

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| GENERAL ELECTRIC COMPANY, |) | |
| |) | |
| |) | |
| Plaintiff, |) | Civ. No. 1:00CV02855 (RWR) |
| |) | |
| v. |) | |
| |) | |
| CHRISTINE TODD WHITMAN, Administrator, |) | |
| United States Environmental Protection Agency, |) | |
| and the UNITED STATES ENVIRONMENTAL |) | |
| PROTECTION AGENCY, |) | |
| |) | |
| Defendants. |) | |

[PROPOSED] MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT
OR, IN THE ALTERNATIVE, 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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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 EPA's Motion to Dismiss and in the Alternative for Summary Judgment. On a national level, Environmental *Amici* have a strong interest in upholding the constitutionality of CERCLA's administrative enforcement provisions 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 GE manufacturing plants on the Upper Hudson River.

STATEMENT OF AMICI INTERESTS

Environmental *Amici* will briefly describe their organizations and their interest in this case.

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 400,000 members nationally and over 31,000 in New York. In the 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 clean-up of PCBs. NRDC is actively supporting EPA's proposed clean-up plan for PCB contamination of the Hudson River, including testifying at public hearings, submitting comments in support of EPA's proposed clean-up plan and providing action alerts for its members.

Founded in 1966, Hudson River Sloop Clearwater (Clearwater) is a non-profit environmental organization 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 the 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 has 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 has led an initiative to secure municipal resolutions in support of EPA's proposed PCB clean-up 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 not-for-profit organization which 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. Riverkeeper's members 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.

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. Building on that foundation of environmental advocacy, Scenic Hudson's mission today, as a leading non-profit environmental organization, is to protect and enhance the scenic, natural, historic, agricultural and recreational treasures of the Hudson River and its Valley. One of Scenic Hudson's primary areas of advocacy over the past two decades has been the clean up of PCBs from the Hudson River. Scenic Hudson is one of the leading voices advocating for General Electric to clean up the Hudson River Superfund site. Through its continuous advocacy work, 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 clean-up. In addition to public education, Scenic Hudson has sponsored research on the feasibility of state-of-the-art contaminated sediment removal technologies for the Hudson River and is informing the debate over suitable remedies.

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. EPA has issued a proposed clean-up order with respect to the Hudson River and is currently accepting comment on it. EPA has reached

no final decision with respect to the clean-up order. Still, GE asserts that the Hudson River site “illustrates that EPA’s threatening behavior is escalating.” Am. Compl. at ¶ 35.

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 to Dismiss or in the Alternative 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 Superfund site.¹

Although GE blithely asserts that that there “is no emergency” justifying EPA’s efforts to require remediation of GE’s contamination, Am. Compl. at ¶42, GE’s PCB contamination threatens public health as well as wildlife along the Hudson and has led to the destruction of a once-thriving commercial fishery on the Hudson. EPA’s peer-reviewed scientific studies concluded that the consumption of PCB-contaminated fish from the Hudson River pose significant cancer and non-cancer health threats considerably above the EPA’s levels of protection. Non-cancerous adverse

¹ See www.epa.gov/hudson/background.htm.

health effects of PCBs include reproductive, neurological, immunological and developmental effects such as low birth weight.²

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. Because of PCB contamination, New York State has all but shut down the once-thriving commercial fishery on the lower Hudson River, once one of the most productive and critical estuaries on the East Coast of the United States. Moreover, the New York State Department of Health (DOH) has been forced to recommend severe restrictions on eating Hudson River fish. As a result of PCB contamination in the lower Hudson River south of Troy, DOH has issued a Fish Consumption Health Advisory that recommends that women of childbearing age, infants and children under the age of 15 should not eat any fish taken from the Hudson River. From Troy up to Hudson Falls, the State recommends that people eat no fish at all.³ Studies have found, however, that low-income subsistence fishermen along the Hudson continue to eat their catch.⁴

In 1984, EPA made an interim no-action decision for the Hudson River PCB-contaminated sediments. In 1990, after encouragement by New York State, EPA began a lengthy and comprehensive reassessment of its 1984 decision not to require any remediation of the Hudson. To provide for public input for a variety of stakeholders, including GE, EPA developed a uniquely broad and comprehensive Community Interaction Program (CIP) because of the “enormous interest” in the Hudson River Superfund site.⁵ During the ten-year Reassessment Project, EPA held more

2 See www.epa.gov/opptintr/pcb/effects.htm.

3 See www.health.state.ny.us/nysdoh/environ/fish.htm; www.epa.gov/hudson/fishadvisory.htm.

4 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).

