportunity to challenge the UAO. *See* D. R. Clay, Assistant Administrator of EPA for Solid Waste and Emergency Response, “Guidance on CERCLA 106(a) Unilateral Administrative Orders for Remedial Design and Remedial Action.” (JA 0700) This EPA Guidance states that such a conference “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 the order should have been issued.”

A PRP accordingly has only two options upon receiving a UAO: it can comply with the UAO, in which case it has no opportunity to challenge the UAO until the response action is completed, a period lasting on average more than three years, *General Electric Company v. Jackson*, 595 F.Supp.2d 8, at 31 (D.D.C. 2009)(JA 0128), or the PRP can refuse to comply with the UAO, in which case it is subject to penalties of \$32,500 for each day of noncompliance and to punitive treble damages on top of the costs of the ordered response action, 42 U.S.C. §§ 9606(b), 9607(c)(3), but the PRP has no opportunity to challenge the UAO through a hearing before a neutral decision-maker until after those costs accrue.

The district court recognized that UAOs subject PRPs to whom they are issued to immediate and substantial deprivations of property without any opportunity for pre-deprivation hearings before a neutral decision-maker.

The critical findings of fact by the district court include:

- The pre-hearing deprivations worked by the issuance of UAOs affects “weighty private interests” (595 F.Supp.2d 8, at 30-31, JA 0128) whether or not the PRP complies with the UAO. (595 F.Supp.2d 8, at 29, JA 0125);

- A PRP that complies with a UAO suffers an average pre-hearing deprivation of \$4,000,000 by paying response costs that it may later recover, (595 F.Supp.2d at 30, 38 (JA 0128, JA 0141)), plus legal and other professional fees that the PRP cannot recover (595 F.Supp.2d at 38 (JA 0141)); this deprivation lasts for an average of three years (*id.*, JA 0141). It is undisputed that a PRP that complies with a UAO suffers deprivations through the costs imposed by the UAO, and that these deprivations occur prior to any hearing and are substantial and long lasting.

- Noncomplying PRPs suffer a “substantial” pre-hearing deprivation that is “something less than the \$76.4 million” calculated by GE’s expert, but nevertheless so significant that “they may have collateral effects.” (*Id.*, JA 0127-28);

- Noncomplying PRPs suffer “A substantial financial deprivation bearing collateral consequences--for example, an effect on a company's operations– [that is] is not purely financial and is a more significant private interest.” (595 F.Supp.2d at 29 (JA 0126)) and “for some PRPs the financial deprivations are sufficiently large to have collateral effects on operations.” (595 F.Supp.2d at 38 (JA 0141));

- If the PRP does not comply with the UAO, then the average size and length of the deprivation are substantial (*Id.* (JA 0141)); noncomplying PRPs suffer millions

of dollars in pre-hearing deprivations due to “a significant decrease in brand and market value [of] . . . something less than \$76.4 million” 595 F.Supp.2d at 30 (JA 0127-28).

- The pre-hearing deprivations suffered by both complying and non-complying PRPs “are sufficiently large and have enough potential collateral effects to constitute weighty private interests.” (595 F.Supp.2d at 30-31(JA 0128));

- “UAOs could put some PRPs out of business.” (595 F.Supp.2d at 30 (JA 0128))²;

² This existential threat to many, many firms is quite real. As noted, the district court found that average pre-hearing deprivation for those PRPs which comply with the UAO is more than \$4 million, and the average pre-hearing deprivation for those PRPs which do not comply with the UAO is greater. The cumulative is substantial. The Small Business Administration’s statistics show that in 2002 (the latest period for which SBA has published data) approximately 85% of all U.S. manufacturing firms (253,572 firms out of 297,873 total firms) and 89% of all U.S. mining firms (16,438 firms out of 18,425 total firms) have less than \$5 million in gross receipts. *See* Small Business Administration, “Employer Firms, Establishments, Employment, Annual Payroll and Receipts by Receipts Size of Firm and Major Industry using NAICS, 2002” at http://www.sba.gov/advo/research/us_rec_mi.pdf. (last accessed 09-20-2009). Almost two thous and (1,782) of NAM’s members have less than \$5 million in sales and these firms employ 63,173 persons. Thus the issuance of a UAO carries with it the real possibility of ruin for many firms, with collateral effects on their stakeholders – proprietors or shareholders and their families, employees and their families, as well as suppliers, lenders, and other creditors. Statistics from the Small Business Administration show that approximately 85% of all U.S. manufacturing firms (253,572 firms) and approximately 89% of all U.S. mining firms (16,438 firms) had less than \$5,000,000 in annual gross receipts.

