IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GENERAL ELECTRIC COMPANY, Plaintiff, v. MICHAEL O. LEAVITT, Administrator, United States Environmental Protection Agency, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	)	Civ. No. 1:00CV02855 (JDB)

[PROPOSED] MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
SUBMITTED BY *AMICI CURIAE*
NATURAL RESOURCES DEFENSE COUNCIL,
HUDSON RIVER SLOOP CLEARWATER,
NEW YORK RIVERS UNITED,
RIVERKEEPER, AND
SCENIC HUDSON

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STATEMENT OF AMICI INTERESTS

Amici Curiae Natural Resources Defense Council, Hudson River Sloop Clearwater, New York Rivers United, Riverkeeper and Scenic Hudson (collectively Environmental *Amici*) submit this Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment. On a national level, Environmental *Amici* have a strong interest in upholding the constitutionality of the administrative enforcement provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) and preserving the appropriately comprehensive toxic remediation powers of that statute. In particular, Environmental *Amici* have a long-standing interest in ensuring the swift remediation of a 200-mile stretch of the Hudson River that is contaminated by polychlorinated biphenyls (PCBs) discharged from two General Electric (GE) manufacturing plants on the Upper Hudson River decades ago. Environmental *Amici* actively supported the long process that lead to the U.S. Environmental Protection Agency's (EPA's) issuance of a Record of Decision in February 2002 calling for the dredging and removal of 2.65 million cubic yards of GE's PCB-contaminated sediments from a 40-mile stretch of the Upper Hudson River. Environmental *Amici* are now actively engaged in tracking and monitoring implementation of the Record of Decision to ensure a swift and full cleanup. GE's filing and aggressive pursuit of this challenge to certain of CERCLA's administrative enforcement provisions threatens to derail the long overdue cleanup of GE's PCB pollution from the Hudson River.

On April 9, 2001, Judge Richard W. Roberts (previously assigned to hear this case) granted Environmental *Amici*'s motion for leave to participate in this case as *amici curiae*. Environmental *Amici* submitted a Memorandum of Points and Authorities in Support of

Defendants' Motion to Dismiss the Amended Complaint, Or, In the Alternative, Motion For Summary Judgment, filed on April 9, 2001 (and entered on August 28, 2001), and a Reply Memorandum in Further Support of Defendants' Motion to Dismiss the Amended Complaint or, in the Alternative, Motion for Summary Judgment, entered on September 27, 2001. On March 31, 2003, this Court granted EPA's motion to dismiss GE's complaint for lack of jurisdiction. *General Electric Co. v. Whitman*, 257 F. Supp. 2d 8 (D.D.C. 2003). Subsequently, the United States Court of Appeals for the District of Columbia Circuit reversed on narrow grounds, holding only that the district court had jurisdiction to hear GE's facial constitutional challenge to certain provisions of CERCLA. *General Electric Co. v. EPA*, 360 F.3d 188 (D.C. Cir. 2004). EPA has filed for summary judgment with respect to the merits of these constitutional claims. As a result, Environmental *Amici* now submit this further Memorandum of Points and Authorities In Support of EPA's Motion for Summary Judgment.

A. Description of Environmental *Amici*

The Natural Resources Defense Council (NRDC) is a national non-profit environmental advocacy organization with its headquarters in New York City, organized under the laws of New York. NRDC has over 550,000 members nationally and over 55,000 in New York. In the more than thirty years since it was founded, NRDC has fought to address many Hudson River water pollution problems, including sewage treatment, power-plant cooling water intakes and cleanup of PCBs. NRDC actively supported the development of the EPA cleanup plan for PCB contamination of the Hudson River, including testifying at public hearings, submitting comments in support of EPA's proposed cleanup plan and providing action alerts for its members.

Founded in 1966, Hudson River Sloop Clearwater (Clearwater) is a non-profit

environmental organization incorporated in New York that conducts environmental education, advocacy programs and celebrations to protect the Hudson River, its tributaries and related bodies of water, and to create awareness of this estuary's complex relationship with the coastal zone. Clearwater has been tireless in its efforts to keep the public informed about GE's PCB contamination, providing sophisticated, science-based analysis for the media and the public for over two decades. Among many other activities, Clearwater produced studies of subsistence fishermen on the Hudson demonstrating that they eat their catch; organized the "Candles for Clean Hudson" candlelight vigil attended by 3,000 people in 42 locations from New York City to Fort Edward; and led an initiative to secure municipal resolutions in support of EPA's PCB cleanup plan from more than 50 municipalities and 130 organizations.

New York Rivers United is a non-profit membership corporation incorporated in New York. Its mission is to enhance, conserve, and restore the natural resources of the state's rivers and tributary streams. It has intervened before the Federal Energy Regulatory Commission (FERC) in licensing proceedings for hydropower projects, including the Hudson Project and Hudson Falls Project, that are located on river reaches contaminated with PCB sediments, in order to address the procedures between FERC, EPA, and the State to remediate that contamination. Its members use these river reaches for boating, swimming and other forms of recreation.

Riverkeeper is a Garrison-based New York non-profit environmental organization that advocates the protection of the Hudson River and its ecosystem, and enforces the environmental laws protecting the Hudson and its watershed. Riverkeeper's members use the Hudson River for a variety of purposes, including commercial and recreational fishing, boating, swimming and

aesthetic enjoyment, and share a deep commitment to the conservation and protection of the Hudson River's rich ecosystem, particularly its fisheries. For their entire thirty-six year history, Riverkeeper and its predecessor, the Hudson River Fishermen's Association, have focused on improving the health and availability of the Hudson River's fisheries. Riverkeeper has been a strong advocate for EPA's cleanup plan and a watchful monitor of every legal and technical aspect of its efforts to ensure that GE as the responsible polluter timely implements the comprehensive remediation. Riverkeeper will continue its advocacy, policy, education, and community based efforts to ensure the cleanup proceeds to completion and the PCBs and their accompanying health threat to the public and wildlife are finally and forever removed.

Scenic Hudson was founded in 1963 as an association of local civic groups and individuals who fought a 17-year legal battle to oppose the construction of a hydroelectric plant on Storm King Mountain. The landmark case won citizens legal standing in environmental disputes, essentially launching the modern American environmental movement. One of Scenic Hudson's primary areas of advocacy over the past two decades has been the cleanup of PCBs from the Hudson River. Scenic Hudson has been a leading voice advocating for GE to clean up the Hudson River PCBs Superfund site. Through its continuous advocacy work and technical expertise, Scenic Hudson has increased public awareness about the health and ecological risks posed by the persistent problem of Hudson River PCB pollution and about the need for a cleanup. In addition to public education, Scenic Hudson has documented the feasibility of state-of-the-art contaminated sediment removal technologies for the Hudson River and has significantly informed the debate over suitable remedies. Scenic Hudson is continuing its lead technical and advocacy role to ensure the EPA cleanup remedy stays on track and is

implemented as decided by EPA.

B. *Amici*'s Interest in this Case

Environmental *Amici* have a deep and well-established interest in ensuring the swift remediation of GE's toxic contamination of the Hudson River. Because GE has mounted a facial challenge to the constitutionality of CERCLA's administrative order provisions, there are no genuine issues of disputed fact with respect to EPA's Motion for Summary Judgment. This Court need not determine any facts with respect to Hudson River contamination issues. However, Environmental *Amici* believe that a brief description of GE's contamination of the Hudson River will provide helpful context to the Court as it considers GE's claims and will illustrate the vital environmental importance of preserving CERCLA's enforcement structure from GE's baseless attack.

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 GE manufacturing plants located in Fort Edward and Hudson Falls, New York. Many of these discharges remain concentrated in hotspots in the sediments of the Upper Hudson, but PCBs have polluted the entire stretch of the River below Hudson Falls. In 1983, as a result of GE's pollution, EPA classified a 200-mile stretch of the Hudson River from Hudson Falls to the Battery in New York City as a CERCLA National Priority Listed Superfund site.[1]

Although GE blithely asserts that "no emergency" justifies EPA's efforts to require remediation of GE's contamination from the River, Am. Compl. ¶ 42, GE's PCB contamination continues to threaten the health of people and wildlife along the Hudson. EPA has determined

[1] *See* http://www.epa.gov/hudson/background.htm (last visited November 28, 2004).

that PCBs are probable human carcinogens and that they also pose a number of serious non-cancer health hazards to brain functions and the nervous, immune and reproductive systems.[2] The adverse and potentially irreversible harms to developing children are especially concerning. EPA has found that PCBs "pose special risks to pregnant women and have been linked to premature births and lowered IQs in children."[3] EPA's numerous peer-reviewed scientific studies have concluded that consumption of PCB-contaminated fish from the Hudson River poses significant cancer and non-cancer health threats that considerably exceed EPA's levels for protection. For example, EPA estimates that cancer risks from eating PCB-contaminated fish from the Upper Hudson River are 1000 times higher than the EPA goal for protection.[4]

To try to warn the public against the dangerous consumption of PCB contaminated Hudson River fish, the New York State Department of Health (DOH) has been forced to recommend severe restrictions on eating Hudson River fish. DOH commends that no one should eat any of the fish from the Upper Hudson River, that children under the age of 15 and women of child-bearing age eat none of the fish from the river for the entire 200-mile stretch of the Hudson River from Hudson Falls to the Battery in New York City, and that the general population eat none of most species of fish caught between Troy and Catskill.[5] Despite DOH's warnings, however, and similar outreach efforts by other concerned groups, including Environmental *Amici*, studies have found that low-income subsistence fishermen along the Hudson continue to

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[2] *PCBs and Human Health*, (EPA) at 1-2, *available at* http://www.epa.gov/hudson/humanhealth.htm (last visited November 28, 2004).
[3] *Id.* at 2.
[4] *Executive Summary Human Health Risk Assessment: Upper Hudson River* (EPA August 1999) at 4, *available at* http://www.epa.gov/hudson/humanhealth.htm (last visited November 28, 2004).
[5] *Record of Decision, Hudson River PCBs Site New York*, (EPA Feb. 2002) at 31 (hereinafter Record of Decision or ROD), *available at* http://www.epa.gov/hudson/RecordofDecision-text.pdf (last visited November 28, 2004).

catch PCB-contaminated fish and eat them with their families, placing them at risk for severe adverse health effects.[6]

Finally, because of GE's PCB contamination, New York State has all but shut down the once-thriving commercial fishery on the lower Hudson River, historically one of the most productive and critical estuaries on the East Coast of the United States.[7] This necessary measure has harmed the economy of the Hudson Valley, left families without the means to support themselves and extinguished a generations-old tradition of this region.