5 See www.epa.gov/hudson/public-participation.htm.

than 65 public meetings on the project, typically with opportunity for at least informal public comment and questioning of agency officials.⁶

Additionally, in order to ensure that the scientific work conducted for its Reassessment was credible, EPA convened five separate peer review panels to examine the major pieces of scientific work performed by EPA that would form the basis for its decision. Four of the peer reviews were conducted by independently chosen scientists from around the world. The fifth review was conducted by the National Remedy Review Board as part of a CERCLA process.⁷

On December 12, 2000, EPA released its Proposed Plan and Feasibility Study for Hudson River PCBs Superfund Site. The Preferred Remedy set forth in EPA's Proposed Plan calls for targeted dredging of 2.65 million cubic yards of sediment containing 100,600 pounds of PCBs from the Upper Hudson River between Fort Edward and Troy. The estimated present worth cost for the cleanup is \$460 million. A final Record of Decision is expected in August 2001. If the Preferred Remedy is adopted, the dredging project would be planned to begin in 2004, after a three year design phase, and EPA estimates that it would take five years to complete.⁸

GE and other interested parties have enjoyed numerous opportunities to provide input and comment into the Proposed Plan. Since the issuance of its Proposed Plan in December 2000, EPA has held eight public meetings for the public – and for GE – to comment on the Proposed Plan and EPA has now scheduled three additional meetings, for a total of eleven.⁹ The EPA also extended its original 60-day comment period to a total of 120 days.

⁶ See Superfund Proposed Plan at 7 (EPA Region II, December 2000).

⁷ See www.epa.gov/udson/peerreview.htm.

⁸ See www.epa.gov/udson/whats-new.htm.

⁹ *Id.*

In addition to participating in the ample opportunities for public comment that EPA has provided, GE has launched a widespread publicity and lobbying campaign aimed at defeating EPA's Proposed Plan. The magnitude of this campaign is unprecedented as a public relations attempt to influence a particular Superfund determination under CERCLA. In the collective awareness of Environmental *Amici*, no single company has ever before attacked a particular remedial or enforcement determination with such vigor. According to some estimates, GE has spent \$60 million on anti-dredging publicity this year alone.¹⁰

Given this history and background, GE's assertion that EPA is engaged in "threatening" behavior on the Hudson River Superfund site rings hollow. EPA's conduct in conducting its Reassessment Study and in developing and accepting its Proposed Remediation Plan has been painstakingly thorough and fair. Instead, through its barrage of expensive advertising and public relations, and, indeed, even through the filing of this lawsuit just weeks before it knew EPA would release its Proposed Plan, it is GE that is trying to intimidate EPA and force it to back down from requiring a comprehensive cleanup.

EPA has not issued a final administrative order with respect to the Hudson River Superfund site, nor has it reached any decision about how any final order would be implemented. However, before GE could be ordered to comply with any final administrative clean-up order issued by EPA for the Hudson River Superfund site, and before any civil penalties or punitive damages could be imposed on GE for refusal to perform the cleanup, CERCLA would provide GE with the opportunity for a hearing before an Article III judge on all of its challenges to the clean-up order. See pp. 12-16 below. In short, GE would have its day in court. But, in the meantime, clean-up of the Hudson

¹⁰ *Gipper Meets 'Survivor' as G.E.'s Image Hardens*, N.Y. Times, March 4, 2001 at 29.