- “EPA lacks a ‘special need for very prompt action’ in issuing UAOs under section 106 of CERCLA . . . [because] EPA does not issue UAOs in true emergency situations.” (595 F.Supp.2d at 32, internal citation omitted (JA 0131)).

These findings show that whether a PRP does or does not comply with the UAO, it suffers immediate and substantial pre-hearing deprivation of important and significant property interests.

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 does not act on an emergency basis, (595 F.Supp.2d at 38 (JA 0140-41)); (2) that the public interest in avoiding the cost of a pre-deprivation hearing, while minimal for any given UAO (595 F.Supp.2d at 38 (JA 0142)), must be considered in the aggregate, but not balanced against the corresponding aggregated deprivations suffered by PRPs, *id.*; and (3) that GE was required to establish a substantial (but undefined) rate of actual error, as opposed to a risk of error, in EPA's issuance of UAOs. *Id.* (JA 0133).

SUMMARY OF ARGUMENT

At its heart, this case is about whether a PRP, which receives a UAO from EPA, and which is called upon by EPA to expend potentially millions of dollars, or suffer many more millions if it does not comply, has the right to a hearing before a neutral decision-maker before the PRP must comply.

The district court failed to address the failure of the government to provide PRPs with *any* pre-deprivation hearing, even though the court acknowledged that "PRPs are deprived of at least some property interests whether or not they comply with a UAO,." (595 F.Supp.2d at 28 (JA 0125)), and that these pre-hearing

deprivations 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.

595 F.Supp.2d at 30-31 (JA 0128).

The district court also found 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." 595 F.Supp.2d at 32 (JA 0131).

Thus EPA's governmental interest in avoiding a pre-deprivation hearing stems solely from the cost of the additional process. Although the district court recognized that "the costs of a single hearing before a presiding officer are minimal, especially considering the size of the private interests at stake" (595 F.Supp.2d at 38 (JA 0142)), it erroneously aggregated the potential cost to EPA of providing pre-deprivation hearings for all or most of the UAOs EPA issues (without any data to support that supposition) and concluded that providing a hearing before a neutral decision-maker would impose a substantial burden on EPA (595 F.Supp.2d at 38 (JA 0142)), again with no cost data to underpin that conclusion. More egregiously, the district court did not balance this assumed aggregate cost of providing a hearing with a neutral decision-maker against the corresponding aggregated deprivations suffered by PRPs . (595 F.Supp.2d at 38-39 (JA 0142-43)).

Further, the district court imposed, after the fact, a burden on GE to establish that there was a significant "rate of error," as opposed to the "risk of error" the relevant cases speak to, and then proceeded to use partial, selective "data" to "calculate" a low rate of error in EPA decisions, and then to conclude that "[t]he cost of additional process must indeed be minimal to "significantly reduce" the "low rate of error." (595. F.Supp. 2d at 38 (JA 0142)). The district court's "calculation" of the costs to the government is based on conjecture heaped upon conjecture, without evidence in the record.

ARGUMENT

I.

EPA's Failure To Provide PRPs With A Pre-Deprivation Hearing Violates Procedural Due Process.

A. The Lack of Any Pre-Deprivation Hearing Violates Procedural Due Process.

Analysis of the procedural due process issues raised in this case must start with three key factual findings of the district court: UAOs impose significant deprivations on PRPs; PRPs do not have any opportunity for a hearing before a neutral decision-maker to challenge UAOs before these deprivations occur; and EPA does not issue UAOs to meet emergencies and therefore there is no justification for abrogating the well-established requirement of a pre-deprivation hearing. These findings compel a holding that EPA's use of UAOs without a pre-deprivation hearing is unconstitutional.

