Washington and Lee Journal of Energy, Climate, and the Environment

Volume 2 | Issue 2 Article 4

6-1-2011

The Constitutionality of the EPA's Enforcement of CERCLA: Big Business Challenges and a Small Business Problem

Scott Corley

Follow this and additional works at: http://scholarlycommons.law.wlu.edu/jece

Part of the Administrative Law Commons, and the Environmental Law Commons

Recommended Citation

Scott Corley, *The Constitutionality of the EPA's Enforcement of CERCLA: Big Business Challenges and a Small Business Problem*, 2 Wash. & Lee J. Energy, Climate & Env't. 261 (2011), http://scholarlycommons.law.wlu.edu/jece/vol2/iss2/4

This Note is brought to you for free and open access by Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Journal of Energy, Climate, and the Environment by an authorized administrator of Washington & Lee University School of Law Scholarly Commons. For more information, please contact osbornecl@wlu.edu.

The Constitutionality of the EPA's Enforcement of CERCLA: Big Business Challenges and a Small Business Problem

Scott Corley*

Abstract

With the Deepwater Horizon oil drill disaster in 2010 and the disaster at Japan's Fukushima Dai-Ichi nuclear power plant in 2011, more attention has recently been focused on the government's role in responding to and recovering from environmental disasters. In the U.S., the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is one of the statutes that allows the EPA to respond to environmental pollution and the inappropriate disposal of hazardous wastes. Businesses have long claimed that CERCLA goes too far in the power it grants the EPA to order private parties to clean up hazardous waste sites, and this Note explores the newest claim that the courts have been asked to consider in this debate: whether the EPA's pattern and practice of enforcing the law is unconstitutional because (1) it subjects companies to the imposition of such high fines and severe penalties that they have no choice but to comply with the law, or because (2) the EPA fails to provide adequate procedural protections to businesses assessed with environmental liabilities.

This Note highlights three criteria that are likely required for a successful constitutional challenge to CERCLA: (1) the challenging parties must be deprived of interests that go beyond the purely financial; (2) challenging parties must be completely precluded from any pre-enforcement review; and (3) the delay of judicial review must actually cause the complete preclusion of judicial review. After highlighting these factors, the Note examines the ironic result that the entities that have challenged CERCLA most fervently are entities that have the weakest case for a potentially successful challenge to the statute. The Note goes on to suggest that there is a class of businesses and entities affected by the statute that have a much stronger constitutional claim, but that members of this

* J.D. Candidate, Class of 2011 at Washington and Lee University School of Law. This Note was prepared as part of Professor Hari Osofsky's Seminar on Climate Change and Environmental Law. Thank you to Professor Osofsky for her comments and feedback and for all of the members of the *Journal of Energy, Climate, and Environment* for their help with preparing this essay for publication.

class of businesses have been unable to mount serious challenges to the statute because of the severe costs and penalties they would face if they denied an EPA order.

In order to deal with this problem, this Note suggests that courts, when considering a pattern and practice challenge to CERCLA, should ask whether there is a class of businesses whose constitutional rights to due process are infringed when they are assessed environmental liabilities without any chance to challenge them. In the alternative, the EPA or Congress should establish either official rules or legislation that prevent the agency from assessing environmental liabilities against smaller, more vulnerable businesses until after the business has an opportunity to make its case before a neutral third-party decision-maker.

Table of Contents

I. Introduction…….263
II. CERCLA's Framework and Enforcement Against Small Businesses...265
A. The Nature of CERCLA……..... 266
B. The Options for Remediation…….267
C. CERCLA's Limits on Judicial Review of EPA Action……..269
D. The Constitutionality of the General Framework……..272
III. The EPA's Pattern and Practice of Enforcement Against Small Businesses……..274
A. Deprivation of Small Business's Property Rights……..274
B. Pre-Deprivation Procedures Available to Small Businesses……..278
C. CERCLA's Preclusion of Judicial Review…….280
D. The Combined Effects of CERCLA on Small Businesses…… 281
IV. Current Litigation: Why Large Corporations Struggle to Successfully Challenge the Constitutionality of CERCLA…….284
A. Overview of the General Electric Litigation……..285
1. Ex parte Young & Large Businesses……...287
2. Mathews v. Eldridge & Large Businesses……...288
B. Due Process and Enforcement Against Small Businesses……290
1. Ex Parte Young & Small Businesses……...290
2. Mathews v. Eldridge and Small Businesses……291
V. Proposed Solutions to the Small Business Problem…..……292
A. Federal Courts Should Recognize Procedural Protections for Some PRPs Assessed with Environmental Liabilities Under CERCLA……..293
B. How a Statutory Amendment or Agency Rulemaking Could Ensure Heightened Protections for Small Businesses……294
VI. Conclusion……295

I. Introduction

In 1995, Congress took up the task of amending the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] in order to provide relief for some small businesses and individuals who could be driven out of business or into bankruptcy by the harsh terms of the law.[2] While Congress did not pass any amendments to CERCLA until 2001, one of the stories used in the Senate in 1995 showed the problems faced by small businesses under the law, and, perhaps unknowingly, illustrated what may be the strongest argument that the EPA's pattern and practice of enforcing CERCLA violates Due Process. In October of 1995, Senator Larry Pressler of South Dakota brought the Senate's attention to the plight of one of his constituents that had recently been featured in the Wall Street Journal.[3]

Senator Pressler focused on Bill Huebner, the owner of Ace Steel and Recycling in Rapid City, South Dakota.[4] In 1991, Mr. Huebner received a letter from the Environmental Protection Agency (EPA) demanding that his company pay $47,000 for the clean-up of a former battery recycling site in Nebraska that had been contaminated by battery lead and acid.[5] These contaminants had been released into the environment between 1940 and 1982, and the area was declared a hazardous waste site under CERCLA in 1991.[6]

Mr. Huebner asserted a litany of problems with the order, namely that his company did not even exist until 1989 and had never sent a single battery to the recycling site.[7] But the fact is that if the EPA had sought to impose this liability on Mr. Huebner's business despite the apparent unfairness, it is likely that he never would have had an opportunity to

---

1. *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2006) (providing the EPA with the authority to direct potentially responsible parties to clean up hazardous waste sites that had resulted from significant industrial pollution).

2. *See* 141 CONG. REC. S15844 (daily ed. Oct. 26, 1995) (statement of Sen. Pressler) (providing the statements of Senator Pressler on Superfund Reform and the importance of providing a liability shield for small businesses).

3. *See id.* (providing the full text of Bill Huebner, *My Superfund Nightmare*, Wall St. J., Oct. 26, 1995).

4. *See id.* (discussing Mr. Huebner's receipt of a letter from the EPA ordering him to pay $47,000 to clean up a hazardous waste site that was contaminated by a company that had little, if any connection, to Mr. Huebner's business).

5. *Id.*

6. *Id.*

7. *Id.*

challenge the EPA's decision before a neutral decision-maker.[8] Like Mr. Huebner, thousands of businesses, small and large alike, have been threatened with billions of dollars of hazardous waste site clean-up costs under the act, and as a result, the question of whether the EPA's administration of the act violates Due Process has been brought to the courts repeatedly throughout the years.[9] Though almost all such challenges have been struck down by the courts that have considered them,[10] the purpose of this Note is to draw attention to a particular context of the EPA's pattern of enforcement under CERCLA, which has possibly been overlooked by the courts.

This Note suggests that the strongest argument that can be made concerning the constitutionality of the EPA's enforcement of CERCLA arises when environmental liabilities are imposed on small businesses. Ultimately, this context provides the clearest evidence that certain provisions of CERCLA have been enforced in a way that has violated the Due Process rights of certain potentially responsible parties (PRPs).

In a 1997 article in the New York Law Journal about the viability of constitutional challenges to CERCLA, the authors posited that such attacks

---

8. *See id.* (stating that if the EPA had not removed the threat of liability, the business owned by Mr. Huebner would have been unable to continue operations)*; see also* 42 U.S.C. § 9607 (providing for potential liability for a very broad class of persons who are affiliated with any hazardous waste site including for any person who "arranged for disposal . . . of hazardous substances" at the site); Aselda Thompson, Comment, *Exposing a Gap in CERCLA Case Law: Is there a Right to Recover Costs Following Compliance With an Administrative Order After* Atlantic *and* Aviall, 46 HOUS. L. REV. 1679, 1683 n.18 (2010) (describing the four categories of persons who can be named as PRPs under CERCLA).

9. *See, e.g.*, Gen. Elec. Co. v. Jackson (*General Electric IV*), 595 F. Supp. 2d 8, 17 (D.D.C. 2009) (rejecting General Electric's claim that the EPA's enforcement of CERCLA violates Due Process under *Ex parte* Young, 209 U.S. 123 (1908)), *aff'd* Gen. Elec. Co. v. Jackson (*General Electric V)*, 610 F.3d 110, 127–29 (D.C. Cir. 2010) (holding that GE had standing to bring a pattern and practice claim and that district court had jurisdiction over the claim but finding that EPA's pattern and practice of administering the statute did not violate Due Process); City of Rialto v. W. Coast Loading Corp., 581 F.3d 865, 877–78 (9th Cir. 2009) (describing Goodrich's challenge to the EPA's enforcement of CERCLA under the Due Process Clause and holding that the court did not have jurisdiction over the claim); United States v. Capital Tax Corp., 2007 WL 488084 *3 (N.D. Ill. 2007) (asserting a constitutional challenge to the EPA's enforcement of CERCLA under the Due Process Clause); Raytheon v. U.S.A. 435 F. Supp. 2d 1136, 1156 (D. Kan. 2006) (accepting the EPA's argument that Raytheon lacked standing to challenge the EPA's pattern and practice of enforcing CERCLA using the Due Process Clause).

10. *See e.g.*, *General Electric IV*, 595 F. Supp. 2d 8, 39 (D.D.C. 2009) (concluding that EPA's pattern and practice of enforcing CERCLA has not violated Due Process); City of Rialto v. W. Coast Loading Corp., 581 F.3d 865, 880 (9th Cir. 2009) (agreeing with the D.C. District Court that the EPA's pattern and practice of administering CERCLA did not violate Due Process).

in the future were likely to succeed only where: first, the property interest infringed by the government is not strictly monetary; second, the statute calls for a complete lack of pre-deprivation procedures; and third, the statute's purported delay of review actually results in the complete preclusion of review.[11] After a brief introduction to CERCLA's statutory framework,[12] this Note will use those three elements as a starting point to show how the EPA's assessments of liability against small businesses in the last twenty years presents the strongest evidence that the agency's enforcement of CERCLA is unconstitutional in at least some contexts.[13] The next section will focus on why the most recent court challenges to the EPA's use of unilateral administrative orders (UAOs) under CERCLA, including the decade-long challenge that has been brought by the General Electric Company (GE),[14] are unlikely to alleviate the problems faced by small businesses under the statute.[15] The final section will explore potential solutions to this problem including, first, the potential that small businesses will have a constitutional right to greater procedural due process recognized by the courts in a pattern and practice challenge; and second, the options available for the EPA or Congress to establish constitutional rules governing the enforcement of environmental liabilities against small businesses.[16]

II. CERCLA's Framework and Enforcement Against Small Businesses

The statutory scheme of CERCLA is one that has been covered in great detail in both cases and by commentators in law review notes and

---

11. Michael B. Gerrard & Deborah Goldberg, *Constitutional Challenges to CERCLA*, N.Y.L.J. May 23, 1997, at 3 (1997).

12. *Infra* Part II.