would likely continue, under most of the scenarios that could unfold under CERCLA as it is currently structured. *Id.* However, if this Court were to accept GE's invitation to strike down CERCLA's bar on pre-enforcement challenges to final administrative clean-up orders, a different outcome would likely result. Based on GE's track record for delay and intimidation, Environmental *Amici* believe that GE would then use its vast resources to create a legal tangle that would delay the clean-up of Hudson River for decades more, causing severe damage to public health and the environment.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the General Electric Company (GE) brings a facial challenge to several provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* GE claims that the provisions of CERCLA that authorize the Environmental Protection Agency (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 asserting that several CERCLA provisions are unconstitutional on their face, GE must be prepared to demonstrate that there exists no circumstance in which these provisions could be constitutionally applied; that is, they are unconstitutional in every application. Implicit in GE's facial challenge is thus the quite remarkable proposition that in every one of the hundreds of times that EPA has applied these statutory provisions in the last 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. As numerous federal courts have held in the two decades since the inception of CERCLA, CERCLA's administrative order and enforcement provisions are constitutional and provide sufficient due process. See pp.28-29 below. 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. The pre-enforcement judicial review of administrative orders that GE demands is clearly 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.¹¹ The past convincingly belies GE's current complaint

¹¹See *M.R. (Vega Alta), Inc. v. Caribe General Electric Products, Inc.*, 31 F. Supp. 2d 226, 232-33 (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).

about the law's fairness. Having used CERCLA's procedural structure as a shield to protect itself from 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, 1978.¹²

Thus CERCLA was passed in order 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.¹³ *See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989).

CERCLA strives to achieve these purposes through a regulatory scheme that provides a menu of cleanup options from which the Environmental Protection Agency¹⁴ may choose. This regulatory flexibility has been a great success: as of September 2000, cleanup construction had been completed

¹²Congressional Research Service, Report for Congress: Superfund Fact Book (updated 1997) (available at <http://www.cnie.org/nle/waste-1print.html>).

¹³Section 107(a) of CERCLA imposes strict liability on four classes of "responsible parties," which include present owners and operators of facilities, certain former owners and operators of facilities, parties who arranged for the treatment or disposal of hazardous substances, and certain transporters of hazardous substances. 42 U.S.C. § 9607(a).

¹⁴The statute delegates authority to the President, who has in turn (pursuant to 42 U.S.C. § 9615) delegated authority to the EPA. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987).

at 757 Superfund sites, and cleanup had been initiated at nearly 600 additional sites.¹⁵

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); the agency 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 the government's Memorandum of Points and Authorities explains, interested parties both from the community surrounding a hazardous waste site and from parties potentially responsible for the contamination at a site receive numerous opportunities to comment upon EPA's proposals for responding to such contamination. *See* Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss the Amended Complaint Or, in the Alternative, Motion for Summary Judgment at 5-8. Depending on the nature and complexity of the remedial effort being contemplated, EPA sometimes engages in unusually extensive factfinding. With respect to the Hudson River Superfund Site, for instance, EPA will have held at least eleven public hearings on its proposed clean-up plan, held an additional sixty-five public meetings during the Reassessment Project, and has subjected the scientific basis for its proposed plan to five rounds of scientific peer review. *See* pp. 6-7 above.

¹⁵Superfund Cleanup Figures, available at <http://www.epa.gov/superfund/action/process/mgmtrpt.htm>.

If a private party disputes the validity of an administrative cleanup order issued by EPA, it may obtain judicial review of that order in the context of an enforcement proceeding three ways. First, if EPA files an enforcement 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 cleans up the hazardous waste site itself and then sues the party whom it ordered to clean up the site for its 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. Through this statutory scheme, Congress provided both for the prompt cleanup of sites that are contaminated with hazardous wastes and, at the same time, ensure that any recipient of an EPA administrative clean-up order has the opportunity for a hearing before a federal judge.