There have been decades of efforts by government to require the cleanup of GE's PCB contamination. In 1984, EPA made an interim no-action decision for the Hudson River PCB-contaminated sediments, requiring no remediation of the Hudson. However, in 1990, after encouragement by New York State, EPA began a lengthy and comprehensive reassessment of this decision. To provide for public input for a variety of stakeholders, including GE, EPA developed a uniquely broad and comprehensive Community Interaction Program because of the "enormous interest" in the Hudson River Superfund site.[8] During the ten-year Reassessment Project, EPA held more than 75 public meetings on the project,[9] typically with opportunity for at least informal public comment and questioning of agency officials.

Additionally, in order to ensure that the scientific work conducted for its Reassessment was of the highest quality and credibility, EPA convened five separate peer review panels to examine the major pieces of its scientific work that would form the basis for its decision. Four

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[6] *See, e.g.*, Survey of Hudson River Anglers and an Estimate of Their Exposure to PCBs, prepared by New York State Department of Health Under a Cooperative Agreement with the Agency for Toxic Substances and Disease Registry (Sept. 30, 1998).
[7] ROD at 30-31.
[8] *Id.* at 8-10.
[9] *Id.* at 8.

of the peer reviews were conducted by independently chosen scientists from around the world. The fifth peer-review was conducted by the National Remedy Review Board as part of a CERCLA process.[10]

On December 12, 2000, EPA issued its proposed cleanup plan. GE and other interested parties enjoyed numerous opportunities to provide input and comment into the remedial investigation, feasibility and plan proposal process.[11] From December 2000 to April 2001, EPA held eleven public meetings for the public – and for GE – to comment on the Proposed Plan.[12] The EPA also extended its original 60-day comment period on the proposed cleanup plan to a total of 120 days.[13] EPA received and considered more than 70,000 comments on the Proposed Plan.[14]

On February 1, 2002, after a public process that lasted a dozen years, EPA issued a Record of Decision (ROD) for the Hudson River PCBs Superfund Site. The ROD calls for targeted dredging of 2.65 million cubic yards of sediment containing 150,000 pounds of PCBs from the Upper Hudson River between Fort Edward and Troy. The estimated present worth cost for the cleanup is $460 million.[15] Following a protracted period of negotiations with GE and design of the remediation, the dredging project, originally slated to begin in 2005, was delayed

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

[11] In addition to participating in the ample opportunities for public comment that EPA provided on the Hudson River cleanup, GE engaged in a widespread publicity and lobbying campaign aimed, unsuccessfully, at defeating EPA's proposed cleanup plan prior to issuance of the ROD. The magnitude of this campaign was unprecedented as a public relations attempt to influence a particular Superfund determination under CERCLA. According to some estimates, GE spent $60 million on anti-dredging publicity in 2001 alone. *See Gipper Meets `Survivor' as G.E.'s Image Hardens*, N.Y. Times, March 4, 2001 at 29.

[12] ROD at 9.

[13] *Id.*

[14] *Id.* at vi.

[15] *Id.* at 91.

one year until 2006.[16] EPA continues to work with GE, and to provide some opportunities for public input and participation, in the design of the remedy.[17]

In the almost three years since EPA released the ROD, GE has negotiated with EPA and signed two Administrative Orders on Consent regarding its performance of specific aspects of the remedial design.[18] But GE has not yet agreed to actually perform or pay for the cleanup, nor has EPA issued a final administrative order with respect to the Hudson River Superfund site. With the cleanup now scheduled to begin in just a year and a half, and in the continued absence of either a remedial action agreement between EPA and GE or an EPA order, *amici* grow ever more concerned that the decades-overdue clean up of the Hudson River will be yet further delayed.

Given this history and background, GE's assertion that EPA is engaged in "threatening" behavior on the Hudson River Superfund site, Am. Compl. ¶35, rings hollow. EPA's conduct in conducting its Reassessment Study, in developing the Proposed Remediation Plan, in issuing the ROD and in the designing the remedy has been painstakingly thorough and fair. In contrast, it is GE that is using this litigation as a bargaining chip to try to intimidate EPA and to continue its efforts to stall, weaken or avoid the comprehensive cleanup of the Hudson River that is so long overdue. If this Court were to accept GE's invitation to strike down CERCLA's bar on pre-enforcement challenges to final administrative cleanup orders, EPA's ability to move forward with implementation of the Hudson River ROD would be significantly impaired, especially in the event that negotiations with GE to perform the cleanup are ultimately unsuccessful. GE

[16] *See* http://www.epa.gov/hudson/proj_des.htm (last visited November 28, 2004).
[17] *See* http://www.epa.gov/hudson/public.htm (last visited November 28, 2004).
[18] *See* http://www.epa.gov/hudson/proj_des.htm (last visited November 28, 2004).

could then use its vast resources to create a legal tangle that could indefinitely delay the cleanup of Hudson River, causing severe damage to public health and the environment.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, GE challenges several provisions of CERCLA, 42 U.S.C. § 9601 *et seq*. GE claims that the provisions of CERCLA that authorize EPA to order private parties to clean up hazardous waste sites for which they are responsible, and that permit judicially imposed penalties for unjustified failures to comply with such orders, are unconstitutional under the Due Process Clause of the Fifth Amendment to the United States Constitution. GE seeks a declaratory judgment to this effect.

In the years-long course of this litigation, GE has striven mightily to avoid labeling its challenge either "facial" or "as-applied." With good reason. If the challenge is as-applied, the D.C. Circuit has made plain that the claim is precluded by section 113(h) of CERCLA. *GE v. EPA*, 360 F.3d 188, 191 (2004). Yet if the challenge is facial, then GE must show that the provisions it challenges are unconstitutional in every application. In either event, GE will lose. Thus the company has been experimenting with numerous different names for its claim. Semantics aside, it is clear that GE's efforts to create a new kind of claim – neither facial nor as-applied – must fail, as no such creature exists.

Treating GE's challenge as a facial challenge, as the D.C. Circuit did, GE must demonstrate that there exists no circumstance in which these provisions could be constitutionally applied; that is, they are unconstitutional in every application. Implicit in this facial challenge is thus the quite remarkable proposition that in every one of the hundreds of times that the EPA has applied these statutory provisions during the past two decades, EPA's actions have been

unconstitutional. This is a breathtaking claim, and one that cannot be sustained.

Indeed, even if GE were not required to show, in this facial challenge, that the administrative orders regime of CERCLA is unconstitutional in every application, its challenge would nevertheless fail because this regime simply embodies no constitutional defect. An administrative cleanup order issued by EPA pursuant to CERCLA does not deprive the person to whom the order is issued of any interest protected by the due process clause; no such deprivation can occur under the statute unless and until a federal court passes upon the validity of the order. Although the statute, to be sure, does not provide for pre-enforcement judicial review of administrative orders, pre-enforcement review is not constitutionally mandated. Moreover, the judicial review that is afforded by CERCLA fully satisfies the requirements of due process. Under CERCLA, a federal judge may award penalties for failure to comply with an administrative cleanup order, but only if the non-complying party lacked "sufficient cause," such as a well-grounded belief in the unlawfulness of the order, for its failure to comply. As for the nature of the judicial hearing afforded by CERCLA, GE's apparent belief that on-the-record, arbitrary-and-capricious review of decisions about the nature and extent of cleanup required at a site violates due process is impossible to square with the last half-century of administrative and constitutional law.

GE seeks an equitable remedy that would operate to invalidate statutory provisions that not only have been applied to GE many times in the last two decades, without a whisper from GE about their unconstitutionality under the due process clause, but that also have been used by GE to its advantage in litigation brought against it.[19] Having used CERCLA's procedural

[19] S*ee M.R. (Vega Alta), Inc. v. Caribe General Electric Products, Inc.*, 31 F.Supp.2d 226, 232-33

structure as a sword to defeat its own liability in the past, GE now asks this Court to strike down this structure when it operates to the company's disadvantage. This Court should decline to do so.