13. *Infra* Part IV.B.

14. *See* Gen. Elec. Co. v. EPA (*General Electric II)*, 360 F. 3d 188, 194 (D.C. Cir., 2004) (holding that the district court erred in dismissing GE's facial challenge to CERCLA); *General Electric IV*, 295 F. Supp. 2d at 17 (holding that EPA's pattern and practice of enforcing CERCLA did not violate the Due Process Clause under either *Ex parte Young* or *Matthews v. Eldridge*); *General Electric V*, 610 F.3d at 129 (affirming the district court's decision in *General Electric IV* that neither the CERCLA statute itself nor EPA's pattern and practice of enforcing the statute were unconstitutional); Gen. Elec. Co. v. Johnson *(General Electric III)*, 362 F. Supp. 2d 327, 344 (D.D.C. 2005) (granting EPA's motion to dismiss GE's textual challenge to CERCLA but also concluding that GE pled a "pattern and practice" claim that was not barred by the statute's jurisdictional limitations); Gen. Elec. Co. v. Whitman *(General Electric I)*, 257 F. Supp. 2d 8, 31 (D.D.C. 2003) (granting the EPA's motion to dismiss GE's initial claims that the EPA's enforcement practices under CERCLA violated Due Process) *overruled by General Electric II*.

15. *Infra* Part IV.

16. *Infra* Part V.

articles,[17] so this Note will only discuss the basics concerning the statute and the provisions that have most recently been alleged to violate Due Process. After discussing the statutory framework, this section will also discuss why the three elements of a successful constitutional challenge to CERCLA are unlikely to be present when the act is enforced against large corporations.[18]

A. The Nature of CERCLA

CERCLA was originally passed in 1980 to ensure a "prompt and effective response to problems of national magnitude resulting from hazardous waste disposal."[19] Because of the high costs of cleaning up a hazardous waste site, Congress sought to ensure that the amount of federal funds that would be used to clean up sites under the act would be minimized,[20] and the enforcement mechanisms of CERCLA were designed to ensure that the polluter of a site would pay for its clean-up.[21] Many commentators and courts have stated that the liability imposed under CERCLA is retroactive, strict, and joint and several for any responsible party.[22] Under CERCLA, then, once the EPA has determined that a

---

17. *See generally General Electric IV*, 595 F .Supp. 2d 8, 11–12 (D.D.C. 2009) (describing the EPA process for assigning liability under CERCLA); *General Electric II*, 360 F.3d at 189–90 (discussing the legislative reasoning for enacting CERCLA); *General Electric I*, 257 F. Supp. 2d at 12–14 (laying out the CERCLA framework); *General Electric III*, 362 F. Supp. 2d 327, 330–331 (providing background on the CERCLA framework); *See also* David H. Topol, *Hazardous Waste and Bankruptcy: Confronting the Unasked Questions*, 13 VA. ENVTL. L.J. 185, 189–92 (1994) (describing the allocation of clean-up costs under CERCLA); Michael P. Healey, *The Effectiveness and Fairness of Superfund's Judicial Review Preclusion Provision*, 15 VA. ENVTL. L.J. 271, 273–85 (1996) (describing the structure of CERCLA cleanups and the structure of CERCLA enforcement).

18. *See infra* notes 60–62 and accompanying text.

19. Healey, *supra* note 17, at 273 (quoting United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982)).

20. *See General Electric IV*, 595 F. Supp. 2d 8, 11 (D.D.C. 2009) (describing Congress's intentions in enacting CERCLA as ensuring that responsible parties clean up hazardous waste sites and that the decontamination be done efficiently and expeditiously) (citations omitted).

21. *See Id.*(describing Congress's intention that the parties responsible for the pollution at a hazardous waste site would either clean it up themselves or pay the costs of clean-up) (citations omitted).

22. *See* Healey, *supra* note 17, at 281 ("[Section 107(a)] has been uniformly interpreted as imposing retroactive, strict, and joint and several liability on responsible parties.") (citations omitted); *see also* Elizabeth Ann Glass, *Superfund and SARA: Are there any Defenses Left?*, 12 HARV. ENVTL. L. REV. 385, 393 (1988) (summarizing the way the courts have been encouraged to accept an expansive view of liability under CERCLA so that liability is strict, is applied retroactively, is applied without regard to culpability or fault, and is joint and several).

hazardous waste site exists and determines the potentially responsible parties (PRPs) who were responsible for the pollution at the site, the next step for the EPA is to determine which parties to hold liable for the pollution and how to ensure that the party or parties responsible pay for the clean-up of the site.[23]

B. The Options for Remediation

CERCLA provides the EPA with three basic options once it determines the parties responsible for the release of pollutants at a hazardous waste site.[24] The first and most controversial provision, § 106 of CERCLA,[25] gives the EPA authority to issue UAOs directing private citizens or corporations to clean up hazardous waste sites when the agency determines that that party was responsible for the contamination.[26] If the PRP complies with such an order, then the site is cleaned up, and the PRP may seek to recoup some of its costs through contribution actions filed against other parties who are also responsible for the pollution at the site, if it can identify them.[27] If the party believes it was misidentified by the EPA as the party responsible for the pollution but still complies with the order to clean up the site, it can then challenge the EPA's order identifying it as the responsible party and seek reimbursement for clean-up costs directly from the EPA.[28]

While the above process sounds fairly simple and straightforward, in practice it takes years to complete, and the EPA generally pursues a number of alternative remedies before issuing a UAO.[29] The first thing the EPA does after it determines that an entity is a PRP for a particular hazardous waste site is send the party a "general notice letter" that notifies the entity of

---

23. *See General Electric IV*, 595 F. Supp. 2d at 11 (noting that once PRPs are identified the EPA will initiate negotiations with them to begin clean up).

24. *See id.* (outlining the three options the EPA has if negotiations fail).

25. 42 U.S.C. § 9606(a) (2006).

26. *See* 42 U.S.C. § 9606(a) (2006) (granting the President, through the EPA, the authority to take action through any order necessary to protect the public welfare and the environment); *accord General Electric IV*, 595 F. Supp. 2d 8, 11 (citing 42 U.S.C. § 9606(a) ("EPA's third option is to issue a unilateral administrative order (UAO) under section 106, ordering PRPs to clean up a site.").

27. *See General Electric IV*, 595 F. Supp. 2d at 11 (citing 42 U.S.C. § 9606(b)) (stating that a PRP that complies with an order may seek contribution from other PRPs or from the EPA itself).

28. *Id.*

29. *See id.* at 29 (describing the process EPA now uses before issuing a UAO).

its liability for the site and its expected contribution.[30] This was likely the type of letter that Ace Steel and Recycling received, which prompted the Wall Street Journal editorial by Bill Huebner that Senator Pressler read into the Congressional Record.[31] After a general notice letter is sent, the PRP is allowed to submit comments to an administrative record.[32] This record is compiled by the EPA, but the EPA does not allow any neutral decision-maker to review the record until after a site cleanup is complete.[33]

After a general notice letter is sent to a PRP and after the PRP has some chance to submit a response in the form of comments to the administrative record, the EPA conducts settlement negotiations with the PRP in an effort to come to an agreement regarding the PRP's contribution to the cleanup.[34] Then, if settlement negotiations fail, a UAO may be issued.[35] Perhaps in an effort to avoid due process concerns, the EPA claims that it often allows PRPs to contribute less than the cost of the cleanup if the PRP would suffer "undue financial hardship" if forced to pay the full amount or if forcing the party to pay the full amount would be inequitable.[36]

Now if a PRP is not persuaded to clean up a hazardous waste site and will neither settle with the EPA nor comply with a UAO directing it to clean up the site, then the second option for the agency is to conduct the cleanup itself and seek reimbursement from PRPs afterwards.[37] In order to protect public funds, when the EPA conducts the clean-up itself, Congress has authorized the agency to seek treble reimbursement and fines of

---

30. *See id.* ("EPA provides notice to potential PRPs through a 'general notice' letter.").

31. *See supra* notes 2–8 and accompanying text.

32. *See General Electric IV*, 595 F. Supp. 2d 8, 29 (D.D.C. 2009) ("PRPs then again have the opportunity to respond to general notice letters and provide information regarding liability and remedy selection.").

33. *See id.* (describing the process of making an administrative record after a general notice letter has been sent out).

34. *See id.* (asserting that the settlement negotiation process is a lengthy one).

35. *See id.* ("Finally, at the end of this lengthy process and only if negotiation fails, EPA will normally issue a UAO.").

36. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-658, ENVIRONMENTAL LIABILITIES: EPA SHOULD DO MORE TO ENSURE THAT LIABLE PARTIES MEET THEIR CLEANUP OBLIGATIONS 7 (2005) *available at* http://www.gao.gov/new.items/d05658.pdf (describing the EPA's settlement procedures when a PRP lacks sufficient resources to pay for the entire cost of a cleanup at a hazardous waste site).

37. *See General Electric IV*, 595 F. Supp. 2d at 36 (citing 42 U.S.C. § 9606(b)(2)) ("PRPs may seek reimbursement upon completion of the cleanup if they believe that they have been issued a UAO in error.")

$32,500 per day that the PRP failed to comply with the EPA's order.[38] The possibility of treble damages and massive fines provide an extremely large incentive for companies to comply with all UAOs issued by the EPA, and the vast majority of companies do comply.[39]

Finally, in the third and least controversial provision of CERCLA, the EPA can seek an order in U.S. district court compelling an identified party to conduct the clean-up of the site.[40] While this option technically remains available to the EPA, at least one PRP has claimed that the EPA has abandoned this enforcement method altogether.[41] According to that PRP, the EPA has not instituted an enforcement action in district court since the late 1980s, when a number of district courts refused to defer to the agency's judgment and instead reviewed the EPA's selected remedial action under CERCLA de novo.[42] When such review occurred, the courts allegedly often rejected the remedies that EPA sought.[43]

C. CERCLA's Limits on Judicial Review of EPA Action

The last statutory provision of CERCLA that will be discussed in this section is the provision that acts to limit judicial review of the EPA's enforcement actions.[44] In addition to providing for the ability of the government to issue powerful orders and seek heavy fines forcing PRPs to clean up hazardous waste sites, CERCLA also limits the ability of PRPs to challenge such orders by delaying any review of such orders until after a

---

38. *See id.* at 11–12 (citing 42 U.S.C. §§ 9606(b), 9607(c)(3), 9611(a)) (describing EPA's options under CERCLA if negotiations with a PRP over a hazardous waste site fail to result in action being taken by the PRP to clean up the site).