In order to encourage responsible parties to comply with the lawful EPA orders to clean up hazardous waste, 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

fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title 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 suggested 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., Solid State Circuits, Inc. v. EPA*, 812 F.2d 383 (8th Cir. 1987); *United States v. Barkman*, Nos. 96-6395, 98-1180, 1998 U.S. Dist. LEXIS 20248 (E.D. Pa. Dec. 17, 1998); *United States v. LeCarreaux*, No. 90-1672 (HLS), 1991 U.S. Dist. LEXIS 19273 (D.N.J. July 30, 1991). On some occasions courts have 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). *Barkman*, 1998 U.S. Dist. LEXIS 20248 ; *United States v. DWC Trust Holding Co.*, No. HAR 93-2859, 1996 U.S. Dist. LEXIS 6440 (D. Md. Jan. 22, 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. Whether challenged in an enforcement action brought by EPA, in a reimbursement action by a private party who has cleaned up a site pursuant to an administrative cleanup order, or in a reimbursement action brought by EPA, EPA’s decision as to the cleanup appropriate for a given site is subject to review on the administrative record and according 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 clean-up costs under section 106(b); and in certain other, limited circumstances. 42 U.S.C. § 9613(h).¹⁶

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.¹⁷ Section 106(a) does not, however, authorize EPA to deprive any party of an interest, such as property, protected by the due process clause, in advance of a judicial hearing.

¹⁶Section 113(h) provides in pertinent part:

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

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

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

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

(4) An action under section 9659 of this title (relating to citizen suits) . . . Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

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

42 U.S.C. § 9613(h).

¹⁷GE does not appear to take issue with the portion of section 106(a) that authorizes EPA to seek a judicial decree ordering a private party to clean up a hazardous waste site.

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 also confer discretion on judges in imposing such penalties, and they 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. To Prevail in its 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 (1984) (emphasis added)). *See also, e.g., Reno v. Flores*, 507 U.S. 292, 301, 308-09 (1993) (applying *Salerno* test to procedural due process

challenge). The D.C. Circuit follows the *Salerno* test in evaluating facial challenges to statutes and regulations. *Steffan v. Perry*, 41 F.3d 677, 693 (D.C. Cir. 1994) (*en banc*); *Chemical Waste Management, Inc. v. EPA*, 56 F.3d 1434, 1437 (D.C. Cir. 1995) (procedural due process challenge).¹⁸ The special rule for facial challenges is 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 the suit.” *Morales*, 527 U.S. at 74 (dissenting opinion) (emphasis in original).

This potential for disruption is particularly great in the present lawsuit. CERCLA 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 often utilized 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

¹⁸In recent years, several Justices have questioned whether the *Salerno* test applies to every kind of constitutional claim. In particular, several Justices have expressed doubts about whether the *Salerno* standard applies when a statute is attacked as unconstitutionally vague under the due process clause. *See City of Chicago v. Morales*, 527 U.S. 41, 55 n. 22 (1999) (opinion of Stevens, Souter, and Ginsburg) (facial challenge appropriate when vagueness “permeates” a law); *but see id.* at 74-82 (dissenting opinion of Scalia and Thomas) (questioning validity, under Article III, of facial challenges, particularly outside context of challenges to statutes on grounds of overbreadth under the First Amendment). The mixed signals from the Supreme Court have 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, 787-90 (6th Cir. 2001), but the standard for facial challenges based on procedural due process clearly remains the test articulated in

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 entities 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. Tellingly, although other firms have in the past challenged CERCLA on grounds like those raised by GE, not one of them has succeeded. For court of appeals decisions rejecting these challenges, see *Employers Ins. of Wausau v. Browner*, 52 F.3d 656 (7th Cir. 1995); *Fairchild Semiconductor Corp. v. EPA*, 984 F.2d 283 (9th Cir. 1993); *Barnet Aluminum Corp. v. Reilly*, 927 F.2d 289 (6th Cir. 1991); *Dickerson v. EPA*, 834 F.2d 974 (11th Cir. 1987); *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383 (8th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986).

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., *State of New York v. General Electric Co.*, 592 F. Supp. 291 (N.D.N.Y. 1984). Now, 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, but 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).

Salerno. See, e.g., *Chemical Waste Management*, 56 F.3d 1434.

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

General Electric thus faces an uphill battle in attempting to show that sections 106, 107(c)(3), and 113(h) of CERCLA are facially unconstitutional.¹⁹ 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 type of due process claims that GE makes, and reject these claims. *See Employers Ins. of Wausau 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)).

¹⁹In 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 itself, 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 Circuit Court of Appeals for the United States for the District of Columbia, 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.

II General Electric 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. Amend. V. 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, 60 (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 60.