STATUTORY AND REGULATORY BACKGROUND

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.*, often referred to as "Superfund," was passed in response to

> the emerging realization that inactive hazardous waste sites presented great risk to public health and the environment in all parts of the nation, that state and local governments did not have the capability to respond, and that existing federal environmental and disaster relief laws were inadequate. The Love Canal site in Niagara Falls, New York first brought the issue to national prominence when the state health commissioner declared a state of emergency there on August 2, 1978.[20]

Thus, CERCLA was enacted to address the problem of abandoned or inactive hazardous waste sites that pose a threat to public health and welfare. The overarching purposes of the statute are to achieve the expeditious cleanup of these sites and to do so at the expense of the parties responsible for the contamination. *See, e.g.*, *United States v. Bestfoods*, 524 U.S. 51, 55-6 (1998). CERCLA strives to achieve these purposes through a regulatory scheme that provides a menu of cleanup options from which the EPA[21] may choose. This regulatory flexibility has been a great success: as of September 2000, cleanup construction had been completed at 757

(D.P.R.1998) (accepting argument of defendants, including GE, that section 113(h) of CERCLA deprived court of jurisdiction to entertain claim for certain response costs brought against GE and other defendants).

[20] Congressional Research Service, Report for Congress: Superfund Fact Book (updated 1997) (*available at* http://cnie.org/NLE/CRSreports/Waste/waste-1.cfm) (last visited November 28, 2004).

[21] The statute delegates authority to the President, who has in turn (pursuant to 42 U.S.C. § 9615)

Superfund sites, and cleanup had been initiated at nearly 600 additional sites.[22]

CERCLA provides EPA with four different ways to achieve the expeditious cleanup of hazardous waste sites. The agency may initiate negotiations with the parties EPA identifies as responsible for hazardous waste contamination (42 U.S.C. § 9622); it may issue an administrative order to these responsible parties, requiring them to clean up the site (42 U.S.C. § 9606(a)); the agency may ask a court to order the responsible parties to clean up the site (42 U.S.C. § 9606(a)); or the agency may itself clean up the site and then file a lawsuit against the responsible parties seeking reimbursement for the costs of cleanup (42 U.S.C. § 9604(a)(1), 9607(a)).

EPA's decision on the scope of the cleanup to be ordered is preceded by significant procedural steps. As EPA's Memorandum of Points and Authorities explains, interested parties, including both members of the community surrounding a hazardous waste site and those potentially responsible for the contamination at a site, receive numerous opportunities to comment upon EPA's proposals for responding to such contamination. *See* Mem. in Support of Defs. Mot. for Summary Judgment (May 2004) at 6-9. Depending on the nature and complexity of the remedial effort being contemplated, EPA sometimes engages in unusually extensive fact finding. In considering possible remedies for the PCB contamination of the Hudson River, for example, EPA solicited five separate rounds of peer review by scientists working in areas relevant to the agency's remedial decision. See pp. 7-8 above.

If a private party disputes the validity of an administrative cleanup order issued by EPA, it may obtain judicial review of that order in three situations. First, if EPA files an enforcement

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delegated authority to the EPA. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987).

action in federal court, seeking compliance with the order or seeking penalties for noncompliance, the party to whom the order was issued may contest the validity of the order. Second, if EPA itself goes ahead and cleans up the hazardous waste site and then sues the party whom it ordered to clean up the site for its incurred cleanup costs, that party may contest the validity of the order in this situation as well. Finally, the party to whom an administrative cleanup order is issued may comply with the order and then petition the EPA for reimbursement of its cleanup costs on the ground that the order was not lawful. If EPA refuses reimbursement, the party who paid for the cleanup may file a federal lawsuit seeking reimbursement. In all three of these situations, a judicial hearing will precede a finding that the private party in question must either complete the cleanup, pay for the cleanup, or pay penalties for having failed to comply with the administrative order.

In order to encourage responsible parties to comply with the lawful orders of the EPA regarding hazardous waste remediation, CERCLA provides that parties who fail, "without sufficient cause," to comply with an EPA order may be subject to penalties regardless of whether EPA chooses to achieve cleanup through an enforcement action or through conducting its own remediation. Specifically, with regard to an enforcement action, if any person,

> without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under [42 U.S.C. § 9606(a)] may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

42 U.S.C. § 9606(b)(1). Alternatively, if EPA incurs costs in cleaning up a site itself, then any person "who is liable for a release or threat of release of a hazardous substance" and who

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[22] *See* http://www.epa.gov/superfund/action/process/mgmtrpt.htm (last visited November 28, 2004).

> fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action.

42 U.S.C. § 9607(c)(3).

The courts have stated that "sufficient cause" means an objectively reasonable belief in either the inapplicability of CERCLA's liability provisions to a party or the arbitrariness of EPA's cleanup decision. *See, e.g.*, *United States v. Barkman*, 1998 U.S. Dist. LEXIS 20248 at *53 (E.D. Pa. 1998); *United States v. LeCarreaux*, 1991 U.S. Dist. LEXIS 19273 at *26 (D.N.J. 1991). One court has refused to impose punitive damages or civil penalties on parties in light of the "sufficient cause" defense of sections 106(b)(1) and 107(c)(3). *United States v. DWC Trust Holding Co.*, 1996 U.S. Dist. Lexis 6440 at *25 (D. Md. 1996).

EPA's decision as to the appropriate cleanup for a given site is, no matter in what context a challenge to that decision is raised, subject to the same kind of judicial review: review on the administrative record pursuant to the arbitrary-and-capricious standard. 42 U.S.C. § 9613(j). EPA's determination that a party is responsible, within the meaning of CERCLA, for contamination at a particular site is also subject to judicial review, albeit under a de novo standard. *See Kelley v. EPA*, 15 F.3d 1100, 1107 (D.C. Cir. 1994).

Section 113(h) governs the timing of challenges to EPA's remedial decisions under CERCLA. 42 U.S.C. § 9613(h). EPA's decisions, including administrative orders under section 106 and its own cleanups under section 104, are judicially reviewable when EPA brings an enforcement action pursuant to section 106; when EPA brings a reimbursement action pursuant to section 107; when a party seeks reimbursement for cleanup costs under section 106(b); and in

certain other, limited circumstances. *Id.*

In a nutshell, then, the provisions of CERCLA challenged by GE in this case – sections 106, 107(c)(3), and 113(h) – accomplish four things. First, section 106(a) authorizes EPA to order parties whom the EPA has identified as responsible for hazardous waste contamination to clean up contaminated sites. Section 106(a) does not, however, authorize EPA to deprive any party of an interest protected by the due process clause in advance of a judicial hearing. Second, section 113(h) provides for judicial review of administrative cleanup orders issued under section 106(a), provided that EPA has sued to enforce an administrative order, a party has sought to recover its expenses in complying with an order, or EPA has cleaned up and sued to recover its own expenses. Third, sections 106(b)(1) and 107(c)(3) provide that judicial review will precede any penalties to be imposed for failure to comply with an administrative order issued under section 106(a); these sections confer discretion on judges in imposing such penalties and instruct judges not to impose penalties if a party had "sufficient cause" for its failure to comply with an administrative cleanup order. Fourth, in all of the federal actions authorized under section 113(h), challenges to EPA's selection of a remedy are reviewed on the administrative record, pursuant to the arbitrary-and-capricious standard of review. 42 U.S.C. § 9613(j).

ARGUMENT

I. GE'S ATTEMPT TO CREATE A NEW CATEGORY OF CONSTITUTIONAL CHALLENGE, WHICH IS NEITHER "FACIAL" NOR "AS APPLIED," MUST FAIL.

In trying to characterize its Amended Complaint in a way that will save it from dismissal, plaintiff GE finds itself caught between a rock and a hard place. If GE's Amended Complaint is viewed as challenging the administrative cleanup order provisions of CERCLA on their face,

then the challenge is governed by the demanding test of *United States v. Salerno*, 481 U.S. 739, 745 (1987), and can succeed only if there is no situation in which these provisions could be validly applied. Yet if GE's Amended Complaint is viewed as challenging the relevant provisions of CERCLA as applied to GE in a specific setting, then the challenge is barred by section 113(h), 42 U.S.C. § 9613(h), according to GE itself, Pl.'s Opp'n. to Defs.' Mot. to Dismiss (June 2001) at 53, and according to the D.C. Circuit's opinion in this case. *General Electric v. EPA*, 360 F.3d 188, 191 (D.C. Cir. 2004).

GE has tried to wriggle out of this tight spot by creating a whole new category of constitutional litigation, neither facial nor as-applied. As this Court noted in its opinion dismissing GE's claim for want of jurisdiction, GE has gone to "great lengths to recast its challenge," attempting to launch a "hybrid attack" on CERCLA and offering a "novel articulation" of its claims. *General Electric v. Whitman*, 257 F.Supp.2d 8, 28 n.4 (D.D.C. 2003). However, as this Court noted in its recent Order granting EPA's motion for a stay of discovery, the Court of Appeals for the District of Columbia, in remanding this action back to the District Court, "repeatedly described" GE's claim as a "`facial constitutional challenge to CERCLA'" or a "'facial due process claim.'" *General Electric v. Leavitt,* Order, Civ. Action No. 00-2855 (Nov. 22, 2004) (hereafter Discovery Stay Order) at 1 (citing *General Electric v. EPA,* 360 F.3d at 189, 194). As this Court further explained, despite the Court of Appeals' citation of *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991), (which *amici* discuss below):

> [I]t is difficult to ignore the repeated descriptions of GE's claim as a facial constitutional challenge and the specific direction by the Court of Appeals to this Court at the conclusion of the appellate decision: "we remand the case to the district court to address the merits of GE's facial due process claim." *General Electric Co. v. EPA*, 360 F.3d at 194. And "systemic" is used by the Court of Appeals to distinguish from "particularized" challenges, in parallel with the distinction between facial and as applied constitutional challenges.