The district court erroneously held that because EPA provided PRPs with an opportunity to confer with EPA when the UAO is issued, and because a district court may later review any penalty EPA seeks to impose for noncompliance with a UAO (thus affording a PRP adjudication by an Article III judge), adequate process was provided. (595 F.Supp.2d at 17-18 (JA 0104-05)). This reasoning is erroneous because the pre-issuance conference before officials of the same regional office that issued the UAO is not a hearing before a neutral decision-maker. The district court's

view that a neutral decision-maker is merely “an important constitutional safeguard” (595 F.Supp.2d at 34 (JA 0134)) seriously understates the vital importance, from a due process perspective, of a neutral decision-maker.

The district court found that the pre-hearing deprivation resulting from EPA's routine issuance of UAOs 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 decision-making. 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 Supreme Court has made clear that absent emergency circumstances the government is required to provide at least some type of pre-deprivation hearing. EPA provides none. The Due Process Clause requires "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) (emphasis supplied; citations omitted); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993). "[W]hatever 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)

(emphasis supplied; internal citations and quotations omitted); “[D]ue 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 When protected interests are implicated, the right to some kind of prior hearing is paramount, ’except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.’” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-570 n.7 (1972) (quoting *Boddie v. Connecticut*, 401 U. S. 371, at 379 (1971)). As the Supreme Court explained in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) “some sort of hearing is required *before* an individual is finally deprived of a property interest.” (Emphasis supplied).

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 decision-maker.” *Fuentes*, 407 U.S. at 83; *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

There is longstanding jurisprudence, beginning at least with *Tumey v. Ohio*, 273 U.S. 510 (1927), and carrying through to the recent decision in *Caperton v. A.T. Massey Coal Co.*, ___ U.S. ___ 129 S. Ct. 2252 (2009), that the decision-maker in an adversarial proceeding must be neutral and impartial. “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*). Most recently, in *Caperton v. A. T. Massey Coal Co., Inc.*, ___ U.S. ___, 129 S. Ct. 2252 (2009) the United States Supreme Court spoke to the need for impartiality and addressed the need to have the due process clause implemented by objective standards that do not require proof of actual bias. The constitutional interest in accurate finding of facts and application of law, and in preserving a fair and open process for decision, is usually satisfied by a judge, not by an employee of a party to the dispute.

The district court erred in deciding that due process can be satisfied by providing the "informal pre-issuance process that EPA provides here" (595 F.Supp.2d at 34 (JA 0135)), which is merely an opportunity to be heard by the same officials who issued the UAO. The notion that this satisfies due process is contradicted by the district court's description of a UAO at an earlier stage in these proceedings:

Due to the unique nature of EPA's enforcement-first regime, EPA attorneys do not function as ordinary prosecutors. Ordinary prosecutors certainly "enforce" the law in that they decide to initiate proceedings against a suspected violator. In doing so, however, they advocate for the agency (or the public) against the suspected violator, with a neutral

third-party as the arbiter – they do not themselves regulate or adjudicate liabilities, rights, responsibilities, or penalties. Prosecutors, then, do not function in any materially different way from private attorneys – it is the nature of their client that differs. EPA attorneys in UAO proceedings, however, may function in a materially different way. 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 the conduct of PRPs).

General Electric v. Johnson, Civil Action No. 00-2855 (JDB), Memorandum Opinion, Sept. 12, 2006, n 5 (JA 0087-88).³

A PRP’s ability to confer with EPA regional staff – the very people who decided to issue the UAO is inadequate from a due process perspective. In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 247 (1980), the Supreme Court noted that an assistant regional administrator [of the Department of Labor] “. . . is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a prosecutor or civil plaintiff. . . .” and simply cannot be equated with a neutral

³ This description of a UAO calls to mind the legal “process” of “verdict first, trial after” described in Chapter XI of Lewis Carroll’s *ALICE'S ADVENTURES IN WONDERLAND*, and the description of the role of the EPA regional officials calls to mind Pooh-Bah’s description in Gilbert & Sullivan’s *The Mikado* of “Our logical Mikado . . . who has rolled . . . two offices into one, and every judge is now his own executioner.”

decision-maker. The right to confer with the very same officer or office which issues the UAO does not provide the sort of due process required.⁴

B. The “emergency situation” exception does not apply.

The “emergency situations” exception, where there is a "special need for very prompt action" (*Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678 (1974); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 n.7 (1972); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993)) is not present here, as the district court found, and EPA admitted. (595 F.Supp.2d at 32 (JA 0131)).