39. *See id.* at 23, 28 (stating that evidence of publicly-traded companies refusing to comply with UAOs is scarce and that of the 1638 PRPs who have been issued UAOs most recently, there have been 75 instances of noncompliance, a rate just over 4%).

40. *Id.* at 11 (citing 42 U.S.C. § 9606(a)).

41. *See* General Electric Co.'s Mot. for Summ. J. and Mem. of Law in Supp. Thereof at 33–34, *General Electric IV*, 595 F. Supp. 2d 8 (D.D.C. 2009) (No. 00-2855), 2007 WL 5022421 (asserting that after the cases of United States v. Hardage, 750 F. Supp. 1460 (W.D. Okla. 1990) *aff'd in part, rev'd in part on other grounds*, 982 F.2d 1436 (10th Cir. 1992) and United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990) were decided against the EPA, the agency stopped bringing judicial enforcement actions under § 106 of CERCLA).

42. *See id.* (discussing the outcome of United States v. Hardage, 633 F. Supp. 1280 (W.D. Okla. 1987) where the court subjected the EPAs remedy to a de novo review).

43. *See id.* ("EPA's experience with direct judicial actions in the late 1980s and early 1990s demonstrates that when district courts have the opportunity to provide meaningful review, EPA's selected remedy is often rejected.")

44. *See* 42 U.S.C. § 9613(h) (2006) (setting forth the timing of review under CERCLA).

hazardous waste site is decontaminated.[45] Thus, if a PRP wished to challenge a specific order issued by the EPA, it would either have to comply with the order and spend large sums of money to decontaminate a hazardous waste site and then challenge the EPA's order in district court, or it would have to first refuse to comply with the order and subject itself to the potential for treble damages and large fines, then wait for the EPA to complete the clean-up and bring an enforcement action against the PRP, and only then could the PRP assert any defenses or counterclaims it may have against the agency.[46] Either way, the average time it takes to complete remedial action at a hazardous waste site is currently about three years, which means that for the average remediation, any EPA actions under CERCLA will be unreviewable by any third-party for at least three years.[47]

Now, just because review of specific agency action is delayed until the completion of remedial action does not mean that the judicial review provisions delay all challenges to the statute. Rather, courts have generally been willing to hear facial challenges to the constitutionality of CERCLA, and at least one court has interpreted the judicial review provision to allow jurisdiction over other broad challenges to the act that fall short of a facial challenge.[48] In *General Electric Co. v. Johnson* (*General Electric III*),[49] the

---

45. *See General Electric II*, 360 F.3d 188, 192 (D.C. Cir. 2004) (describing how § 113(h) of CERCLA bars judicial review of challenges to a § 106 order until after remedial actions are completed).

46. *See id.* at 193 (stating that the plain language of § 113(h) of CERCLA bars pre-enforcement judicial review of agency action under §§ 104 and 106(a) of CERCLA)*; see also* Raytheon v. United States 435 F. Supp. 2d 1136, 1156 (D. Kan. 2006) (finding the court lacked jurisdiction over Raytheon's constitutional challenge of an EPA order under CERCLA because the EPA had not issued a formal notice stating that Raytheon had completed its clean-up responsibilities at the site, which was required for the company to seek reimbursement from the government under CERCLA).

47. *See General Electric IV*, 595 F. Supp. 2d 8, 31 (D.D.C. 2009) (giving three years as the average time it takes to complete remedial actions under CERCLA and going on to state that there is no evidence that the EPA waits to bring enforcement actions to delay a party's opportunity for review).

48. *See General Electric III*, 362 F. Supp. 2d 327, 344 (D.D.C. 2005) (concluding that GE had pled a "pattern and practice" claim that EPA's administration of the statute was unconstitutional and that this claim survived the judicial review provision of CERCLA); *General Electric II*, 360 F.3d at 194 (holding that the judicial review provision does not bar a court from considering a facial or systemic challenge to CERCLA); Reardon v. United States, 947 F.2d 1509, 1515 (1st Cir. 1991) (determining that § 113(h) of CERCLA does not bar a constitutional challenge to the CERCLA statute itself).

49. *See General Electric III*, 362 F. Supp. 2d 327, 344 ("[T]he Court concludes that GE has also pled a "pattern and practice" challenge to EPA's administration of CERCLA, which survives the jurisdictional limitation of section 113(h)."). *General Electric III* was a continuation of GE's constitutional challenge to CERCLA. *Id.* at 330. In the case, EPA argued that GE was simply attacking the facial validity of the statute. *Id.* Because a facial

U.S. District Court for the District of Columbia determined that GE presented a "pattern and practice" challenge to the EPA's administration of the statute, and the court further determined that it could take jurisdiction over that claim without violating CERCLA's jurisdictional limitations.[50] The court therefore ruled that GE could proceed with its claim that the EPA's "pattern and practice" of enforcing CERCLA was unconstitutional.[51] This type of claim acknowledges the facial validity of the statute as written but challenges that the EPA's systematic enforcement of CERCLA is unconstitutional.[52]

While that case was a major victory for GE because it allowed the corporation to continue with its challenge, it has not been definitively settled that the judicial review provision of CERCLA does in fact allow such a challenge.[53] In fact, after that case, the U.S. District Court in the

---

attack requires a party to show that a statute is unconstitutional in every application, EPA argued that summary judgment was proper because the statute is at least constitutional when applied in an emergency setting. *Id.* However, GE argued that its pleadings asserted both that the statute was facially unconstitutional and that the EPA's "pattern and practice" of enforcing the statute was unconstitutional. *Id.* The EPA relied on the facts that GE filed a single-count amended complaint challenging the constitutionality of the statute and that the U.S. Court of Appeals for the D.C. Circuit had previously remanded the case so the court could "address the merits of GE's facial due process claim." *Id.* at 333. According to the EPA, this was evidence that the court should only consider the statute's facial validity. *Id.* However, the court viewed GE's pleading liberally and determined that the company provided enough notice to the EPA that it intended to press both a facial challenge and a "pattern and practice" challenge. *Id.* The court then turned to determining whether GE's pattern and practice challenge could proceed under that circuit's precedent. *Id.* at 334. According to the district court, The U.S. Court of Appeals for the D.C. Circuit's opinion remanding the case drew a line between systemic and particularized challenges. *Id.* at 334–35. In this case, GE's challenge was not to any particular order and would not delay any environmental clean-up. *Id.* at 335. Therefore, the district court concluded that the court of appeals would not bar GE's pattern and practice claim in the case, as it was a systemic challenge rather than a particularized one. *Id.* at 336. Because GE did in fact plead the pattern and practice claim and the district court believed the circuit court would allow the claim to proceed, the court concluded by allowing GE to proceed with that claim after granting EPA's motion for summary judgment on the facial validity of the statute. *Id.* at 344.

50. *Id. at* 336.

51. *See General Electric III*, 362 F. Supp. 2d at 344 (concluding that GE did plead a pattern and practice claim, that the claim was not barred by the limitations on judicial review found in § 113(h) of CERCLA, and that GE could proceed with discovery on that claim).

52. *See General Electric IV*, 595 F. Supp. 2d at 13–14 (portraying GE's claim as one that asserts that the EPA's enforcement of CERCLA violates the Constitution in fact, even if the statute is not unconstitutional in theory).

53. *See* U.S. v. Capital Tax Corp. 2007 WL 488084, at *6 n.2 (N.D. Ill. 2007) (disagreeing respectfully with the U.S. District Court for the District of Columbia's decision in *General Electric III* that past application of an allegedly unlawful practice can confer jurisdiction over a claim for future injunctive relief).

Central District of California, for one, refused jurisdiction over a similar pattern and practice claim, and its decision and interpretation of the judicial review provision of CERCLA was upheld by the U.S. Court of Appeals for the Ninth Circuit.[54] More recently, the U.S. Court of Appeals for the District of Columbia Circuit agreed that challenges to EPA's "pattern and practice" of enforcing CERCLA were not necessarily barred by CERCLA's provisions limiting judicial review,[55] but the court, in that case, distinguished the Ninth Circuit opinion on the grounds that GE, unlike the plaintiff in California, could establish that it had suffered past injury and continued to suffer from threatened future harm from EPA's pattern and practice of enforcing CERCLA without relying on third parties.[56]

D. The Constitutionality of the General Framework

In conclusion, CERCLA's framework provides heavy incentives for businesses and individuals to comply with orders from the EPA in the form of potential treble damages and heavy fines.[57] Additionally, by delaying review until a clean-up has been completed, the EPA has been able to respond to hazardous waste sites promptly and ensure that such areas are cleaned up as quickly as possible.[58] When applied to big businesses,

---

54. *See* City of Rialto v. W. Coast Loading Corp., 581 F.3d 865, 867 (9th Cir. 2009) (holding that the district court lacked jurisdiction to decide a claim that the EPA's pattern and practice of enforcing CERCLA violated the plaintiff's Due Process rights); *accord* United States v. Capital Tax Corp., 2007 WL 488084, at *6 n. 2 (N.D. Ill. 2007) (stating that a plaintiff lacks standing to challenge the EPA's pattern and practice of enforcement under CERCLA when the plaintiff cannot show that it could expect another UAO from the EPA); Raytheon v. United States, 435 F. Supp. 2d 1136, 1154 (D. Kan. 2006) (pointing out that while many circuit courts have considered the availability of jurisdiction over such "pattern and practice" claims, only one district court has ever determined that a challenge of the EPA's enforcement of CERCLA is a legitimate challenge). *But see General Electric V*, 610 F.3d 110, 125 (D.C. Cir. 2010) ("Although we thus read [*General Electric II*] as holding only that the district court had jurisdiction over GE's facial challenge, we nonetheless agree with GE that the district court had jurisdiction to entertain its pattern and practice claim as well.")

55. *See General Electric V*, 610 F.3d at 125 (agreeing with GE that the district court had jurisdiction over GE's pattern and practice claim when the claim did not seek relief from any particular UAO).

56. *See id.* at 127 (mentioning both GE's involvement in response actions at 79 active CERCLA sites and the possibility for the future issuance of UAOs to GE as reasons for the court's decision that GE has standing to challenge the EPA's pattern and practice of enforcing CERCLA).

57. *See supra* notes 38–39 and accompanying text.

58. *See* United States v. City and County of Denver, 100 F.3d 1509, 1513–14 (10th Cir. 1996) (stating that the purpose behind the provisions limiting judicial review is to

CERCLA works well, and it ensures that hazardous waste sites are cleaned up as quickly as possible, that the costs are borne by private parties instead of the federal government, and that the businesses can be reimbursed if others have also contributed to the pollution at a site or if it turns out that the EPA made a mistake in attempting to impose liability on the company in the first place.[59]

With that in mind, this Note suggests that the enforcement of CERCLA against big businesses, even through the use of UAOs, is not likely to rise to the level of a constitutional violation for a number of reasons. First, even though there are few, if any, pre-deprivation procedures provided, the property interests that the businesses are deprived of tend to be purely financial, *i.e.*, the cost of the cleanup, a depressed stock price, and decreased brand value.[60] Second, because the provisions which delay review are unlikely to completely preclude review for big businesses, the enforcement of CERCLA against them is more likely to be constitutional.[61] In other words, big businesses have an actual opportunity, if they wish, to challenge orders that direct them to clean up a site or to seek contribution from other responsible parties.