The first question in this case, therefore, is whether section 106, 107(c)(3), or 113(h) of CERCLA deprives General Electric of an interest protected by the due process clause. As we explain in Part 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.²⁰

²⁰In 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 complaint recognizes as much, insofar as it seems to strive to limit its challenge to non-

A motion to dismiss should be granted if a complaint fails “to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Although, for purposes of a motion to dismiss, factual allegations in a complaint must be assumed to be true, *see, e.g., Kowal v. MCI Communications*, 16 F.3d 1271, 1273 (D.C. Cir. 1994), a court need not accept legal conclusions offered in the form of factual allegations. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986). Moreover, facial constitutional challenges such as this one generally raise questions of law rather than questions of fact. *See, e.g., St. Croix Waterway Association 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, *see* Am. Compl. ¶¶ 34, 42, 47), these allegations about the site-specific, as-applied operations of CERCLA are inapposite to GE’s facial challenge.²¹

A. Sections 106(a) and 113(h) of CERCLA Do Not Deprive Any Person of an

emergency settings. Am. Compl. ¶¶ 16, 29, 42, 47, 49, 53. Yet the CERCLA provisions GE attacks include emergency settings, and GE has filed a facial challenge to these provisions. Given CERCLA’s potential application to emergency settings, and given the less stringent procedural requirements for such settings, GE’s facial complaint must fail. *Cf. Chemical Waste Management, Inc. v. EPA*, 56 F.3d 1434 (D.C. Cir. 1995) (rejecting facial challenge to hazardous waste regulation on procedural due process grounds because regulation might be lawful in some circumstances).

²¹At the very least, however, the factual assertions sprinkled through GE’s amended complaint are, even if true, not material to the resolution of the underlying legal dispute, and thus summary judgment in the government’s favor is appropriate even if this court denies the motion to dismiss because non-material facts have been placed in issue by GE.

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 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 Insurance of Wausau 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), *aff’d*, 52 F.3d 656 (7th Cir. 1995); *see also J.V. Peters & Co. v. 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 *Wausau*, 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 Insurance of Wausau v. Browner*, 52 F.3d 656, 660 (7th Cir. 1995) (Posner, J.). *See also* pp. 28-29 below.

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. 947 F.2d at 1518-23.

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 Laboratories 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 206-15,²² and held that even a constitutional claim could not be reviewed 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 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 in original). 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 220.²³

²²Similarly, 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 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.

²³In *Shalala*, Justice Thomas argued for an interpretive presumption favoring pre-enforcement review, 529 U.S. at 42-51, but nothing in his opinion suggests a retreat from his earlier view, expressed in *Thunder*

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 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.²⁴

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. of Wausau v. Browner*, 52 F.3d 656 (7th Cir. 1995); *Fairchild Semiconductor Corp. v. EPA*, 984 F.2d 283, 289 (9th Cir. 1993); *Barnet 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.

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

²⁴Just last month, this Court 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., Inc. v. Herman*, No. 1:00CV01026 (ESH), 2001 U.S. Dist. LEXIS 1479 (D.D.C. Feb. 13, 2001).

1986).²⁵

Not only have the lower courts uniformly upheld CERCLA's preclusion of pre-enforcement judicial review of administrative compliance orders, they also have uniformly 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 uniformly rejected these challenges. *See Laguna Gatuna 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 (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. They also,

²⁵The 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 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. Pa. 1985).

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 Wausau*, 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 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 responsible party 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 209. 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. *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 338 (1920); *Reisman v. Caplin*, 375 U.S. 440, 446-47 (1964).

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. *Wausau*, 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. 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 . . . ; 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.

Wausau, 52 F.3d at 664 (internal citation omitted).