The only rationale advanced by the district court for not requiring a pre-deprivation hearing before a neutral decision-maker is the *cost* to EPA of the additional process. The district court found that "the costs of a single hearing before a presiding officer are minimal, especially considering the size of the private interests at stake." (595 F.Supp.2d at 3 (JA 0142)). We respectfully submit that the issue of cost pertains only to the type and extent of the pre-deprivation hearing (*e.g.*, whether pre-hearing discovery can be had, whether there should be “canned” direct testimony,

⁴ Moreover, as noted above, EPA’s own guidance documents make it clear that such conferences are not due process hearings and do not afford PRPs the opportunity to challenge the UAO. *See* D. R. Clay, Assistant Administrator of EPA for Solid Waste and Emergency Response, “Guidance on CERCLA 106(a) Unilateral Administrative Orders for Remedial Design and Remedial Action,” (JA 0700).

the length of submissions and of the hearings), not whether such a hearing should take place.

The district court did not address the failure of the government to provide PRPs with *any* pre-deprivation hearing. A post-deprivation hearing does no good for a PRP which has been put out of business by the issuance of a UAO, or whose business activities and opportunities have been severely curtailed by the cost of compliance or the penalties for non-compliance. That alone should have been dispositive in favor of GE, given the absence of an exigent circumstances requiring that action be taken before a hearing. As the Supreme Court held in *Roth*, 408 U.S. 564, at 570-571, “to determine whether due process requirements apply in the first place, we must look not to the “weight,” but to the nature, of the interest at stake. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.” *Roth*, 408 U.S. 564, 570-71 (citation omitted). There can be no question that the protection of property is the core interest at stake in this case.

This court should hold that CERCLA § 106 violates procedural due process because PRPs are not provided a hearing before a neutral decision-maker prior to the government action depriving them of their protected property interests and reverse the district court's judgment for EPA.

II.

A Balancing Of Private and Governmental Interests, and Risk of Error Requires That EPA Provide A Pre-Deprivation Hearing Before a Neutral Decision-Maker

Because the district court erroneously failed to recognize the facial due process violation inherent in EPA's habitual use of UAOs in non-emergency situations, it proceeded to engage in a *Mathews v. Eldridge*, 424 U.S. 319 (1976) "balancing" of governmental and private interests, but then ignored its own factual findings in so doing.

If, *arguendo*, the district court did not err in undertaking a *Mathews v. Eldridge* "balancing," then we respectfully submit that the district court made a number of serious errors in applying the *Mathews* criteria, and this Court should remand the case for further proceedings on the nature of the pre-deprivation hearing that is required by the *Mathews* balancing test.

Under *Mathews*, 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.

The district court correctly identified the elements to be balanced, but erred in applying the balancing factors to the facts it found. The *Mathews* factors, properly weighed, demonstrate that EPA must provide PRPs with a pre-deprivation hearing before a neutral decision-maker and with at least some customary procedures, such as the right to present evidence and cross-examine EPA witnesses.

The Private Interest

The district court concluded that a PRP can incur pre-hearing deprivations totaling millions of dollars (\$4 million in the case of those who comply with the UAO and something less than \$76 million for those who do not comply, whether or not it complies with the UAO, and that those deprivations will have collateral impacts on ongoing business operations that can never be recovered through any putative post-deprivation hearing. (595 F.Supp.2d at 30, 38 (JA 0127-28; 0141)).

Notably, the district court recognized that in some cases, “UAOs could put some PRPs out of business.” (595 F.Supp.2d at 30 (JA 0128)).⁵ In fact, according to the government’s own statistics, an overwhelming percentage of firms in the manufacturing and mining industries (industries most likely to be involved in

⁵ The district court held, quite anomalously, that “Although the private interest are significant, GE has not demonstrated that the primarily financial interests at stake here routinely have such collateral effects as to constitute a “brutal need” requiring greater pre-deprivation process.” (595 F.Supp.2d at 38-39, citation omitted (JA 0142-43)). If the threat to the very survival of a firm does not constitute a “brutal need,” nothing does.

CERCLA sites) have annual revenues of less than \$5 million.⁶ For companies that are mortally injured by the issuance of a UAO and their stakeholders (owners, employees, lenders, creditors, etc.), the deprivation cannot be remedied through a post-deprivation hearing. Moreover, individual owners or executives of smaller companies face personal ruin, because EPA often sues them individually as defendants, as “owners” or “operators” and thus “covered persons” under section 107(a)(2) of CERCLA, 42 U.S.C. §9607(a)(2).