Unfortunately for small businesses, when a UAO is issued to them or when an environmental liability is assessed under CERCLA through a general notice letter, these provisions can deprive the business and its owners of more than purely financial interests.[62] Additionally, the CERCLA provisions that purport to only delay review may actually operate to eliminate any possibility of review if a small business cannot survive

---

prevent time-consuming litigation and allow the EPA to focus on the primary goal of CERCLA, which is the "prompt cleanup of hazardous waste sites").

59. *See infra* part IV.A. (discussing the financial and other effects large businesses face when assessed environmental liabilities and explaining why the EPA has a strong case that the procedures in place under CERCLA are sufficient to protect the affected property interests or larger companies).

60. *See General Electric V*, 610 F.3d at 128 (stating that no procedural protections are required under GE's arguments because any harms to a company's stock price, credit rating, or brand value are consequential damages and not "constitutionally protected property interest[s]"); *cf. General Electric IV*, 595 F. Supp. 2d 8, 30 (D.D.C. 2009) (stating that the deprivations GE complained of were purely financial deprivations, and that these deprivations were less serious because they could be recouped in a post-deprivation hearing).

61. *See General Electric IV*, 595 F. Supp. 2d at 38 ("If the PRP complies, then the average costs of compliance are $4 million and the deprivation lasts for an average of three years. If the PRP does not comply, then the average size and length of the deprivation are substantial but unclear.")

62. *See id.* at 30 (noting that for some PRPs, the issuance of a UAO could result in a variety of collateral effects including putting the PRP out of business).

under looming environmental liabilities for a period that can extend for multiple years.[63]

III. The EPA's Pattern and Practice of Enforcement Against Small Businesses

A. Deprivation of Small Business's Property Rights

Now that it is clear how the EPA enforces CERCLA and how potential constitutional problems arise in the course of that enforcement generally, this section of the Note will focus on the constitutional problems that arise when the EPA uses CERCLA to assess environmental liabilities against small businesses. Returning to the elements likely to be present in a successful due process challenge to CERCLA, the first is to show that the issuance of a UAO to a small business deprives that business, or the owners of the business, of important private property interests that go beyond purely financial interests.[64] If it were possible to find the number of businesses that are forced either to declare bankruptcy or to cease operations because of the assessment of an environmental liability under CERCLA, this would be fairly clear evidence of a weighty private property interest that goes beyond a purely financial deprivation.[65] Quite simply, business owners whose environmental liabilities contribute to or directly cause their business's failure may be entirely deprived of their ability to earn a living for an indefinite period of time.

Unfortunately, it is unlikely that any remotely clear empirical evidence exists that shows the number of businesses that experience this situation. Even though there is little clear evidence on this point though, the United States District Court for the District of Columbia, in *General Electric Co. v.*

---

63 *See id.* at 32 (noting that expert evidence was presented in the case that suggested an average of eight years between the identification of a hazardous waste site and the issuance of a UAO and an average of four years between the selection of remedial measures and the issuance of the UAO).

64. *See* Gerrard & Goldberg, *supra* note 11 (citing Reardon v. United States, 947 F.2d 1509, 1515 n.10, 1520 (1st Cir. 1991)) ("[A] new challenge is most likely to be successful where the statutory provision deprives a PRP of property interests that are not strictly monetary."); *accord General Electric V*, 610 F.3d 110, 121 (D.C. Cir. 2010) ("[N]othing . . . implies that consequential injuries, standing alone, merit due process protection.").

65. *See General Electric IV*, 595 F. Supp. 2d at 29 (recognizing that a substantial financial deprivation that has collateral effects on a company's operations is not a purely financial deprivation); *but see General Electric V* 610 F.3d at 119–20 (disagreeing with GE's argument that government actions that subject individuals or corporations to consequential injuries but that do not subject those individuals or corporations to deprivations of liberty or property interests are limited by procedural due process).

Jackson (*General Electric IV*),[66] still recognized that UAOs could put some PRPs out of business.[67] Moreover, the court also recognized that such a result would deprive that party of a private property interest that is weightier than the purely financial interests of which GE was deprived.[68] This finding may be particularly relevant to any future challenges after the United States Court of Appeals for the District of Columbia Circuit's opinion in *General Electric Co. v. Jackson* (*General Electric V*)[69] that held

---

66. *General Electric IV*, 595 F. Supp. 2d 8, 39 (D.D.C. 2009) (concluding that businesses assessed environmental liabilities under CERCLA do not have a procedural right to a pre-issuance hearing under the Due Process Clause). In this case, GE was challenging the EPA's "pattern and practice" of enforcing CERCLA. *Id.* at 10. GE claimed that the EPA's aggressive enforcement of the statute and the severe punishments available thereunder essentially forced PRPs to comply with the statute in violation of the rule laid out in *Ex Parte Young*. *Id.*at 14. GE also claimed that the balancing test of *Mathews v. Eldridge* required greater procedural protections than those allowed for under the statute because of the substantial property interest that companies could be deprived of through CERCLA. *Id.* The court, however, rejected both of GE's arguments. *Id.*at 11. The district court dismissed GE's challenge under *Ex Parte Young* because it found that the statute allowed for a "sufficient cause defense" and because penalties and fines could only be imposed by an Article III judge, and not by the agency itself. *Id.* at 17–18. As for the company's challenge under *Mathews v. Eldridge*, the court decided that the high cost of providing additional procedural safeguards are not required under CERCLA because it is unlikely that such additional procedures would reduce an already low risk of error. *Id.* at 38. Therefore, the court rejected both of GE's constitutional arguments and granted EPA's motion for summary judgment. *Id.* at 39.

67. *See id.* at 30 ("UAOs could put some PRPs out of business.")

68. *Id.* at 30–31.

69. *See General Electric V*, 610 F. 3d 110, 129 (D.C. Cir. 2010) (affirming the district court's decisions that PRP's are not entitled to greater procedural protections under CERCLA and that CERCLA is facially constitutional). GE again challenged CERCLA's constitutionality under both *Ex Parte Young* and *Mathews v. Eldridge*. *Id.* at 113. GE presented essentially the same arguments as it had in *General Electric IV* that the EPA's pattern and practice of enforcing CERCLA forced PRPs to comply with the statute without challenging it and that the level of procedural protections provided by the EPA was inadequate considering the size of the private property interest implicated by environmental enforcement actions. *Id.* Like the district court, the circuit court first assessed the constitutional challenge under *Ex Parte Young* and determined that CERCLA did not violate the rule of *Ex Parte Young* because the statute included a "sufficient cause" defense and because fines and penalties can only be imposed on PRPs through an Article III judge. *Id.* at 118–19. The court then turned to address GE's claims that the statute was unconstitutional because of the way it can harm companies' stock price, brand value, and cost of financing. *Id.* at 119. The court determined that such harms were only "consequential injuries," which do not merit any type of due process protection. *Id.* at 120. Finally, the court addressed GE's "pattern and practice" challenge. *Id.* at 124. It determined that the district court did have jurisdiction over GE's pattern and practice challenge and that GE had standing to bring the challenge. *Id.* at 125–27. However, the court quickly ruled against GE based on its prior determination that the injuries GE suffered to its brand value, stock price, and cost of financing were not injuries to interests that are entitled to constitutional protection. *Id.* at

that the injuries GE suffers because of CERCLA are only consequential injuries and, therefore, are not constitutionally protected.[70]

The district court's declaration in *General Electric IV* that the assessment of environment liabilities could put some PRPs out of business was premised on the acceptance of expert testimony presented by an economist for GE.[71] In a counterfactual that the expert created for the purposes of the GE litigation, he found that roughly 7% of the fictional companies that refused to comply with a UAO in his study were driven completely out of business by the environmental liability and another 7% of businesses had their value reduced by at least half.[72] Besides this counterfactual and expert testimony showing that the EPA's issuance of UAOs will force some businesses to completely shut down, a study conducted by the General Accounting Office when CERCLA was first being implemented included a statement that the EPA projected that as many as 30% of the companies issued UAOs under CERCLA could be forced into bankruptcy.[73]

A more recent study by the Government Accountability Office found it impossible to determine with any certainty the number of businesses that have been forced into bankruptcy by the issuance of a UAO or notice letter from the EPA.[74] However, the report did state that from 1998–2003, the Justice Department pursued environmental liabilities stemming from CERCLA in 100 different bankruptcy proceedings.[75] By combining this

---

128. Having disposed of all of GE's arguments, the court affirmed the trial court's decisions. *Id*. at 129.

70. *See id*. at 119–24 (D.C. Cir. 2010) (discussing the injuries to GE's stock price, brand value, and ability to secure financing and concluding that those interests are not constitutionally protected liberty or property interests).

71. *See General Electric IV* at 30–31 ("UAOs could put some PRPs out of business. For other PRPs, UAOs may affect operations, like whether to bid for new projects or to hire additional employees. Yet for other companies, like GE, UAOs are not material to financial positions, results of operations, or liquidity.") (internal quotations and citations omitted).

72. *See* Expert Report of John Geweke ¶¶ 21–22, Gen. Elec. Co. v. Jackson, 595 F. Supp. 2d 8, (D.D.C. 2009) (No. 00-2855), 2007 WL 6148045 (stating that of 290 firms in the counterfactual who did not comply with the EPA's order, 21 had their value reduced to zero and another 7.6% of firms had their value reduced by at least 50%).

73. *See* Topol, *supra* note 17, at 191 ("EPA has projected that thirty percent of all hazardous waste site owners will be forced to file for bankruptcy." (citing U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED 86-77, HAZARDOUS WASTE: ENVIRONMENTAL SAFEGUARDS JEOPARDIZED WHEN FACILITIES CEASE OPERATING (1986))).

74. *See* U.S. GOV'T. ACCOUNTABILITY OFFICE, *supra* note 36, at 17–18 (stating that the number of businesses in bankruptcy with environmental obligations is not known).

75. *See id*. at 18–19 (stating that of the 112 bankruptcy proceedings in which the Department of Justice pursued environmental liabilities from 1998–2003, 100 of the proceedings involved liabilities incurred under CERCLA).

information and some information from *General Electric IV*, it may be possible to gain a general idea of the number of companies who receive UAOs that end up in bankruptcy. These calculations are not meant to provide any specific conclusions concerning the number or types of businesses that are deprived of important property interests through the enforcement of CERCLA; rather they are intended to provide a general idea of the extent of the collateral effects of the enforcement of CERCLA against small business owners, which may be helpful in understanding the nature of the property interest at stake for some businesses in future pattern and practice CERCLA litigation.