General Electric v. Leavitt, Discovery Stay Order at 2.

Discerning the exact nature of GE's Amended Complaint is difficult because GE itself has inconsistently described its challenge. In the previous round of litigation in this Court, EPA and Environmental *Amici* observed that GE's Amended Complaint appeared to be limited to the issuance of administrative cleanup orders in non-emergency situations. Defs. Mem. in Supp. of Mot. to Dismiss (March 2001) at 29; Environmental *Amici* Mem. in Supp. of Mot. to Dismiss at 20-21, n.20. In reply, GE objected to that characterization of its Amended Complaint. Pls. Opp'n. to Defs. Mot. to Dismiss (June 2001) at 51 ("To begin with, EPA claims that GE challenges § 106 only insofar as it authorizes EPA to issue UAOs in non-emergency situations. That assertion is wrong.") (citation omitted). However, GE also stated that it was challenging CERCLA

> as authoritatively construed by EPA, permitting the agency to issue UAOs and dispense with necessary procedural safeguards in all situations, *whether true emergencies or emergencies in name only*. . .. [Section] 106 is invalid because, *inter alia*, the statute as currently drafted *does not require the presence of any actual emergency* that might justify the extraordinary step of depriving a person of liberty and property without a prior opportunity to be heard.

Pl.'s Opp'n. to Defs.' Mot. to Dismiss (June 2001) at 53 (emphasis added). In a single brief, therefore, GE asserted both that it was challenging the administrative orders regime as applied to *all* situations, emergency and non-emergency alike, *and* that its Amended Complaint was not a "pure facial challenge" because it was directed only toward the use of section 106 in non-

emergency settings. It is as if GE's brief was drafted by a committee of people who did not compare notes.

To compound the confusion, GE cited a series of cases to support its claim that "the dichotomy between 'facial' and 'as applied' constitutional challenges is a false one." Pl.'s Opp'n. to Defs.' Mot. to Dismiss (June 2001) at 52-53 (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Tennessee v. Garner*, 471 U.S. 1 (1985); and *United States v. Grace*, 461 U.S. 171 (1983). GE's counsel also cited these cases during oral argument in the D.C. Circuit, when pressed by the panel to explain how GE's challenge is neither facial nor as applied. Oral Argument Tr. at 12-14 (attached to Defs. Mot. for Summ. Judg. (May 2004) as Exhibit 1). However, these three cases all declined to strike down challenged statutes on their face, while at the same time maintaining the distinction between facial challenges and challenges based on specific applications of a law. Thus these cases support rather than refute the distinction between facial and as-applied challenges that GE has tried to avoid.

On remand from the D.C. Circuit, the mystery as to what GE is actually claiming has only deepened. In this round of litigation, GE has opted for the monikers "systemic" and "pattern and practice" to describe the nature of its challenge to CERCLA. *See* Pl.'s Opp. to Defs. Mot. to Stay Discovery Pending Resolution of Dispositive Mot. (May 2004) (hereinafter GE Mem. On Disc. (May 2004)) at 1, 4, 13, 14, 15, 16, 18 (calling its challenge "systemic"), and at 2, 13, 14, 16, 18 (labeling the challenge a "pattern and practice" claim). GE asserts that its claim is not "limited to a 'facial' challenge," *id.* at 3, that it is indeed "far broader" than a facial challenge, *id*. at 14, and it is not challenging CERCLA merely "as written," *id*. at 4, 5, 13, 18, but rather "attacks EPA's systematic implementation of CERCLA's UAO provisions." *Id*. at 13.

In addition, despite GE counsel's statements at oral argument in the D.C. Circuit apparently conceding that "limiting [CERCLA's UAO provisions] to real emergencies" would cure the constitutional defects GE sees in the provisions, Oral Argument Tr. at 11 (attached to Defs.' Mot. for Summ. Judg. (May 2004) as Exhibit 1); *see also id.* at 12, 14, 15, GE now states that "[t]here are no circumstances – even emergency situations – in which EPA's use of Section 106 would be constitutional." GE Mem. On Disc. (May 2004) at 20-21. One would have hoped that, four years into this litigation, GE would by now have a consistent and coherent theory about the nature of its own case.

In any event, GE's labored semantics do not bolster its case. On remand, GE has made much of the fact that the D.C. Circuit referred to its challenge as "systemic," intimating that the court of appeals' choice of language somehow aids GE's attempt to create a whole new kind of constitutional litigation, neither facial nor as-applied. GE Mem. On Disc. (May 2004) at 1, 4, 13, 15, 16. GE's argument is risible. As this Court noted in its recent order, "`systemic'" is used by the Court of Appeals to distinguish from `particularized' challenges, in parallel with the distinction between facial and as-applied constitutional challenges." *General Electric v. Leavitt*, Discovery Stay Order at 2. Indeed, the D.C. Circuit expressly equated "facial" with "systemic" challenges, noting that its holding was consistent with "precedent distinguishing between facial, or 'systemic,' and as-applied, or particularized challenges." *General Electric v. EPA,* 360 F.3d at 192. Clearly, here the court is equating facial and systemic challenges on the one hand, and equating as-applied and particularized challenges on the other. Moreover, in the course of its brief opinion, the D.C. Circuit referred to GE's challenge as "facial" no fewer than nine times. *Id.*, *passim*. The court made clear that an as-applied challenge by GE would be barred at this

time by section 113(h) of CERCLA, *Id.* at 191, and specifically remanded this case to this Court "to address the merits of GE's *facial* due process claims." *Id.* at 194 (emphasis added). Clearly, therefore, the D.C. Circuit correctly believed that what it had before it was a facial attack.

GE has also cited the D.C. Circuit's reliance on *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), as support for its attempt to create a new category of constitutional claims. GE Mem. On Disc. (May 2004) at 4, 15-16. *McNary* does not help GE, either. Although that case did indeed involve "systemic" challenges to the way in which the Special Agricultural Worker provision was being implemented, the challenges were "systemic" in the sense of being broad in scope. They were not facial challenges to a law, but rather broad-scale, as-applied challenges to the way in which a law was being implemented. *See McNary*, 498 U.S. at 492 (referring to plaintiffs' claims as "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications"), 488 (case "attacks the manner in which the entire program is being implemented" (quoting *Haitian Refugee Center, Inc. v. Nelson*, 694 F. Supp. 864, 873 (S.D. Fla. 1988)). The plaintiffs in *McNary* were 17 individual farm workers and several non-profit organizations. *Haitian Refugee Center*, 694 F. Supp. at 866. The district court in *McNary* made sure to determine whether these individuals and organizations had standing to challenge the practices they were attacking – that they had suffered an "injury in fact" as a result of the practices they challenged. *Id.* at 874-76.

McNary involved, in other words, a quite ordinary, even if broad, as-applied challenge, a challenge to the way an agency was doing its business under a statute. As a result, plaintiffs in that case were required to show that they had been injured by the very practices they were challenging. Plaintiffs' claims in that case can indeed be labeled "systemic" because of their

breadth, but "facial" they were not.

If GE really wanted to launch the kind of challenge involved in *McNary*, it would face two problems. First, its as-applied action would be barred by section 113(h) of CERCLA, as the D.C. Circuit has held and GE itself has conceded. Second, GE's claim would be limited to those instances in which *GE* has been affected by EPA's implementation of CERCLA. As the *McNary* litigation makes clear, plaintiffs cannot simply instigate roving constitutional challenges to whole statutory programs without showing that they themselves have been injured by the practices they attack. In sum, this Court's recent observation that GE's instant challenge to CERCLA "may pose standing and related issues not present in the *McCary* class action," *General Electric v. Leavitt*, Discovery Stay Order at 2, is entirely correct.

As this Court has already noted, there is no constitutional claim of the kind GE wants to create: "A plaintiff can either challenge *all* applications of a statute (*i.e.*, a facial challenge), or the statute as-applied to the plaintiff's particular conduct – but he cannot take the middle ground and challenge the statute as-applied to a general class of activity into which his conduct also falls." *GE v. Whitman*, 257 F. Supp.2d 8, 11 n.4 (quoting *GDF Realty Investments v. Norton*, 169 F. Supp.2d 648, 656 (W.D. Tex. 2001)). This principle reflects the "well-established rule that a plaintiff may constitutionally challenge either the application of a statute *to his own conduct*, or he may argue the statute, on its face, does not constitutionally apply to *any* conduct – he may not strike down the statute as unconstitutionally applied to some abstract class or subset of conduct." *GDF Realty*, 169 F. Supp.2d at 657 n.11. To hold otherwise would be to flout the equally well-established principle that courts are to pass upon the validity of legal regimes only as those regimes apply to the parties actually before them. *See, e.g.*, *Members of City Council v.*

Taxpayers for Vincent, 466 U.S. 789, 798 (1984); *United States v. Raines*, 362 U.S. 17, 21 (1960).