The district court’s own estimate of the frequency with which EPA issues UAOs, which that court used to calculate the supposed burden on EPA if it were to provide some sort of hearing before a neutral decision-maker, actually demonstrates that the risk of serious injury to PRP, and the possible extinction of some PRPs, is not at all rare.⁷

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. The harm to PRPs’ private interests

⁶ See n. 2, *supra*.

⁷ “On average, then, EPA has issued approximately six UAOs to nineteen PRPs every *month*.” (595 F.Supp.2d at 33; record citation omitted, emphasis in original (JA 0132)). The district court acknowledged that this “*underestimates* the number of UAOs EPA currently issues per month.” (*Id.* at 33 n. 17; emphasis in original (JA 0132)).

is magnified by the long delay before a PRP can obtain any post-deprivation review of a UAO. *See* 595 F.Supp.2d at 31 (JA 0127).

A PRP's private interest in avoiding multi-million-dollar deprivations and prolonged disruption to ongoing business operations is clearly "weighty," as the district court found. 595 F.Supp.2d at 30-31 (JA 0128).

The Government's Interest

"The second factor is the financial and operational cost of additional process and the need to conserve 'scarce fiscal and administrative resources.'" 595 F.Supp.2d at 32 (JA 0130-31) (quoting *Mathews*, 424 U.S. at 347-348).

The district court's rationale, that "[f]inancial deprivations are less troubling because money can be recouped in a post-deprivation hearing" (595 F.Supp.2d at 30 (JA 0128)), citing *City of Los Angeles v. David*, 538 U.S. 715, at 717 (2003) is wrong. *David* is clearly distinguishable. It did not involve a challenge to the failure of a government agency to provide a pre-deprivation hearing. That case involved a car that had been towed for illegal parking; the city provided a hearing by which the owner of the car could recover the \$134.50 fee he had paid to liberate the car. In *David*, the city presumably had an imperative need to tow illegally parked cars to clear streets, which the car owner did not challenge. David's claim was only that the city violated his due process rights by failing to provide a "sufficiently prompt" post-deprivation hearing because the hearing took place some four weeks after

impoundment. The issue was not whether there should have been a pre-deprivation hearing at all, nor whether the monetary amount at issue was significant, but whether due process had been violated by denying David the use of his money between the time of paying the impoundment and towing fees and the time of the hearing. (538 U.S. at 717). In fact, the Court noted that the city held hearings within 48 hours for those persons who could not afford the impoundment fees. (538 U.S. at 718). But David is inapplicable to this case, because a post-deprivation hearing is of no help to a PRP which is put out of business by the issuance of a UAO.

The only government interest weighing against a pre-deprivation hearing is that such a hearing would cost money. However, "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 v. District of Columbia*, 948 F.2d 1327, 1335 (D.C. Cir. 1991). But, "[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. . . . [but] these rather ordinary costs cannot outweigh the constitutional right." *Fuentes*, 407 U.S. at 92 n.22; *INS v. Chadha*, 462 U.S. 919, 944 (1983).

The district court correctly found that the governmental interest in not providing a pre-deprivation hearing to a PRP with regard to any individual UAO is "minimal." The district court also properly recognized that the government has no

“special need for very prompt action,” 595 F.Supp.2d at 32 (JA 0131) (quoting *Fuentes*, 407 U.S. at 91), and it correctly found that the costs of a hearing before a presiding officer or a “less formal process” before an administrative law judge are “minimal, especially considering the size of the private interests at stake.” 595 F.Supp.2d at 33, 38 (JA 0132, 0142) and EPA “has a lower interest in avoiding the less formal process before an ALJ” than “a full judicial hearing.” (*id.* at 33 (JA 0132)).

The cost to EPA of providing a pre-issuance hearing before an ALJ is likely to be marginal.⁸ EPA already has a large and experienced cohort of ALJs (*see* <http://www.epa.gov/oalj>) who regularly hear disputes involving “highly technical decisions,” including cases arising under CERCLA (*see* www.epa.gov/oalj/statutes.htm).