In *General Electric IV*, the court stated that the EPA issued 5,422 UAOs to companies between 1982 and 2006.[76] The GAO report stated that the Justice Department pursued CERCLA liabilities in 100 bankruptcy proceedings from 1998–2003.[77] Although the evidence shows that the rate of issuance of UAOs has increased during the last 15 years, this Note will assume, for simplicity's sake, that the rate of issuance of UAOs was constant over the 24 year period mentioned in *General Electric IV* and that the GAO report's findings are indicative of a pattern where about 100 companies assessed CERCLA liabilities end up declaring bankruptcy every five years.[78]

Using those assumptions, it is possible to estimate that in the period from 1982 to 2003, 4,571 businesses were issued UAOs and 420 of those businesses ultimately went bankrupt.[79] 420 businesses out of 4,571 equals a bankruptcy rate of just over nine percent. While it is likely that many, if not most or all, of these companies were driven into bankruptcy by factors

---

76. *See General Electric IV*, 595 F. Supp. 2d 8, 28 (D.D.C. 2009) (mentioning that of the 5,422 UAOs issued in that time period, there were 189 instances where a PRP did not comply with the order).

77. *See* U.S. GOV'T. ACCOUNTABILITY OFFICE, *supra* note 36, at 18–19 (stating that 100 of the proceedings in which the Department of Justice pursued environmental liabilities from 1998–2003 involved CERCLA liabilities).

78. *See General Electric IV*, 595 F. Supp. 2d at 33 n. 17 (referencing an expert report prepared for the litigation that shows that the rate of issuance of UAOs has not been constant but has instead increased in the past 15 years).

79. *See id.* at 8 (giving 5,422 as the number of UAOs that were issued between 1982 and 2006). 5,422 UAOs issued over 25 years from 1982 through 2006 equates to roughly 217 UAOs issued to businesses each year. If 217 UAOs are assumed to be issued each year from the beginning of 1982 through the end of 2003, that would mean that 4,571 UAOs were issued over the entire 22 year period. Assuming that 100 businesses with environmental liabilities declared bankruptcy in every five-year period, then between 1982 and 2003, 420 businesses would have declared bankruptcy over that 22 year period. *See* U.S. GOV'T. ACCOUNTABILITY OFFICE, *supra* note 36, at 18–19 (stating that 100 companies in bankruptcy had environmental liabilities arising out of CERCLA during the five-year period from 1998–2003).

in addition to their environmental liabilities,[80] these numbers do illustrate that there is a class of businesses for which the effects of environmental liabilities incurred through CERCLA include forced bankruptcy or dissolution.

For another illustration of this point, one need only look to the Wall Street Journal article presented to the Senate in 1995 by Senator Pressler. [81] The article points out that Mr. Huebner's business in South Dakota was assessed a liability under CERCLA of $47,000, an amount greater than the company's profit for the entire year.[82] Had the EPA sought to enforce the liability, the article makes clear that given the limits imposed by CERCLA's judicial review provisions, Mr. Huebner would have been driven out of business with no chance to challenge the EPA's determination of liability.[83] While the EPA has argued, and some courts have accepted, that the deprivations faced by GE, like fluctuations in a company's stock price, reputational injury, and damages to a company's brand value are not property interests protected by the Due Process Clause,[84] both the agency and the courts should recognize that the potential complete deprivation of a company's livelihood and its ability to conduct business is an important property interest that is protected by the Constitution.[85]

B. Pre-Deprivation Procedures Available to Small Businesses

Proceeding to the next element of a potentially successful constitutional challenge to CERCLA, the question becomes whether the process that the government provides sufficiently protects the parties who

---

80. *See* Topol, *supra* note 17, at 2 (stating that according to the EPA, businesses file for bankruptcy protection for economic reasons that most often have nothing to do with environmental liabilities though there are some notable exceptions).

81. *See* 141 CONG. REC. S15844 (daily ed. Oct. 26, 1995) (statement of Sen. Pressler) (describing the plight of the Ace Steel & Metals company under CERCLA).

82. *See id.* (describing the liability faced by Ace Steel and Recycling under CERCLA).

83. *See id.* (mentioning the small business's choice of fighting the EPA's determination or going out of business).

84. *See General Electric IV*, 595 F. Supp. 2d 8, 20 (D.D.C. 2009) (describing EPA's argument that "consequential" deprivations of property, *e.g.*, those that result because the market values a company less after it receives a UAO than it did before, such as a decrease in stock price, could not be the basis for a due process challenge).

85. *Cf.* Connecticut v. Doehr, 501 U.S. 1, 11–12 (1991) (finding a sufficient deprivation of private property to warrant due process protection when a state's action clouded an individual's title, tainted the individual's credit rating, and reduced the individual's chances of obtaining a home equity loan or an additional mortgage).

are deprived of their property interest.[86] In the enforcement of CERCLA, the only processes that are provided by the EPA are the opportunity to respond to the agency's general notice letter by submitting comments to the agency and the opportunity to engage in settlement negotiations.[87]

Assuming the counterfactual report prepared by GE's expert witness is accurate, around 7% of businesses that are assessed environmental liabilities under CERCLA end up either in bankruptcy or simply shut down as a direct collateral effect of the EPA's enforcement.[88] Using statistics taken from *General Electric IV* and from the Government Accountability Office, this Note has come up with a rough estimate that about 9% of businesses assessed liabilities under CERCLA end up in bankruptcy.[89] If the procedures provided by the agency were in fact adequate to protect a PRP's property interests, then it seems that businesses should not be driven out of business with only an opportunity to comment on the EPA's decision. Based on the estimates in the counterfactual and in this Note, it seems quite possible that the procedures provided by the EPA are in fact insufficient to protect the property interests of smaller businesses assessed liabilities under CERCLA.[90]

Finally, assuming both that CERCLA does act to deprive this class of PRPs of a significant private property interest that is not purely financial, and that the pre-deprivation process that the government provides is inadequate, the final requirement for a potentially successful constitutional

---

86. *See* Gerrard & Goldberg, *supra* note 11, at 217 (citing Reardon v. United States, 947 F.2d 1509, 1515 n.10, 1520 (1st Cir. 1991)) (stating the importance of a lack of pre-deprivation procedures for a potentially successful constitutional challenge to CERCLA after *Reardon*).

87. *See General Electric IV*, 595 F. Supp. 2d at 29 (describing the process that EPA follows in assessing liabilities to PRPs under CERCLA); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 36, at 7 (describing the settlement procedures EPA implements when a PRP apparently cannot pay for the cost of a cleanup without being subjected to undue financial hardships).

88. *See* Expert Report of John Geweke, *supra* note 72, at ¶¶ 21–22 (giving his estimation that 7.6% of businesses assessed an environmental liability may end up in bankruptcy or going out of business entirely).

89. *See supra* notes 77–80 and accompanying text.

90. *But see General Electric IV*, 595 F. Supp. 2d at 36 (giving at least two examples where the EPA made errors in issuing a UAO but then either withdrew the order or was enjoined from enforcing the order through a challenge brought in a parallel cost recovery action); 141 Cong. Rec. S15844 (daily ed. Oct. 26, 1995) (statement of Sen. Pressler) (noting that three and a half years after the original letter threatening liability for Ace Steel and Recycling, the EPA settled with another party and removed Ace from the case, apparently ending Ace's potential liability for a $47,000 contribution).

challenge to CERCLA is a showing that the provisions that delay judicial review actually operate to preclude review altogether.[91]

C. CERCLA's Preclusion of Judicial Review

Three major consequences of CERCLA liability contribute to the conclusion that judicial review is effectively precluded for small businesses ordered to clean up sites or contribute funds to the clean-up: first, the extremely high cost of remedial actions are likely enough in and of themselves to deplete a small business's assets and the imposition of such a large liability can scare creditors away from continued financing of the business;[92] second, even if the amount of the clean-up itself does not deplete a company's assets, the possible imposition of huge penalties for noncompliance is likely to substantially diminish the company's assets and handicap the business's ability to secure financing;[93] finally, the length of time it takes for the EPA to conduct remedial actions and seek payment from the small business is likely to push any chance for review well into the future.[94] When the length of time it takes to obtain review is coupled with a potentially massive overhanging environmental liability, it becomes extremely unlikely that all small businesses affected by the statute will be able to continue operations long enough to challenge an order. When viewed as a whole, the result is that small businesses may be entirely

---

91. *See* Gerrard & Goldberg, *supra* note 11, at 217 (stating that "'where the effect of a ban on pre-enforcement review is to preclude review altogether,' or throw it 'so far into the future as to render it inadequate,'" the statute may be unconstitutional (quoting Reardon v. United States, 947 F.2d 1509, 1515 n.10, 1520 (1st Cir. 1991))).

92. *See* 141 CONG. REC. S15844 (daily ed. Oct. 26, 1995) (statement Sen. Pressler) (stating that the liability that EPA sought to impose on Ace Steel and Recycling exceeded the company's entire profits for the year); Expert Report of John Geweke, *supra* note 72, at ¶ 24 (stating that for six of eighty-nine companies who did not comply with a UAO issued in his counterfactual, the increased cost of financing the company through the issuance of bonds was equivalent to a company going from an A credit rating to a BB credit rating (a "junk" rating)).

93. *See* Expert Report of John Geweke, *supra* note 72, at ¶ 24 (explaining the increased costs of financing for companies that were issued UAOs and failed to comply in the counterfactual he performed for the GE litigation).

94. *See* 28 U.S.C. §§ 2462, 9613(g)(2) (giving the EPA five years to bring an enforcement action against a PRP who violates a UAO and giving the EPA either three years or six years after the completion of a removal or remediation to file an action requiring a PRP to contribute to the costs of clean up); *General Electric IV*, 595 F. Supp. 2d at 31 (finding an expert's report that the average time it takes to complete remedial action is three years to be persuasive but failing to find that the EPA unilaterally delays enforcement proceedings to delay review of UAOs issued to PRPs).

deprived of the chance to challenge a liability assessed by the EPA under CERCLA.

D. The Combined Effects of CERCLA on Small Businesses

The first factor that contributes to small businesses being precluded from challenging EPA orders under CERCLA is that liabilities imposed under the statute are often huge when compared to a small business's operations.[95] In the example of Ace Steel & Recycling in South Dakota, the company's assessed liability of $47,000 was greater than the company's profits for the year.[96] The owner of the company asserted that, had it been unable to remove that overhanging liability from the EPA, he would certainly have gone out of business.[97] Although there is little empirical evidence on this matter, it is highly unlikely that Ace Steel and Recycling's story is the only one of its kind; in fact, Bill Huebner suggested that as of 1995, "20,000 small and medium-sized businesses, community groups, and other organizations" had been implicated in some way under CERCLA.[98] The fact that the average Superfund Site has now been calculated to cost about $12 million to clean up further illustrates the massive costs that small business can face under the statute.[99] When a small business is assessed even a fraction of that cost, it is unlikely to be able to conduct the cleanup itself or pay the high costs of the clean up.[100]

If a small business cannot meet the liability that the EPA assesses and wants to contest the EPA's decision then, its only option is to refuse to settle with the EPA, receive a UAO, and refuse to comply with the EPA's order to clean up the site.[101] But because the cost of financing increases, and can

---

95. *See General Electric IV*, 595 F. Supp. 2d 8, 38 (D.D.C. 2009) (stating that if a PRP complies with an order, the average cost to the PRP is $4 million but that if a PRP does not comply, the average costs are "substantial but unclear").