In the remainder of this brief, we assume that GE's challenge is as the D.C. Circuit has characterized it: a facial challenge to several provisions of CERCLA.

II. TO PREVAIL IN A FACIAL CHALLENGE, GE MUST SHOW THAT SECTIONS 106, 107(C)(3), AND 113(H) OF CERCLA ARE UNCONSTITUTIONAL IN EVERY APPLICATION.

A party bringing a facial challenge to a statute bears a "heavy burden." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The Supreme Court has described this burden in the following terms:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since *the challenger must establish that no set of circumstances exists under which the Act would be valid*. The fact that the [statute in question] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

Id. (citing *Schall v. Martin*, 467 U.S. 253, 269 n.18 (1984)) (emphasis added). Of particular importance to this case, the Supreme Court has applied the *Salerno* standard to challenges based on procedural due process. *See Reno v. Flores*, 507 U.S. 292, 301, 308-09 (1993). The D.C. Circuit likewise applies the *Salerno* test in evaluating facial challenges based on procedural due process. *See Chem. Waste Mgmt. v. EPA*, 56 F.3d 1434, 1437 (D.C. Cir. 1995); *see also Nebraska v. EPA*, 331 F.3d 995, 998 (D.C. Cir. 2003) (applying *Salerno* test to claim based on Commerce Clause); *Steffan v. Perry*, 41 F.3d 677, 693 (D.C. Cir. 1994) (en banc) (applying *Salerno* test to claim based on substantive due process).

Just six months ago, the Supreme Court referred to the "demanding standard" of *Salerno*,

requiring a party to establish that the challenged law "can never be applied constitutionally." *Sabri v. United States*, 124 S.Ct. 1941, 1945 (2004). The Court admonished potential plaintiffs that "facial challenges are best when infrequent," and that "any gain" from pursuing challenges "wholesale" is "offset by losing the lessons taught by the particular, to which common law method normally looks." *Id.* at 1948.

The special rules for facial challenges are understandable in light of their unusual potential to disrupt statutory and regulatory schemes. As the Supreme Court has recognized, "[f]acial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1999) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). Justice Scalia has described the peculiarly disruptive effect of facial invalidations as follows: "When a facial challenge is successful, the law in question is declared to be unenforceable in *all* its applications, and not just in its particular application to the party in suit." *City of Chicago v. Morales*, 527 U.S. 41, 74 (1999) (dissenting).

This potential for disruption is particularly great in the present lawsuit. CERCLA as a whole has been on the statute books for twenty years, and several of the provisions GE challenges were amended a decade and a half ago. During that time, EPA has grown to rely quite extensively on its authority to issue administrative cleanup orders under section 106. The remediation of hundreds of hazardous waste sites has been initiated (and in many cases completed) pursuant to this authority. A ruling, at this late date, that CERCLA is facially unconstitutional would seriously undermine the regulatory scheme governing cleanups and significantly threaten ongoing efforts to clean up hazardous waste sites. Such a ruling would

also, perversely, work to the competitive disadvantage of those firms that have, in CERCLA's twenty-year history, complied with EPA's lawfully issued orders rather than tying up the courts in challenges to them.

GE's eleventh-hour facial challenge to this statute is all the more troubling because the company has had numerous opportunities to raise precisely this kind of challenge in the past. In fact, GE has been feeling the effects of this statute almost since the day it was enacted; some of the very earliest interpretations of CERCLA came in response to actions brought against GE. *See, e.g., New York v. General Electric*, 592 F.Supp. 291 (N.D.N.Y. 1984). Now, more than two decades after CERCLA's enactment and two decades into GE's significant involvement with this statutory regime, GE brings a facial challenge against several central provisions of the law. Not only that, GE brings this attack despite the fact that it has, in the past, *relied upon* one of the provisions it attacks in defeating jurisdiction over a claim brought against itself. *See M.R. (Vega Alta), Inc. v. Caribe General Electric Products, Inc.*, 31 F.Supp.2d 226, 232-33 (D.P.R. 1998).

The strict requirements for facial challenges serve an important purpose in stabilizing statutory and regulatory regimes. Thus strict observance of these requirements is particularly crucial in cases challenging well-settled, longstanding statutory regimes.

To avoid the strictures of *Salerno* in this case, GE has claimed that the *Salerno* test is no longer good law; indeed, it has implied that it never has been. Pl.'s Opp'n. to Defs.' Mot. to Dismiss (June 2001) at 54-55. In doing so, GE relies on the plurality opinion in *City of Chicago v. Morales*, 527 U.S. 41 (1999), in which three Justices appeared to question the viability of the *Salerno* standard in the course of sustaining a facial challenge to an anti-loitering ordinance, not on the ground that the ordinance was unconstitutional in every application but on the ground that

vagueness "permeate[d]" the law, *id.* at 55.

There are several large problems with GE's reliance on *Morales*. First, the plurality opinion in *Morales* does not purport to resolve the question whether the *Salerno* test remains valid, but leaves this question for another day in light of the unusual procedural posture of that case. *Morales*, 527 U.S. at 55 n.22.

Second, *Morales* involved a very different legal question from the one presented here.[23] In that case, the plaintiff charged, and the Court held, that the anti-loitering statute was too vague to provide adequate notice as to what the law required and too vague to constrain arbitrary and discriminatory enforcement of the law. *Id.*. at 56. As Justice Breyer observed in his concurrence, in explaining why a facial challenge was appropriate in that case,

> The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance *is* invalid in all its applications.

Id.. at 71. In challenges based on vagueness, in other words, the danger of arbitrary enforcement exists in every application of the statute. In this sense, *Morales* represents, in effect if not in form, a reinforcement rather than a rejection of the *Salerno* standard: Chicago's anti-loitering ordinance failed because *in every case* it offered policemen and other governmental officials too

[23] The opinions in *Morales* have, to be sure, produced some perplexity in the lower courts concerning the availability of facial challenges to laws on vagueness grounds, *see, e.g.*, *Staley v. Jones*, 239 F.3d 769, 773-4 (6th Cir. 2001), but the standard for facial challenges based on procedural due process clearly remains the test articulated in *Salerno*. *See, e.g.*, *Chem. Waste Mgmt., Inc. v. EPA*, 56 F.3d 1434 (D.C. Cir. 1995).

little direction and too much discretion. Void-for-vagueness challenges, like that in *Morales*, are starkly different from procedural due process claims like that raised here, insofar as a statute might provide inadequate procedural protections to one group of parties while offering adequate protections to other groups. *See, e.g., Chem. Waste Mgmt. Inc.* v. EPA 56 F.3d 1434, 1437 (D.C. Cir. 1995) (rejecting facial challenge, based on procedural due process, to hazardous waste statute on ground that law would provide adequate procedural protections to at least some parties affected by the law). Indeed, the Supreme Court has been careful to avoid facial invalidation of laws on due process grounds where there are circumstances in which the challenged process is not constitutionally problematic. *See, e.g.*, *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (rejecting facial challenge to cognovit note authorized by state law, where party challenging law was sophisticated corporation that had agreed to cognovit procedure in arms-length transaction).

Finally, even in the context of void-for-vagueness claims, it cannot be said that the Supreme Court has come to closure on the issues surrounding facial challenges. Given the heated dispute among the Justices in *Morales*,[24] GE's apparent belief that the *Salerno* test is no longer good law is mistaken. Indeed, in the *Sabri* case noted above, the Supreme Court recognized that facial challenges may be brought even when based on claims of overbreadth. *Sabri*, 124 S.Ct. at 1948-49.

Thus *Salerno* remains good law. Yet GE's approach to litigating this facial challenge turns *Salerno* on its head. With its astonishingly sweeping requests for discovery of all

[24] In *Morales* itself, Justices Scalia and Thomas, in dissent, questioned the validity of the very idea of a facial challenge, suggesting that it was incompatible with the case-or-controversy requirements of Article III. 527 U.S. at 77-78 & n.1. The dissenting Justices pointed to the *Salerno* standard as a salutary check on a category of challenges they found deeply problematic from the perspective of Article III. *Id.* at 77-78.

documents related to EPA's decades-long history of implementing section 106 of CERCLA, GE makes clear that it hopes to find some situation, in the 1500-some instances in which administrative cleanup orders have been issued under the statutory provisions GE challenges, that lacks constitutional validity. GE seems to think that, in a facial challenge, it is enough if the challenger finds one example, or group of examples, of unconstitutional conduct. This is exactly the converse of the principle announced in *Salerno*.

It is not only the *Salerno* principle, but more fundamentally, Article III itself, which is threatened by GE's peculiar approach to facial challenges. GE is not entitled to complain about government conduct that supposedly takes another person's property without due process of law; it is entitled only to complain about conduct that takes *GE's* property without due process. The government's behavior with respect to *other* parties does not, under Article III, give GE a federally justiciable claim. GE's proposed fishing expedition in the government's files on 1500-some cases, the vast majority of which do not involve GE, merely serves to highlight GE's misunderstanding of the proper limits of federal jurisdiction.