However, the district court improperly weighed the “cumulative effect of the additional process” on the government of providing additional process for all UAOs. (595 F.Supp.2d at 38, JA 0142) This “calculus” was premised on the district court's speculation that “most PRPs would contest the UAO” if a pre-issuance hearing were

⁸ There appears to be no evidence in the district court record of the cost to EPA of holding hearings before ALJs or hearing officers, nor of the percentage of PRPs who would avail themselves of such hearings if they were allowed, nor of the cumulative financial burden on EPA and PRPs to participate in such hearings. This issue was not addressed in either the Rule 56.1 statements and responses, nor in the briefs, below.

available (595 F.Supp.2d at 33 (JA 0132)), among others.⁹ There is absolutely no evidence in the record to support the district court's several speculations. The district court also overlooked the fact that the same "high stakes" and "complex technical judgments" such hearings would require would entail substantial expense and risk for the PRP, and would likely deter many from availing themselves of the opportunity for a such a hearing.

More egregious is the "apples to oranges" comparison of the presumed aggregate cost to EPA of providing hearings before ALJs or presiding officers and the interest of a single PRP in being able to challenge a single UAO. Such a metric would always come out in favor of the agency, and the *Mathews* weighing process would be rendered nugatory. The "exception," that a government agency can deny a pre-deprivation hearing because of the aggregate cost of all potential hearings, swallows the rule that due process requires a hearing before a neutral decision-

⁹ There are at least three factual assumptions or speculations in the district court's analysis for which there is no evidence in the record. The district court wrote: "Because EPA generally issues UAOs only when negotiations with a PRP have failed, most PRPs would contest the UAO through the pre-issuance hearing GE seeks. To be sure, EPA might issue fewer UAOs if more pre-issuance process were required. But because UAOs involve high stakes and complex technical judgments, any hearing before a neutral decision-maker would involve significant fiscal and administrative burdens; hence, even a fraction of the current monthly rate of UAO issuance would generate a substantial impairment of the government's interest measured in the financial and administrative costs of that additional process." (595 F.Supp.2d at 33 (JA 0132-33)).

maker before the government takes coercive action.¹⁰

The governmental interest in avoiding pre-deprivation hearings is minimal and does not outweigh, or even balance, the “weighty private interest” (595 F.Supp.2d at 31 (JA 0128)) the district court found here.

Moreover, the district court’s analysis does not explain why if, as is the case, a PRP has an immediate right under CERCLA to a hearing before a neutral decision-maker in which it can challenge EPA's determination that the PRP is liable and the appropriateness of EPA's selection of the response action if EPA conducts the cleanup itself and files 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, or if EPA files an action in federal district court to compel a PRP to conduct a specified response action, *see* 42 U.S.C. § 9606(a), there is no similar right if EPA issues a

¹⁰ EPA argued below that it provides PRPs with adequate post-deprivation opportunity to challenge a UAO through a reimbursement petition or an EPA enforcement action. Thus, EPA's argument cannot be that providing PRPs with a hearing is too expensive or administratively inconvenient, but that the hearing can be delayed until long after the UAO is issued without violating the PRP’s due process rights. But a post-deprivation hearing before a neutral decision-maker and with procedural safeguards would not impose any lesser costs or personnel burdens on the government than a pre-deprivation hearing because the scope of the substantive issues would be the same. The government “cannot seriously plead additional financial or administrative burdens involving pre-deprivation hearings when it already claims to provide an immediate post-deprivation hearing.” As the Supreme Court explained in *Connecticut v. Doehr*, 501 U.S. 1, at 16 (1991). “From an administrative standpoint it makes little difference whether that hearing is held before or after the seizure.” *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, at 59 (1993).

UAO in non-emergency situations, which the district court found to be common. We submit that the difference is inexplicable: the private interests are identical, the government costs are the same, and the risk of error is lower when there is a neutral decision-making process before costs are incurred, whoever ultimately must bear them.

Risk of Error

The Supreme Court in *Mathews*, weighed “the risk of error inherent in the truthfinding process” as part of the calculus of the type of procedure due process requires. 424 U.S. at 344

EPA's use of UAO's increases the risk of error because PRPs have no opportunity to challenge a UAO before a neutral decision-maker, but only to confer with the same EPA regional officials who issued the UAO (595 F.Supp.2d at 34 (JA 0134)), and there is no independent review prior to the issuance of the UAO and a deprivation of rights. *See Connecticut v. Doehr*, 501 U.S. at 13.