96. *See* 141 Cong. Rec. S15844 (daily ed. Oct. 26, 1995) (statement of Sen. Pressler) (showing that the liability assessed to Ace by the EPA was greater than the company's profits for the year).

97. *See id.* (suggesting that the company had the choice of either fighting the liability being imposed or going out of business).

98. *Id.*

99. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 36, at 8 (2005) (stating that the average cleanup costs associated with the 1,236 sites on the National Priorities List as of September 30, 2004 was $12 million).

100. *Cf.* 141 Cong. Rec. S15844 (daily ed. Oct. 26, 1995) (statement of Sen. Pressler) (mentioning that Ace Steel and Recycling, as a small business, did not have "an extra $47,000 to spare" to help pay for the cleanup of a hazardous waste site).

101. *See General Electric IV*, 595 F. Supp. 2d 8, 11 (D.D.C. 2009) (indicating the choice that a PRP is faced with if it wishes to challenge the EPA's order).

increase substantially,[102] when a PRP refuses to comply with a UAO, a small business may not be able to continue to secure the funds it needs to keep its doors open. Returning to the counterfactual prepared for the GE litigation, for 6 of 89 companies that refused to comply with a UAO in the hypothetical, the difference in the cost of financing after the decision not to comply was the same as if the company's bonds went from an A, or investment grade, credit rating to a BB, or "junk," credit rating.[103] If a small company is unable to obtain financing at a previously available rate, or is unable to obtain financing at all, this of course increases the likelihood that the company will lose the ability to carry on day-to-day operations and subsequently increases the likelihood that the company will be forced out of business as it waits for the opportunity to challenge the EPA's order.[104]

The conclusion that small businesses are likely to be unable to find financing after receiving an order from the EPA is reinforced by the potential for treble damages and the possibility of up to nearly $1 million a month in fines for a business that fails to comply with an EPA order.[105] If the EPA had not settled with another PRP and instead sought to enforce the liability against Bill Huebner's company, Ace Steel & Recycling, the EPA could have sought not only the $47,000 of clean-up costs, but also over $140,000 in treble damages plus fines of thousands of dollars per day for as long as the company did not comply with the order.[106] By increasing liability in such a way, the statute and the EPA are essentially forcing companies of a certain size either to settle or "bet the company" that a judge will find the company is not liable under CERCLA. It is impossible to conclude anything other than that such a scheme makes sure that any small business facing an order from the EPA has its entire livelihood threatened by the treble damages and fines allowed under the statute.

---

102. *See* Expert Report of John Geweke, *supra* note 72, at ¶ 24 (asserting that in the counterfactual he performed for the GE litigation, the increased costs of financing for some companies that received UAOs and failed to comply were equivalent to the increased financing costs that would result from a company going from an A credit rating to a BB rating).

103. *See id.* (concluding that the cost of bond yields for companies who do not comply with a UAO is substantial).

104. *See id.* ¶ 25 (stating that for a firm refusing to comply with a UAO, there will be an increased cost of servicing debt; if the firm is already in a financially precarious position, the result of noncompliance will be the cancellation of ongoing projects, the reduction of the workforce, and possibly bankruptcy).

105. *See General Electric IV*, 595 F. Supp. 2d at 12 (citing 42 U.S.C. §§ 9606(b), 9607(c)(3)) (acknowledging that CERCLA allows the EPA to seek treble damages and fines of $32,500 per day that a PRP fails to comply with a UAO, which is $975,000 per month).

106. *See id.* (describing the penalties for refusing to comply with an EPA order under CERCLA).

The last hurdle to clear for a potentially successful CERCLA challenge is to show that the provisions that delay judicial review actually preclude review entirely.[107] That is highly likely in the case of smaller companies because a small business that wishes to combat an order will face the consequences of refusing to comply, including possible bankruptcy, as soon as the business decides not to comply with the order.[108] On the other hand, the average time for the EPA to complete remedial work and seek contribution from a PRP is now over four years.[109]

This leads to a situation where smaller companies are faced with a "bet the company" liability that can only be challenged after an average of four years.[110] The question then is: under these circumstances, do CERCLA's judicial review provisions only operate to delay review or do they, in reality, preclude review altogether? Based on the evidence from GE's counterfactuals, from the number of UAOs issued, and from the number of businesses with CERCLA liabilities that go bankrupt, it is likely that, at least for some smaller companies, the provisions of CERCLA that purport to delay judicial review actually operate to preclude review altogether. Thus, small businesses that are named as PRPs and assessed environmental liabilities under CERCLA are the parties who are most likely to be able to show the three elements needed for a potentially successful constitutional challenge to CERCLA.[111]

Again, the interests that these businesses are deprived of go beyond the purely financial, as there appears to be a very real possibility that at least some class of PRPs are likely to be driven completely out of business by such an order.[112] Next, even though the EPA provides an opportunity for a PRP assessed with a liability to comment before depriving that business of those property interests, this level of review is inadequate to protect the property interests of these small businesses with environmental liabilities, as these companies are still likely to be forced into bankruptcy

---

107. *See* Gerrard & Goldberg , *supra* note 11 (declaring that "'where the effect of a ban on pre-enforcement review is to preclude review altogether,' or throw it 'so far into the future as to render it inadequate,'" the statute may be unconstitutional (quoting Reardon v. United States, 947 F.2d 1509, 1515 n.10, 1520 (1st Cir. 1991))).

108. See General *Electric IV*, 595 F. Supp. 2d 8, 12 (D.D.C. 2009) (describing the penalties available under CERCLA and explaining that daily fines can be imposed from the day the EPA issues the order up until the day the EPA brings an enforcement action against the company, which it is not required to do for up to six years).

109. *See id.* at 8 (citing Expert Report of Shahrokh Rouhani at ¶ 6.1.3.4, *General Electric IV*, 595 F. Supp. 2d 8 (D.D.C. 2009) (No. 00-2855), 2007 WL 6148046) (giving the average time it takes for a party to complete a remedial action and seek contribution).

110. *Id.*

111. *See supra* notes 64–110 and accompanying text.

112. *See supra* notes 64–85 and accompanying text.

before they are given a legitimate chance, before a neutral third party, to challenge the EPA's imposition of liability.[113] Finally, because a PRP is likely to face the consequences of refusing to comply with a UAO, including bankruptcy, when it makes the decision not to comply, the judicial review provisions that delay review for an average of four years after the PRP refuses to comply with the order impermissibly operate to entirely preclude review for this class of PRPs.[114]

IV. Current Litigation: Why Large Corporations Struggle to Successfully Challenge the Constitutionality of CERCLA

The arguments above are premised on the idea that the three elements of a potentially successful constitutional challenge fit into the precedential decisions of the court considering the challenge. In fact, these elements are transferable and can be used to show both that the EPA's enforcement of CERCLA violates the Due Process Clause as set forth in *Ex parte Young*[115] and that greater procedures are required when the EPA enforces CERCLA against small businesses under *Mathews v. Eldridge*.[116] In this section of

---

113. *See supra* notes 86–90 and accompanying text.

114. *See supra* notes 92–94 and accompanying text.

115. *See Ex parte* Young, 209 U.S. 123, 148 (1908) (holding that the provisions of the act which provided for enormous financial penalties and imprisonment for defendants that unsuccessfully challenged the act were unconstitutional). In this famous case, the Minnesota legislature passed laws imposing certain rates on the carriage of freight on some of the railways throughout the state. *See id.* at 127. The laws imposed fines of between $2,500 and $5,000 for any corporation that violated the imposed rate structure for the first offense and fines of between $5,000 and $10,000 for any subsequent offense. *Id.* The legislature later passed laws providing that any officer, agent, or representative of a railway company that violated the statutory rate structure could be fined up to $5,000 and sentenced to up to 5 years in prison. *Id.* at 128. Shareholders of the railroad companies covered by the statute sued in federal court in an effort to prevent the railroads from complying with the law and to prevent the state from enforcing the law. *Id.* at 129–31. In the circuit court, the Attorney General of Minnesota, Edward Young, was enjoined from enforcing the law against the railroad companies. *Id.* at 131. The day after the injunction was issued, Young brought suit in state court against the railroad companies and sought an order to have them comply with the law, and the circuit court ultimately held Young in contempt of court for violating the injunction issued in the federal court. *Id.*at 133. In reviewing the case and Young's detention on appeal, the Supreme Court first found that the federal courts had jurisdiction over whether the rates published by the Minnesota legislature were so low as to be confiscatory. *Id.* at 144–45. The Court then held that the provisions of the act that imposed enormous fines and possible imprisonment as the penalties for noncompliance with the rate structure were facially unconstitutional, regardless of whether the actual rate schedule was confiscatory or not. *Id.* at 148.

116. *See* Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (concluding that an evidentiary review was not required before an agency could terminate an individual's

the Note, the focus is on fitting these arguments into the mold of past precedent and the current litigation challenging the constitutionality of CERCLA. This section will also highlight some of the key differences between the arguments for small businesses that CERCLA violates their constitutional rights and the arguments that have been tried by large corporations and rejected by the courts.

This will be accomplished by first discussing the General Electric cases and the problems that the courts have noted with GE's arguments.[117] Then, this section will discuss how the arguments above fit into the requirements of *Young* and *Mathews* to show that for a certain class of PRPs, the enforcement of CERCLA by the EPA results in serious constitutional violations that have been continuously overlooked in the courts, including in the most recent round of litigation.[118]

A. Overview of the General Electric Litigation

Since the enactment of CERCLA in 1980, GE has been subject to at least 68 orders from the EPA to clean up hazardous waste sites, presumably after settlement negotiations had failed and the agency had determined that GE was responsible for the contamination at the site.[119] At the time of this writing, GE states that it has some involvement with 89 sites on the EPA's

---

disability benefits). An individual, Eldridge, was originally awarded disability benefits pursuant to the Social Security Act. *Id.* at 323. The state agency that monitored Eldridge's medical condition sent him a questionnaire and, after receiving the results, determined that the individual's disability had ceased in May 1972. *Id.* at 324. After Eldridge's disability benefits were terminated, he filed a suit seeking to reinstate his benefits because the procedures provided to him before his benefits were terminated were inadequate. *Id.* at 324–25. The district court and court of appeals agreed with Mr. Eldridge and enjoined the termination of his benefits until after an evidentiary hearing could be held, but the Supreme Court reversed. *Id.* at 325–26. The Court stated that the specific level of process that is due when the government deprives individuals of interests depends on three distinct factors: (1) the private action that will be affected by the government's action; (2) the risk that the procedures used will lead to inappropriate deprivations and the probable value, if any, of adding any extra procedural safeguards; and (3) the Government's interest including the costs and administrative burdens to the Government of imposing additional procedural safeguards. *Id.* at 335. After considering all of these factors, the Court determined that additional procedures were not required before the Social Security Administration could make its determination that Eldridge was no longer disabled.

117. *See Infra* Part IV.A.