In any event, GE should lose on all of the various interpretations it offers of its own Amended Complaint. First, if this is a facial challenge, it is governed by *Salerno* and, for the reasons stated in the remaining sections of this brief, the challenge should fail. Second, if this is an "as-applied" challenge, it fails for several alternative reasons. If conceived as a challenge to a specific cleanup order, such as the order that could be contemplated for the Hudson River PCB site if GE does not agree to the cleanup, GE concedes that the challenge is barred by section 113(h) of CERCLA. Pl.'s Opp'n. to Defs.' Mot. to Dismiss (June 2001) at 53. However, if GE's Amended Complaint is conceived as a challenge to a broad category of cases such as cases

involving non-emergency settings, then the challenge fails because it is too abstract and therefore not justiciable. GE is not allowed, under Article III, to complain about the government's conduct toward *someone else*. Although the Supreme Court has somewhat relaxed this rule where a person complains about the overbreadth or vagueness of a statute, *see Morales*, 527 U.S. at 52, it has not done so in the context of procedural due process.

GE faces an uphill battle in attempting to show that sections 106, 107(c)(3), and 113(h) of CERCLA are facially unconstitutional.[25] As we explain in the discussion that follows, GE cannot make this showing. This Court should thus follow the lead of every court of appeals that has confronted the claims GE makes, and reject these claims. *See Employers Ins. v. Browner*, 52 F.3d 656 (7th Cir. 1995) (rejecting challenge to sections 106(b) and 113(h)); *Fairchild Semiconductor Corp. v. EPA*, 984 F.2d 283 (9th Cir. 1993) (rejecting challenge to section 113(h)); *Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289, 295-296 (6th Cir. 1991) (rejecting challenge to section 113(h)); *Dickerson v. EPA*, 834 F.2d 974, 978 n.7 (11th Cir. 1987) (rejecting challenge to section 113(h)); *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 388-90 (8th Cir. 1987) (rejecting challenge to sections 106(b), 107(c)(3), and 113(h)); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315-16 (2d Cir. 1986) (rejecting challenge to sections 106(b), 107(c)(3), and 113(h)).

[25] In places, GE's Amended Complaint seems to challenge not only CERCLA on its face, but also EPA's regulations under CERCLA and its case-specific implementations of section 106. Am. Compl. ¶¶ 17, 19, 22-26, 51-52. To the extent that GE is attempting to import such challenges into its facial challenge to the statute, GE's attempt should fail for several reasons. First, it is untimely; under section 113(a), any challenge to CERCLA regulations must occur within 90 days of the promulgation of the regulations. 42 U.S.C. § 9613(a). Second, review of such regulations must occur in the District of Columbia Court of Appeals, and thus if this is a challenge to EPA regulations under CERCLA, it has been brought in the wrong court. 42 U.S.C. § 9613(a). Finally, given the facial nature of GE's challenge, it is not appropriate for GE to conjure a worst-case scenario under the statute and, based on that worst-case scenario, allege that the statute is unconstitutional on its face.

IV. GE CANNOT SHOW THAT SECTIONS 106, 107(C)(3), AND 113(H) OF CERCLA ARE UNCONSTITUTIONAL IN EVERY APPLICATION, AND THUS ITS FACIAL CHALLENGE TO THESE PROVISIONS MUST FAIL.

The Due Process Clause of the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const., Amdt. 5. Thus, the Supreme Court recently reminded us, "[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999), citing *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "Only after finding the deprivation of a protected interest," the Court cautioned, should a court "look to see if the [challenged] procedures comport with due process." *Sullivan*, 526 U.S. at 59.[26]

The first question in this case, therefore, is whether section 106, 107(c)(3), or 113(h) of CERCLA deprives GE of an interest protected by the due process clause. As we explain in Part

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[26] In the discussion that follows, we demonstrate that CERCLA, in its normal operation and in the broad run of cases, raises no serious constitutional question. In this way, we establish more than is necessary to defeat GE's facial challenge because such a challenge can succeed only if there is *no* circumstance in which the statute can be constitutionally applied. It is easy to defeat GE's challenge on this basis. Even if CERCLA deprived parties of interests protected by the due process clause in advance of a judicial hearing (which, we will establish, it does not do), such summary deprivations are justified in emergency situations. *See, e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 299-300 (1981) (citing numerous cases). GE's Amended Complaint recognizes as much, insofar as it seems to strive to limit its challenge to non-emergency settings. Am. Compl. ¶¶ 16, 29, 42, 47, 49, 53; *see also* Oral Argument Tr. at 14-15 (attached to Defs.' Mot. for Summ. Judg. (May 2004) as Exhibit 1). Yet the CERCLA provisions GE attacks include emergency settings. Given CERCLA's potential application to emergency settings, and given the less stringent procedural requirements for such settings, GE's facial complaint must fail. *See Chem. Waste Mgmt., Inc. v. EPA*, 56 F.3d 1434, 1437 (D.C. Cir. 1995) (D.C. Circuit, applying *Salerno*, rejects a facial challenge to a rule issued by EPA regarding the procedures to be used in classifying commercial hazardous waste facilities as "unacceptable" to contract to manage wastes taken from sites cleaned up under CERCLA because there was "at least one scenario where the off-site rule would be procedurally valid" and "[w]hile this hypothetical scenario may not be common, it is sufficient to establish that petitioners' facial

II(A) below, nothing in these sections authorizes EPA to deprive any person of property or liberty in advance of a judicial hearing. In particular, the issuance of an administrative cleanup order under section 106(a) does not deprive the person to whom it is issued of any interest protected by the due process clause. Moreover, as we explain in Part II(B) below, although sections 106(b)(1) and 107(c)(3) do indeed authorize the deprivation of a property interest, such a deprivation occurs only after a judicial hearing which fully comports with the requirements of due process.

A motion for summary judgment "`shall'" be granted if "`there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986) (quoting Fed. R. Civ. P. 56(c)). Facial constitutional challenges such as this one generally raise questions of law rather than questions of fact. *See, e.g.*, *St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 519 (8th Cir. 1999). While GE's Amended Complaint contains some allegations of fact (regarding, for example, the lack of any emergency or time pressure at the sites at which it has been deemed responsible for hazardous waste remediation), Am. Compl. ¶¶ 34, 42, 47, these allegations about the site-specific, as-applied operations of CERCLA are inapposite to GE's facial challenge and thus do not preclude awarding summary judgment to the government.

A. Sections 106(a) and 113(h) of CERCLA Do Not Deprive Any Person of an Interest Protected by the Due Process Clause Prior to a Judicial Hearing.

Section 106(a) empowers EPA (as delegated by the President) to issue "such orders as may be necessary to protect public health and welfare and the environment" when the agency has found that "there may be an imminent and substantial endangerment to the public health or

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challenge must fail.").

welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. § 9606(a). These "abatement orders" issued pursuant to section 106(a) do not deprive the affected persons of any interest protected by the due process clause. Abatement orders do not, for example, result in the seizure or attachment of property. In fact, EPA may effect compliance with its abatement orders only through an enforcement action filed in federal court. 42 U.S.C. § 9606(b)(1).

Courts have upheld CERCLA's administrative orders regime against due process attack on precisely this ground. As the district court explained in rejecting a due process challenge in *Employers Ins. v. Browner*,

> a PRP is fully entitled to obtain judicial review of EPA's order prior to being deprived of its property. . . . [T]he only means that the EPA has of forcing a PRP to comply with an order, or of collecting penalties for failures to comply, is through an enforcement action. As a result, no deprivation can possibly occur until the EPA brings such an action, at which time the PRP is also entitled to judicial review. Accordingly, the lack of a hearing prior to the bringing of an enforcement action is irrelevant, since there is also no deprivation at that time.

848 F. Supp. 1369, 1374 & n.10 (N.D. Ill. 1994); *see also J.V. Peters & Co. v. Adm'r, EPA*, 767 F.2d 263, 266 (6th Cir. 1985) (upholding CERCLA regime against due process attack on ground that judicial hearing would precede any deprivation of interest protected by due process). In affirming the district court's decision in *Employers Ins.*, the Seventh Circuit thought so little of the constitutional challenge to CERCLA's administrative orders regime that it declined even to discuss it, calling it "baseless" and "a noisy and largely incomprehensible broadside of charges the majority of which lack, at least so far as we are able to understand them, sufficient merit to warrant discussion." *Employers Ins. v. Browner*, 52 F.3d 656, 660 (7th Cir. 1995) (Posner, J.).

The CERCLA provision invalidated in *Reardon v. United States*, 947 F.2d 1509 (1st Cir.

1991) (*en banc*), provides an instructive contrast to section 106(a). In *Reardon*, EPA filed a notice of lien on contaminated property pursuant to section 107(1) of CERCLA, 42 U.S.C. § 9607(1). The court found that the lien notice was a deprivation of a significant property interest, and that CERCLA provided neither a pre-deprivation hearing nor adequate post-deprivation review. Thus, the court held, the lien provision violated due process. *Id.* at 1518-19.

The issuance of an administrative order under section 106(a), in contrast, does not deprive a party of an interest protected by the due process clause. A party who disagrees with the substance or scope of a cleanup order may refuse to comply with that order. If EPA files a civil action to enforce the order, the party to whom the order was directed receives a judicial hearing as to its liability and/or the appropriateness of the remedy ordered by EPA. Unless and until the EPA seeks enforcement of its section 106 order, the parties to whom the order is directed are not deprived of any property. In *Reardon*, in contrast, the lien provision deprived parties of important property interests in advance of a judicial hearing. 947 F.2d at 1518.