The district court, however, held – without citing any precedent – that “GE must also demonstrate that the current procedures in fact would result in an unacceptable *rate of error*.” (595 F.Supp.2d at 33 (JA 0133), emphasis supplied). The district court’s conclusion that GE had not shown that there was an “unacceptable” rate of error with regard to UAO cases specifically was the linchpin of the district court’s decision because the court then proceeded to conclude that the additional cost

to the government was not justified by “only a marginal improvement” in the “already very small” rate of error. (595 F.Supp. 2d at 38 (JA 0142)).

The district court’s analysis is wrong on at least three counts. First, while the district court cited some other courts which have considered rate of error evidence when presented by the parties, we have found no reported decision in which a federal court has required a party to establish that the government has in fact acted in error in order to show a deprivation of due process. Second, our search of the record does not disclose any explicit mandate by the district court before it rendered its decision putting GE on notice that it would have to establish a “rate of error” as distinct from “risk of error” which is repeatedly discussed in the controlling precedents (*e.g.*, *Mathews*, 424 U.S. at 344; *Doehr*, 501 U.S. at 13; *James Daniel Good*, 510 U.S. at 55.) Third, the district court’s use of examples in which GE was able to obtain some relief post-deprivation, either through discussion with EPA or through court decision cannot excuse the pre-deprivation of due process. *See 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.”); *see also Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86-87 (1988). Moreover, while GE may have substantial resources with which to challenge EPA’s determination post-deprivation, many PRPs do not. In any event those firms should

not be forced to reallocate resources from job creation, product development or other productive uses in order to vindicate fundamental constitutional rights.

CONCLUSION

The judgment of the district court should be reversed.

Dated: December 30, 2009

Respectfully submitted,

s/ _____
Martin S. Kaufman
ATLANTIC LEGAL FOUNDATION
2039 Palmer Avenue, Suite 104
Larchmont, New York 10538
Telephone: (914) 834-3322
Attorneys for *Amicus Curiae*
National Association of Manufacturers

Of Counsel:

Quentin Riegel
National Association of Manufacturers
1331 Pennsylvania Avenue, NW
Washington, DC 20004-1790
(202) 637-3000

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 6,710 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). This brief has been prepared in a proportionally spaced typeface using WordPerfect X3 in Times New Roman 14 point Font.

Dated: December 30, 2009

s/ _____
Martin S. Kaufman
Attorney for *Amicus Curiae*
National Association of Manufacturers

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 30, 2009, two copies of the foregoing Brief Amicus Curiae of National Association of Manufacturers were served on the following counsel of record by first class mail:

Sambhav N. Sankar U.S. Department of Justice ENRD, Appellate Section 601 D Street NW Mail Room 2121 Washington, D.C. 20004 Attorney for Defendants-Appellees	Donald W. Fowler Eric G. Lasker HOLLINGSWORTH LLP 1350 I Street, NW Washington, DC 20005-3305 Attorneys for Plaintiff-Appellant
Christopher J. Wright WILTSHIRE & GRANNIS LLP 1200 18 th Street, NW, 12 th Floor Washington, D.C. 20036 Attorney for amici curiae	Carter G. Phillips SIDLEY AUSTIN LLP 1501 K Street, NW Washington, DC 20005 Counsel for Plaintiff-Appellant
Robin S. Conrad Amar D. Sarwal NATIONAL CHAMBER LITIGATION CENTER 1615 H Street, N.W. Washington, D.C. 20062 Attorneys for amicus curiae	Prof. Laurence H. Tribe 420 Hauser Hall 1575 Massachusetts Avenue Cambridge, MA 02138 Counsel for Plaintiff-Appellant
Paul D. Clement Daryl Joseffer Adam Conrad KING & SPALDING LLP 1700 Pennsylvania Ave., NW Washington, DC 20006 Attorneys for amicus curiae	Thomas H. Hill Jonathan M. Goodman GENERAL ELECTRIC COMPANY 3135 Easton Turnpike Fairfield, CT 06431 Counsel for Plaintiff-Appellant

s/ Martin S. Kaufman
Martin S. Kaufman
Attorney for *Amicus Curiae*
National Association of Manufacturers