118. *See Infra* Part IV.B.

119. *See General Electric IV*, 595 F. Supp. 2d 8, 17 (D.D.C. 2009) (acknowledging that GE has been issued 68 unilateral administrative orders by the EPA and complied with all of them).

Superfund National Priorities List (NPL),[120] a list reserved for sites that pose the greatest threat to human health and the environment.[121] And from 1990 through 2009, GE spent over $1.7 billion on the cleanup of three hazardous waste sites alone.[122] Under CERCLA then, GE has been ordered by the government to clean up dozens of sites and spend well over a billion dollars, but the company was never entitled to a hearing on the propriety of the government's orders before complying.

In November of 2000, GE launched a broad constitutional attack against CERCLA. GE's suit challenged the constitutionality of CERCLA, specifically the EPA's use of the UAO provision (§ 106 of CERCLA).[123] This decade-long lawsuit recently came to an apparent final resolution in the United States Court of Appeals for the District of Columbia Circuit.[124] Over the years, multiple preliminary issues in the case have been resolved at both the district court and circuit court level, including GE's challenge that the statute was facially invalid.[125] The most recent decision held that the EPA's "pattern and practice" of enforcing the unilateral administrative order provision of CERCLA did not operate to deprive GE or other

---

120. *See* GE Citizenship: Programs & Activities, Environment, Remedial Responsibilities, http://www.ge.com/citizenship/programs-activities/environment/remedial-responsibilities.html (last visited Nov. 15, 2010) (stating the number of Superfund sites on the NPL that GE is currently involved with) (on file with the Journal of Energy, Climate, and Environment).

121. *See* Healey, *supra* note 17, at 277 (describing how the NPL was the result of Congress's awareness that funding under CERCLA was inadequate). *Cf.* 40 C.F.R. 300.425(c) (2009) (listing the criteria for a release to be on the NPL).

122. *See* GE Citizenship: Programs & Activities, Environment, Remedial Responsibilities, http://www.ge.com/citizenship/programs-activities/environment/remedial-responsibilities.html (last visited Nov. 15, 2010) (describing the expenses incurred dredging three river sites that the EPA concluded GE was responsible for polluting with carcinogenic compounds) (on file with the Journal of Energy, Climate, and Environment). *But see General Electric IV*, 595 F. Supp. 2d at 30 (reporting that GE repeatedly stated that environmental costs were not material to its "financial positions, . . . , results of operations, or liquidity" (quoting GE Annual Reports, 1997–2000)).

123. *See General Electric IV*, F. Supp. 2d at 12 (giving the procedural history of the lawsuit, specifically that GE filed its complaint in November 2000 and amended the complaint to challenge CERCLA in two ways in March 2001).

124. *See General Electric V*, 610 F.3d 110, 129 (D.C. Cir. 2010) (affirming the district court's decisions that neither the CERCLA statute itself nor the EPA's practice of enforcing the statute violates the Constitution).

125. *See General Electric II*, 360 F. 3d 188, 189 (D.C. Cir. 2004) (holding the plain meaning of the CERCLA statute did not prevent GE's facial constitutional challenge from being considered).

potentially responsible parties of Due Process under either *Ex Parte Young* or *Eldridge v. Mathews*.[126]

1. Ex parte Young *& Large Businesses*

In *Ex parte Young*, the Supreme Court announced the rule that a statute violates Due Process if the penalties it imposes for noncompliance are so severe that companies are prevented from seeking judicial review of the legislation.[127] Courts have often had the opportunity to consider challenges to the facial validity of the steep fines that may be imposed under CERCLA, and the provisions have always been upheld because the implementation of fines under the statute can be avoided if the PRP had sufficient cause to refuse to comply with the order, and additionally, the imposition of fines is always subject to judicial discretion.[128]

So the first important reason that the district court in *General Electric IV* concluded that the EPA's use of UAOs under CERCLA is consistent with *Young* was that PRPs can avoid liability for the fines that result from the violation of an order issued by the EPA if there is a "sufficient cause" for the failure to comply.[129] According to the court, this provision expressly allows potentially responsible parties to avoid the imposition of penalties that can be levied for failing to comply with an order issued by the EPA if it can show that the party had sufficient cause to avoid compliance with the order.[130] Since the court determined that parties may refuse to comply with a UAO issued by the EPA, it was able to determine that there

---

126. *See General Electric V*, 610 F.3d at 127–129 (setting forth GE's arguments that CERCLA and the EPA's administration of CERCLA violate Due Process and "quickly disposing" of the company's arguments that the statute violated Due Process).

127. *See Ex Parte* Young, 209 U.S. 123, 148 (1908) (invalidating a Minnesota regulatory regime that imposed severe fines and potential prison time for railroad companies and executives that charged more than the state-mandated rates for rail transportation). *See also General Electric IV*, 595 F. Supp. 2d 8, 17 (D.D.C. 2009) (discussing the circumstances when statutes can be declared unconstitutional under *Young* and its progeny).

128. *See, e.g.*, *General Electric IV*, 595 F. Supp. 2d at 17 (citing numerous cases that have held that the "sufficient cause defense" contained in the CERCLA statute operates as a good faith safe harbor and cures any potential constitutional violations under *Young*).

129. *See id.* (focusing on the fact that liability and fines for violating an order issued by the EPA under CERCLA can only be imposed by an Article III judge and only if the PRP violated the order "without sufficient cause").

130. *See id.* at 17–18 (explaining that these provisions provide enough security that parties challenging the statute in good faith will not be punished for the statutory scheme to withstand scrutiny under *Ex Parte Young*); *See also* 42 U.S.C. § 9601(b)(1) (2006) (allowing for the imposition of penalties on a party who violates an EPA order only if the party violates the order "without sufficient cause").

was no constitutional problem posed by the Superfund Act under *Young*.[131] This reasoning is consistent with numerous decisions of other courts,[132] but most of these decisions dealt with large companies who were likely relatively unaffected by their environmental liabilities rather than small businesses whose existence could be jeopardized by the imposition of environmental liabilities.[133]

2. Mathews v. Eldridge *& Large Businesses*

The district court in *General Electric IV* then went on to determine whether the implication of liabilities and use of UAOs by the EPA violated the due process framework of *Mathews*.[134] The district court recognized that even companies that comply with an order issued by the EPA suffer deprivations of a private property interest protected by the Due Process Clause and have no opportunity for a hearing before the deprivation occurs.[135] The court then determined that the private interests implicated by

---

131. *See General Electric IV*, 595 F. Supp. 2d 8, 17 (D.D.C. 2009) (deciding that the sufficient cause defense in CERCLA satisfies the rule that if a party can challenge the statute in good faith without the imposition of penalties, then the statute may be constitutional under *Young*).

132. *See* Emp'rs Ins. of Wausau v. Browner, 52 F.3d 656, 665 (7th Cir.1995) (refusing to allow a company to seek reimbursement for its clean-up costs until after it has completely cleaned up a contaminated site, even when that company is not responsible for any of the remaining contaminants); Solid State Circuits Inc. v. EPA, 812 F.2d 383, 391 (8th Cir. 1987) ("[T]o pass constitutional requirements, the standard must provide parties served with EPA clean-up orders a real and meaningful opportunity to test the validity of the order."); Wagner Seed Co. v. Daggett, 800 F.2d 310, 316 (2d Cir.1986) (seeing plainly that there cannot be a violation of the Due Process Clause if the imposition of financial penalties is subject to judicial discretion and if there is a "good faith exception" to the penalty provisions of the statutes); United States v. Capital Tax Corp., 2007 WL 488084 at *6 (N.D. Ill. 2007) (explaining that CERCLA is constitutional in part because of two safety nets provided in the statute including a "sufficient cause" defense and the ability to comply and then seek reimbursement from the government).

133. *See, e.g.*, *General Electric IV*, 595 F. Supp. 2d at 30 ("[F]or other companies, like GE, UAOs are 'not material to financial positions, results of operations, or liquidity.'" (quoting GE's annual financial reports from 1997–2000)); *Employers Insurance*, 52 F.3d 664 (highlighting that the company did not claim that it would have been unreasonable or unduly burdensome for the company to "shell out another couple of hundred thousand dollars to complete the clean-up project" and that the business had thousands of employees and annual revenues of over a billion dollars).

134. *See General Electric IV*, 595 F. Supp. 2d at 20 ("That brings us to the primary due process challenge GE asserts, which must be assessed within the framework of *Mathews v. Eldridge*.").

135. *See General Electric IV*, 595 F. Supp. 2d at 31 (recognizing that whether PRPs comply with a UAO or not, they are deprived of some private property interest that is protected by the Constitution).

EPA action under CERCLA are generally primarily financial but have enough potential collateral effects to "constitute weighty private interests."[136] Nevertheless, the court determined that the size and nature of the private interests of the PRP do not justify the greater expense that would have to be incurred by the agency to provide greater procedural safeguards when the reduction that would be achieved in the potential risk of error by those safeguards is relatively small.[137]

This decision seems correct as far as its decision applies to GE and other large companies. The fact is that large corporations like GE can conduct clean-ups, bear the expenses that go along with decontaminating hazardous waste sites, and then challenge any potential errors made by the government after the fact if it wants to ensure that the large corporation's financial interests are protected.[138] While UAOs directed at large companies may cause financial problems and lead to unwelcome expenses, the fact that the government needs to facilitate quick and effective responses to hazardous waste sites to protect the public health provides enough of a justification for delaying review until the site has been decontaminated.[139]

If there is a problem with the decisions issued in the GE litigation, it is that they apply equally as well to the EPA's administration of the statute against small businesses.[140] Instead of applying one broad finding to the EPA's administration of the statute, it is necessary to recognize that the enforcement of the act against different classes of PRPs results in different consequences. Quite simply, when compared to the effect an enforcement action has against companies like GE, the act affects smaller businesses completely differently; small businesses are deprived of a different type of property interest and they are, in reality, precluded from ever challenging

---

136. *Id.* at 30–31.

137. *See id.* at 37–39 (conducting a balancing of the factors required when analyzing due process claims under the *Mathews* framework and deciding that the increased protections of a PRP's property interests were not warranted because such process would greatly increase the burden on the government and not greatly reduce the risk of error).

138. *See id.* at 30 ("[F]or other companies, like GE, UAOs are 'not material to financial positions, results of operations, or liquidity.'" (quoting GE's annual financial reports from 1997–2000)).

139. *See* Fuentes v. Shevin, 407 U.S. 67, 91–92 (1971) (showing that the Court has allowed deprivations of property interests in situations requiring prompt action like the collection of taxes, meeting the needs of the national war effort, and protecting against misbranded drugs) (citations omitted).

140. *See General Electric IV*, 595 F. Supp. 2d 8, 39 (D.D.C. 2009) (listing the options for any PRP that wants to challenge an order as either complying with the order and then seeking review or refusing to comply and defending its behavior in a subsequent judicial action).

the UAOs issued against them in front of a neutral decision-maker. Under both *Young* and *Mathews*, the EPA's administration of CERCLA against small businesses raises greater due process concerns.