Section 113(h) of CERCLA, also challenged by GE, does not alter the above analysis; indeed, it supports it. By providing that section 106 abatement orders may be challenged in federal court in certain, limited contexts, section 113(h) confirms the necessity of a judicial action in forcing a reluctant party to undertake the actions required by the abatement order.

To be sure, section 113(h) also means that the party against whom an abatement order is directed may not receive judicial review of that order unless and until EPA files an action to enforce the order or, for example, cleans up the relevant site and then sues for recovery of its cleanup costs. But in challenging section 113(h) on the ground that it does not provide for judicial review prior to the issuance of an enforcement order, GE is in essence claiming that pre-

enforcement review is required as a matter of constitutional due process. Such a claim not only ignores the fact, explained above, that no deprivation occurs until enforcement occurs, but it also turns the structure of judicial review of agency action on its head. As explained in the next section, pre-enforcement review has long been allowed, in certain circumstances, as an exception to the principle that the federal courts ordinarily decide cases in concrete factual settings; it has never been held to be *constitutionally required*.

B. The Due Process Clause Does Not Require Pre-Enforcement Review of Agency Decisions.

In the leading case of *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), the Supreme Court allowed pre-enforcement judicial review of regulations promulgated by the Commissioner of Food and Drugs, in the face of claims that the relevant statute did not provide for pre-enforcement review and that the controversy was not yet ripe. Nowhere did the Court suggest that pre-enforcement review was constitutionally required; indeed, the Court explicitly recognized that a "statutory bar" to pre-enforcement review – such as that found in section 113(h) in this case – would preclude such review. *Id.* at 153.

Likewise, in more recent cases, the Supreme Court has interpreted statutes to preclude pre-enforcement judicial review without any suggestion that, in doing so, it has rendered such statutes unconstitutional. In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the Court interpreted the Federal Mine Safety and Health Act Amendments of 1977 to preclude pre-enforcement judicial review of a compliance order issued by the Mine Safety and Health Administration, *id.* at 206-15,[27] and held that even a constitutional claim could not be reviewed

[27] Similarly, in *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000), the Court interpreted a provision of the Medicare laws to preclude pre-enforcement review of a claim under the

outside the process created by the statute, *id.* at 215. The Court also declined to reach the claim that this process violated due process because the statute forced the plaintiff "to choose between violating the Act and incurring possible escalating daily penalties, or, on the other hand, complying with the [agency order] and suffering irreparable harm." *Id.* at 205. The Court found that "neither compliance with, nor continued violation of, the statute [would] subject petitioner to a serious prehearing deprivation." *Id.* at 216. The Court noted that even if the company challenging the statute refused to comply with the agency's orders, thus subjecting itself to potentially "onerous" penalties, those penalties would become "final and payable" only after review by an independent commission and the federal courts. *Id.* at 217-18.

In a concurrence joined by Justice Thomas, Justice Scalia stated that he thought due process would be satisfied in that case "whether or not compliance produces irreparable harm – at least if a summary penalty does not cause irreparable harm (e.g., if it is a recoverable summary fine) or if judicial review is provided before a penalty for noncompliance can be imposed." *Id*. at 220 (emphasis omitted). Accordingly, Justices Scalia and Thomas agreed, the constitutional claim was meritless because the company in that case could "obtain judicial review if it complies with the agency's request, and can obtain presanction judicial review if it does not." *Id*. at 221.[28]

There is, in sum, no indication that any current member of the Court believes that pre-enforcement judicial review is required as a matter of due process, and every indication to the contrary. The Court's precedents suffice to establish the constitutionality of the cleanup scheme

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statutes. Although several Justices disagreed with the majority's reading of the relevant statute, and three Justices also believed that statutes should, if possible, be construed so as to permit pre-enforcement review, no Justice suggested that a failure to provide pre-enforcement review would violate the due process clause.

[28] In *Shalala*, Justice Thomas argued for an interpretive presumption favoring pre-enforcement review, 529 U.S. at 44-53, but nothing in his opinion suggests a retreat from his earlier view, expressed in

created by CERCLA. Indeed, in several respects, the constitutional question posed by CERCLA's remedial scheme must be regarded as less substantial than that posed by the statute in *Thunder Basin*. For example, the Federal Mine Safety and Health Act Amendments of 1977 authorized the implementing agency to issue orders to mine operators that, if violated, could result not only in civil penalties, but in criminal liability. 30 U.S.C. § 820(d). Moreover, the mining safety statute, unlike CERCLA, provides no "sufficient cause" defense to penalties for noncompliance with the agency's orders. 30 U.S.C. § 820(j). Yet, as noted, the Supreme Court found no constitutional defect in that statute's failure to authorize pre-enforcement judicial review.[29]

The lower courts are in unanimous agreement with the conclusion that pre-enforcement judicial review is not constitutionally required. Every court of appeals that has faced the question whether CERCLA's bar on pre-enforcement review of administrative cleanup orders is unconstitutional under the due process clause has firmly answered "no." *See Employers Ins. v. Browner*, 52 F.3d 656 (7th Cir. 1995); *Fairchild Semiconductor Corp. v. EPA*, 984 F.2d 283, 289 (9th Cir. 1993); *Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289, 295-96 (6th Cir. 1991); *Dickerson v. EPA*, 834 F.2d 974, 978 n.7 (11th Cir. 1987); *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 388-90 (8th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 315-16 (2d Cir. 1986).[30]

Thunder Basin, that pre-enforcement review is not constitutionally required.

[29] This Court has relied on *Thunder Basin* in interpreting the Occupational Safety and Health Act to preclude pre-enforcement judicial review even of constitutional challenges to the regulatory regime created by the law. *Sturm, Ruger & Co. v. Herman*, 131 F.Supp.2d 211, 219-20 (D.D.C.) (Feb. 13, 2001), *affirmed in Sturm, Ruger & Co. v. Chao*, 300 F.3d 867 (D.C. Cir. 2002).

[30] The district courts are similarly unified in their rejection of such constitutional claims, with the exception of two decisions issued prior to CERCLA's 1986 amendments, preliminarily indicating sympathy with such claims. *See Aminoil, Inc. v. United States*, 599 F.Supp. 69 (C.D. Cal. 1984), rejected

Not only have the lower courts uniformly upheld CERCLA's preclusion of pre-enforcement judicial review of administrative compliance orders, they also have upheld other, similar regulatory regimes. Many other regulatory statutes besides CERCLA permit the implementing agency to issue to regulated entities orders that instruct the entities to comply with the relevant statute, and many such statutes also preclude pre-enforcement review of these compliance orders. *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 Conservation and Recovery Act). Courts faced with due process-based challenges to the preclusion of pre-enforcement review under these statutes have rejected these challenges. *See Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 566 (10th Cir. 1995) (Clean Water Act); *Southern Pines Assocs. v. United States*, 912 F.2d 713, 717 (4th Cir. 1990) (Clean Water Act); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567, 569-70 (7th Cir. 1990) (Clean Water Act); *Child v. United States*, 851 F.Supp. 1527, 1535-36 (D. Utah 1994) (Clean Water Act); *Ross Incineration Services 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 (N.D. Ohio 1999) (Resource Conservation and Recovery Act); *Union Electric Co. v. EPA*, 593 F.2d 299, 305-06 (8th Cir. 1979) (Clean Air Act).

The consistent rulings of the lower courts upholding statutory provisions that, like section 113(h) of CERCLA, preclude pre-enforcement judicial review of administrative compliance orders strongly reinforce the conclusion that GE's challenge to section 113(h) lacks legal merit.[31]

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in *Aminoil, Inc. v. United States*, 646 F.Supp. 294 (C.D. Cal. 1986); *Industrial Park Development Co. v. EPA*, 604 F.Supp. 1136 (E.D. Penn. 1985).

[31] The lone case pointing in the other direction is *TVA v. Whitman, 336 F.3d 1236 (11th Cir. 2003), cert. denied sub nom. Leavitt v. TVA,* 124 S.Ct. 2096 (2004). In *TVA*, the Eleventh Circuit held that an administrative compliance order issued by EPA was not final because, if it were final, it would be unconstitutional. The court thought the order was unconstitutional because "severe civil and criminal

They also, incidentally, give the lie to GE's claim that the CERCLA regulatory regime "is a sharp departure from the protections afforded in administrative law governing other agencies." Am. Compl. ¶ 5.

What is more, parties subject to administrative cleanup orders under CERCLA have an additional option that is lacking in the other regulatory regimes just described: such parties may comply with the administrative order and then seek reimbursement of their costs from EPA or, failing that, from the courts. 42 U.S.C. § 9606(b). Although GE complains about the adequacy of this remedy as a matter of procedural due process, the fact of the matter is that the reimbursement proceeding allowed by CERCLA simply adds to the choices facing a party subject to an administrative cleanup order. As courts have noted, even without the reimbursement provisions, CERCLA would not violate due process, *see Employers Ins.*, 52 F.3d at 664; if anything, adding this option to the menu afforded responsible parties under CERCLA diminishes rather than exacerbates any constitutional issues raised by the statute.