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. GE’s attempt to get around this line of cases results only in an unintentional pun: as GE notes, “no rational *and responsible* PRP” would fail to comply with an administrative cleanup order. Am. Compl. ¶ 24 (emphasis added). Under CERCLA, “responsible party” is a term of art for a party legally obligated to clean up (or to pay for the cleanup of) a hazardous waste site. Thus, while GE is certainly correct that no “rational and *responsible*” party would fail to comply with an EPA order to clean up a site, unless the party had other good grounds for objecting to the order, this point proves nothing for purposes of due process. The interests of the due process clause are simply not implicated by a desire to raise meritless claims.²⁶

²⁶*Cf. American Mfrs. Inc. Co. v. Sullivan*, 119 S.Ct. 977, 990 (1999) (“[W]hat respondents ask in this

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 arrow in its quiver. 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 (e.g., Am. Compl. ¶ 16) and to the lack of an “*impartial* hearing” before a complaint becomes effective (e.g., Am. Compl. ¶ 20).²⁷ 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).²⁸

At the outset, we note that GE does *not* appear to be challenging these features of CERCLA as they apply in all contexts. Specifically, GE’s amended complaint does not mention CERCLA sections 113(j) and 113(k) as among the provisions challenged in this lawsuit. Section 113(j)(1) provides that judicial review of any action ordered by EPA under CERCLA “shall be limited to the

case is that insurers be required to pay for patently unreasonable, unnecessary, and even fraudulent medical care without any right, under state law, to seek reimbursement from providers. Unsurprisingly, the Due Process Clause does not require such a result.”).

²⁷GE 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 complaint, since CERCLA explicitly provides for such review in an enforcement proceeding. 42 U.S.C. § 9606(b)(2)(D).

²⁸EPA’s determination that a particular party is responsible, within the meaning of CERCLA, for the

administrative record” and that “[o]therwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.” 42 U.S.C. 9613(j)(1). Section 113(j)(2) provides that judicial review of EPA’s response actions is to take place according to the arbitrary-and-capricious standard of review. 42 U.S.C. 9613(j)(2). Finally, section 113(k) prescribes the procedure for selecting response actions, which must involve, among other things, notice and opportunity for the public to comment on EPA’s proposed actions. 42 U.S.C. 9613(k).

Because GE challenges section 106 but not sections 113(j) or 113(k) in its amended complaint, we must assume that it means to challenge the limitation of judicial review to the administrative record and to arbitrary-and-capricious review *only* in the context of actions for reimbursement under section 106. Thus GE’s complaint leaves untouched the framework for judicial review of response actions outside the context of review of reimbursement petitions (except for the timing of such judicial review as prescribed in section 113(h), 42 U.S.C. § 9613(h), which GE does challenge).

To return to the merits: 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 remediation should take place not on the basis of EPA’s administrative record, but instead on the

contamination at a site is reviewed de novo. *See Kelley*, 15 F.3d at 1107.

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 Commission v. Transcontinental Gas Pipeline Corp.*, 423 U.S. 326 (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.” *Id.* 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,

Policymaking 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. Legislatures throughout the Nation, including Congress, frequently enact bills on which no hearings have been held or on which testimony has been received from only a select group. Executive agencies likewise make policy decisions of widespread application without permitting unrestricted public testimony. Public officials at all levels of government daily make policy decisions based only on the advice they decide they need and choose to hear. To recognize a constitutional right to participate directly in government policymaking would work a revolution in existing government practices.

Not least among the reasons for refusing to recognize such a right is the impossibility of its judicial definition and enforcement. Both federalism and separation-of-powers concerns would be implicated in the massive intrusion into state and federal policymaking that

recognition of the claimed right would entail. Moreover, the pragmatic considerations identified by Justice Holmes in *Bi-Metallic Investment Co. v. State Board of Equalization*, [239 U.S. 441 (1915)], are as weighty today as they were in 1915. Government makes so many policy decisions affecting so many people that it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard. “There must be a limit to individual argument in such matters if government is to go on.” *Id.* at 445.

Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271, 284-85 (1984).

When EPA decides what the scope of a cleanup will be at a hazardous waste site, it does so on the basis of facts about toxicology, the fate and transport of pollutants, hydrology, geology, and so forth. *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., The Anaconda Company v. Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973) (rejecting procedural due process challenge to section 110 of Clean Air Act); *cf. L. Tribe, American Constitutional Law* ¶ 10-7, pp. 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. C.A.B.*, 359 F.2d 624, 633 (1996) (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, GE's amended complaint for declaratory relief should be dismissed or, in the alternative, summary judgment should be granted against GE.

Respectfully submitted,

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