C. Due Process Is Not Violated by the Penalty Provisions of CERCLA.

In its Amended Complaint, GE acknowledges, as it must, that CERCLA provides for judicial review of administrative cleanup orders issued under section 106(a). GE contends, however, that other provisions of CERCLA – specifically, sections 106(b) and 107(c)(3) – negate the procedural protections afforded by judicial review because they allow courts to impose penalties on a party that has unjustifiably refused to comply with an administrative

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penalties" could follow from noncompliance with the order, even though the order was initially issued without a judicial hearing. *Id.* at 1239. The case is easily distinguished from the long line of authority going the other way. In *TVA*, EPA had developed an ad hoc procedure for hearing TVA's challenges to the administrative compliance order. The court found this unusual procedure constitutionally problematic.

cleanup order. CERCLA creates, in GE's words, a "Hobson's choice" between complying with an invalid order, and incurring the expenses associated with cleaning up a hazardous waste site; and not complying, and facing penalties. Am. Compl. ¶¶ 2, 4, 23, 24, 28. On this view, no matter how procedurally punctilious the judicial review contemplated by CERCLA, it cannot rescue the statute from constitutional invalidation because "no rational and responsible PRP will take the enormous risk involved in not complying with an EPA unilateral order." Am. Compl. ¶ 24.

The notion that what GE characterizes as a "Hobson's choice" can violate due process comes from *Ex Parte Young*, 209 U.S. 123 (1908), in which the Supreme Court stated that a statute violates due process if "the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate [an affected party] from resorting to the courts to test the validity of the legislation." *Id.* at 147. In later cases, however, the Court has made plain that a statute does not violate due process if it imposes no penalty in circumstances where the party challenging the validity of an order has reasonable grounds to do so. *Reisman v. Caplin*, 375 U.S. 440, 446-47 (1964); *Okla. Operating Co. v. Love*, 252 U.S. 331, 338 (1920). CERCLA creates exactly the kind of statutory regime contemplated by the latter cases. Although it provides that penalties or punitive damages may be awarded against a party who has refused to comply with an administrative cleanup order, it also provides that such penalties or damages may not be awarded if the party had "sufficient cause" to refuse to comply. 42 U.S.C. § 9606(b)(1), § 9607(c)(3). Moreover, CERCLA provides for judicial discretion in imposing penalties and punitive damages; it provides that a judge "may," not must, impose penalties or punitive damages for failure to comply with an administrative order. 42 U.S.C. §§ 9606(b)(1),

9607(c)(3).

On the basis of these features of CERCLA, constitutional claims like GE's – relying on the "Hobson's choice" supposedly created by the statute – have been rejected by every court of appeals that has been confronted with them. *See Employers Ins.*, 52 F.3d at 664; *Solid State Circuits*, 812 F.2d at 388; *Wagner Seed*, 800 F.2d at 316. In *Wagner Seed*, the Second Circuit explained:

> Without deciding the exact boundaries of the *Ex Parte Young* line of cases, it is plain that there is no constitutional violation if the imposition of penalties is subject to judicial discretion, and the enforcement provisions contain a good faith exception.

800 F.2d at 316 (internal citations omitted). The Seventh Circuit explained its rejection of a claim like GE's in even more forceful terms:

> The risk of losing and being made to pay heavy sanctions, a risk mitigated by the defense of sufficient cause as glossed in *Solid State Circuits*, would not violate the Constitution even if there were no reimbursement provision, 812 F.2d at 389-92; it certainly does not violate it given the additional if imperfect remedy which that provision grants. The energy that [plaintiff] devoted in its briefs to attempting to create constitutional qualms about the remedial structure of the Superfund law was misdirected.

Employers Ins., 52 F.3d at 664.

Here, too, then, the lower courts have all lined up against the kind of claim GE makes, and with good reason: the "sufficient cause" defense to, and judicial discretion in imposing, the penalties authorized by CERCLA for violations of administrative cleanup orders clearly satisfy the Supreme Court's requirements for due process as stated in the *Ex Parte Young* line of cases.

D. On-the-Record Judicial Review, for Arbitrariness, of EPA Decisions About the Appropriate Scope of Hazardous Waste Remediation Does Not Violate the Due Process Clause.

GE has one last string to its bow. It charges that a party subject to an administrative

cleanup order

> does not receive any prior hearing before the order becomes effective. On the contrary, EPA makes its decision on a record it controls without granting any right to any person to present evidence, examine witnesses or obtain impartial review.

Am. Compl. ¶ 2. Throughout its complaint, GE continues to refer to the lack of *any* hearing, *see e.g.*, Am. Compl. ¶ 16, and to the lack of an "*impartial* hearing" before a complaint becomes effective, *see e.g.*, Am. Compl. ¶ 20 (emphasis added).[32] The Amended Complaint is not crystalline on this point, but it appears that GE is here taking issue with two features of CERCLA's procedural framework: the limitation of judicial review of EPA's administrative orders to the administrative record, and the specification of the arbitrary-and-capricious standard for judicial review of EPA's decisions about the scope of cleanup required at a site. 42 U.S.C. § 9606(b)(2)(D).[33]

In challenging section 106's limitation of judicial review to the administrative record and to review for arbitrariness, GE seems to be contending, in essence, that it is unconstitutional to limit judicial review of agency findings of general facts – such as findings on the harmfulness of certain hazardous substances, the likelihood they will migrate, and so forth – to the administrative record and to review for arbitrariness. Bluntly put, this claim ignores the last half century of administrative and constitutional law.

First of all, any suggestion that judicial review of EPA decisions about hazardous waste

[32] GE also occasionally asserts that CERCLA provides no opportunity to challenge EPA's administrative orders as arbitrary. (*See, e.g.*, Am. Compl. ¶¶ 51, 52.) This is a curious charge, since CERCLA explicitly provides for such review. 42 U.S.C. § 9606(b)(2)(D).

[33] EPA's determination that a particular party is responsible, within the meaning of CERCLA, for the contamination at a site is reviewed de novo. *See Kelley v. EPA*, 15 F.3d at 1107.

remediation should take place not on the basis of EPA's administrative record, but instead on the basis, presumably, of a record developed in the district court, must be rejected. The Supreme Court has long held that judicial review of administrative action should take place on the basis of the record assembled by the agency: "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Federal Power Comm'n v. Transcon. Gas Pipeline Corp.*, 423 U.S. 326, 331 (1976) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). Indeed, the Court has held, if the agency's decision "is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration." *Camp*, 411 U.S. at 143. The Court has cautioned that any other approach might "propel the court into the domain which Congress has set aside exclusively for the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). GE cannot seriously argue, at this late date, that review on the administrative record is unconstitutional.

Second, GE cannot seriously argue that it is entitled to, for example, "examine witnesses," Am. Compl. ¶ 2, in the context of EPA decisions about the appropriate scope of hazardous waste remediation. This is a bridge crossed decades ago by the Supreme Court. As the Court has emphasized, "[p]olicymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted." *Minn. State Bd. for Colls. v. Knight*, 465 U.S. 271, 284-85 (1984) (citation omitted).

Certainly, the Supreme Court has also recognized that agencies might be required, as a matter of procedural due process, to adopt additional procedures, beyond those contemplated by

the Administrative Procedure Act and like statutes, in some exceptional circumstances. In particular, "when an agency is making a 'quasi-judicial' determination by which a very small number of persons are 'exceptionally affected, *in each case upon individual grounds*,'" further procedures might be required by due process. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 542 (1978) (emphasis added) (quoting *United States v. Florida E. Coast Railway Co.*, 410 U.S. 224, 242, 245 (1972) (quoting *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446 (1915))).

No exceptional circumstances such as those hypothesized by the Supreme Court are present here. To be sure, in some settings involving administrative cleanup orders under CERCLA, a small number of parties is involved and each of these parties may be "exceptionally affected" by the order. Yet ever since *Bi-Metallic* in 1915, the Supreme Court has made clear that it is not enough that a small number of parties are affected by a regulatory action; such parties must also be affected "*upon individual grounds*." *Bi-Metallic*, 239 U.S. at 446. When EPA decides what the scope of a cleanup will be at a hazardous waste site, it does so on the basis of general facts about toxicology, the fate and transport of pollutants, hydrology, geology, and the like. It does not do so on the basis of facts about a particular polluter. *See* 42 U.S.C. § 9621(a)-(b) (describing requirements for selecting remedial action). Thus GE is not entitled to a judicial hearing beyond that permitted by CERCLA's on-the-record review for arbitrariness. This is an old point in administrative and constitutional law, and not a controversial one. *See, e.g.*, *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973) (rejecting procedural due process challenge to section 110 of Clean Air Act's failure to provide an individual adjudicatory hearing); *cf.* L. Tribe, *American Constitutional Law* § 10-7, 503-504 (1978) (case for special due

process protection strongest when individuals affected "in a way that is likely to be premised on *suppositions about specific persons*") (emphasis added), *American Airlines, Inc. v. Civil Aeronautics Bd.*, 359 F.2d 624, 633 (D.C. Cir. 1966) (en banc), *cert. denied*, 385 U.S. 843 (1966) (distinguishing legislative from adjudicative facts). GE's attempt to obtain trial-type procedures for decisions about hazardous waste remediation must fail.

CONCLUSION

For the foregoing reasons, Environmental *Amici* respectfully submit that this Court should grant EPA's motion summary judgment against GE.

Respectfully submitted,

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