B. Due Process and Enforcement Against Small Businesses

1. Ex Parte Young *& Small Businesses*

Returning to the rule of *Ex parte Young*, a statute violates Due Process if the penalties it imposes for noncompliance are so severe that companies are prevented from seeking judicial review of the legislation.[141] In GE's challenge, the courts determined that CERCLA is not unduly coercive for two reasons: first, the statute has a sufficient cause defense that insulates a PRP from treble damages or heavy fines; and second, because the imposition of fines under the statute is not mandatory but is within an Article III judge's discretion.[142] The effect of these provisions, the court concluded, was that PRPs were not coerced into complying with the statute rather than challenging the EPA's actions in court.[143] In fact, it appears that GE and other corporations have not been improperly coerced into complying with the statute, as plenty of large corporations have filed numerous suits contesting CERCLA liability.[144]

However, the district court in *General Electric IV* never addressed the coercive effect of the potentially massive liability that can be imposed through the act for that 7% of companies for which the effect of refusing to comply with an order will be a greatly increased cost of financing, possible reductions in workforce, or bankruptcy. For these businesses, the statute's potential penalties and collateral effects ultimately coerce small businesses to comply with EPA orders because if they do not, the negative business

---

141. *See id.* at 17 (discussing the circumstances when statutes can be declared unconstitutional under *Young* and its progeny (citing *Ex parte* Young, 209 U.S. 123, 147 (1908))).

142. *See id.* 17–19 (deciding that, when combined with the fact that fines under the statute may only be imposed by Article III judges, the "sufficient cause defense" contained in the CERCLA statute operates as a good faith safe harbor and cures any potential constitutional violations under *Young*).

143. *See id.* at 19 (summing up that GE did not show that EPA's pattern and practice of enforcing CERCLA was unduly coercive).

144. *See id.* at 30 ("[F]or other companies, like GE, UAOs are 'not material to financial positions, results of operations, or liquidity.'" (quoting GE's annual financial reports from 1997–2000)); Emp'rs Ins. of Wausau v. Browner, 52 F.3d 656, 665 (7th Cir.1995) ("It is a large company with thousands of employees, and its annual revenues from premiums exceed $1 billion."). *See also* cases cited *supra* note 9 (listing numerous challenges to CERCLA brought by companies like GE, Employers Insurance or Wausau, Goodrich, and Raytheon).

effects will be felt immediately while any opportunity to challenge the EPA's action will be delayed for years.[145]

In some ways, the EPA has already recognized this problem. When it comes to collecting liabilities, the agency "often settles environmental claims with businesses for less than the cleanup costs if paying for the cleanup would present 'undue financial hardship,' such as depriving a business of ordinary and necessary assets or resulting in an inability to pay for ordinary and necessary business expenses."[146] Despite this apparent kindness by the EPA, the fact is the agency's settlement practices cannot cure the coercive effect that exists when a business still faces liability for full clean-up costs, treble damages, and extremely large fines.[147] Instead of allowing the provision of additional safeguards for such companies to remain a generous gesture, the courts should in fact recognize that when the statute is applied to a certain set of businesses, the effect is unduly coercive and therefore unconstitutional.

2. Mathews v. Eldridge *and Small Businesses*

Now returning to *Mathews*, the Court established that the procedural protections that the government must provide to satisfy the due process requirement of the Fifth Amendment depend on the importance of the private property interest at stake, the government's interest in maintaining the procedures that it has in place, and the risk of erroneous deprivation of property through the procedures already in place and the probable value, if any, of providing additional procedures.[148] The court in *General Electric IV* determined that the private property interests at stake when CERCLA is enforced through UAOs were "less constitutionally significant" because they were primarily financial.[149] Additionally, it found that forcing the government to provide greater procedural protections would generate a substantial impairment of the government's interest in avoiding greater

---

145. *See supra* Part III.D. (describing how the enforcement of CERCLA against small businesses deprives those entities of valuable personal property rights and how the judicial review provisions push delay so far into the future that small businesses assessed environmental liabilities may be precluded of review entirely).

146. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 99, at 7 (2005).

147. *Cf.* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 472–73 (clarifying that an administrative agency cannot cure an unlawful delegation of power by Congress by refusing to exercise some of that power).

148. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (laying out the three factors that determine the amount of procedural due process required in a given situation).

149. *See General Electric IV*, 595 F. Supp. 2d 8, 30 (D.D.C. 2009) ("Financial deprivations are less troubling because money can be recouped in a post-deprivation hearing.").

procedures because of the high "financial and administrative costs" of providing more review.[150] Finally, the court determined that the risk of erroneous deprivation was small and that greater procedural protections were unlikely to have a substantial impact on reducing the risk of error.[151]

Now, under the court's analysis, the procedural protections provided by the EPA do appear sufficient to protect the less constitutionally significant purely financial interests of large corporations like GE. But two differences between the effect that CERCLA enforcement has on small businesses and the effect it has on large corporations suggest that greater procedures should be provided to protect small businesses.

First, the property interests of small businesses are not purely financial and thus are more constitutionally significant than the property interests of large corporations that are impacted by the EPA's enforcement of CERCLA.[152] Second, because the need for greater procedural protections is limited to the class of PRPs made up of small businesses, a court could limit the financial and administrative costs that must be incurred by the EPA in providing greater procedural protections. Ultimately, when the Mathews test is recalibrated and considers the importance of the private property interests of small businesses that are impacted under CERCLA as well as the lower cost for the government in providing greater procedures to this relatively small class of PRPs, it may well be the case that the EPA's enforcement of CERCLA against small businesses requires greater procedural protections than are provided when the act is enforced against the class of larger corporate PRPs.

V. Proposed Solutions to the Small Business Problem

This section of the Note considers two different steps that could be taken that could lead to the EPA enforcing CERCLA in a way that protects the private property interests of small businesses in the face of the daunting liabilities that can be incurred in CERCLA. The first step would be for the courts that do accept jurisdiction over a pattern and practice challenge to the administration of CERCLA to recognize that the statute has different effects

---

150. *Id.* at 33 (noting also that because the government only issues UAOs after settlement negotiations have failed, it is likely that almost every PRP would seek pre-enforcement review of the EPA's action against it, which would result in very high costs for the government).

151. *See id.* at 38 (stating that greater procedural protections would be unlikely to reduce the risk of error because the risk was already very small).

152. *See id.* at 29 ("Deprivations that can be recouped after a hearing—like purely financial deprivations—are less significant than irreparable deprivations.") (citations omitted).

when applied against different classes of parties. As a result, when determining the coercive effect of EPA's administration of the statute and the procedural protections that are due PRPs, courts should look beyond the facial validity of the statute and act to protect those PRPs who are the most vulnerable to unconstitutional deprivations because of the EPA's enforcement of the act. The second step would be for some sort of legislative action to be taken, either through official agency rulemaking or through Congress, so that this class of vulnerable PRPs is not completely precluded from challenging an agency action that deprives them of important private property interests.

A. Federal Courts Should Recognize Procedural Protections for Some PRPs Assessed with Environmental Liabilities Under CERCLA

When courts do accept jurisdiction over pattern and practice challenges to the EPA's enforcement of CERCLA, they should consider the different effects that the act has when enforced against different kinds of PRPs.[153] A pattern and practice challenge is a more systemic challenge than an as-applied challenge but more fact-specific than a facial challenge;[154] it follows that the courts should focus on the different types of companies that are adversely affected by the EPA's practice of enforcing CERCLA, rather than taking a one-size-fits-all approach and concluding that because the act is constitutional when enforced against large corporations, it is constitutional when enforced against anyone.

The error of taking a one-size-fits-all approach when considering the constitutionality of the EPA's enforcement of CERCLA is, again, that small businesses will find themselves without any recourse to challenge adverse EPA action before a neutral decision-maker.[155] These businesses simply will not have the ability to comply with an expensive order to clean up the hazardous waste sites that are governed by CERCLA;[156] nor is it possible to expect that each of these businesses will be able to continue operations after

---

153. *See General Electric IV*, 595 F. Supp. 2d at 15 (citing Mcnary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991)) (verifying that a pattern and practice claim is not analyzed under the same test that applies to facial challenges).

154. *See id.* (pointing out that GE was not challenging the application of the statute in a hypothetical situation but was challenging the EPA's actual administration).

155. *See supra* Part III.D (showing that the costs of noncompliance with a UAO will be felt by small businesses immediately and include the threat of bankruptcy while the ability to challenge an order will be delayed for three years on average).

156. *Cf.* 141 Cong. Rec. S15844 (daily ed. Oct. 26,1995) (statement of Sen. Pressler) (giving the plight of one small business that the EPA sought to hold accountable under CERCLA by imposing a liability so large there was little chance the business would be able to pay it).

refusing to comply with an order from the EPA long enough to mount a defense in an enforcement action brought by the EPA.[157] Ultimately, considering that when compared to large corporations, there is a class of PRPs for which the effects of CERCLA liability are more serious, for which the availability of treble damages and large fines provide a greater coercive effect, and for which judicial review of agency action may be precluded entirely, courts considering the EPA's administration of the statute should distinguish between the EPA's practice of assessing environmental liabilities against small businesses and the agency's enforcement practices against large corporations.

B. How a Statutory Amendment or Agency Rulemaking Could Ensure Heightened Protections for Small Businesses

In the second option, the agency or Congress could moot any pattern and practice challenge by adopting a rule or passing legislation that requires the EPA to provide a pre-enforcement hearing when it seeks to impose liabilities against PRPs of a certain size. In the most recent amendments to CERCLA, Congress acted to protect small businesses and used definitions from the Small Business Act to ensure that small businesses and small non-profit organizations could not be held liable for the contribution of household trash products to a hazardous waste site.[158] It follows that the agency could use similar definitions and make additional procedural protections available, including some type of hearing before a neutral decision-maker, when it seeks to impose liability on a business that employs a certain number of individuals or for which the liability sought to be imposed is greater than the annual profits of the business, or even of the business's total assets.[159] Such a rule would do more to protect the interests of the most vulnerable parties that are subject to CERCLA enforcement, and it would place less of a burden on the agency than extending pre-deprivation protections to all PRPs assessed liabilities under the act.

If the EPA does not choose to follow that path and provide greater procedural protections for small businesses, then it would be up to Congress

---

157. *See supra* Part III.D (concluding that since the effects of noncompliance will be felt right away while review is delayed for a substantial period of time, judicial review of agency action against small businesses is unlikely).

158. *See* 42 U.S.C. § 9607(o), (p) (2001) (excluding individuals from liability who can demonstrate the amount of waste they contributed to a site was minimal).

159. *See* 42 U.S.C. § 9607(p) (citing 15 U.S.C. §631) (2006) (allowing for an exception to liability under CERCLA for businesses that were small business concerns and that employed, on average, 100 or fewer full-time employees per year for the three years preceding notification of liability).

to act and amend the Superfund Act to provide greater procedural protections for small businesses and individuals. Such an amendment could simply extend the protections Congress passed in 2001 and ensure that pre-enforcement procedures before a neutral decision maker are allowed for small businesses.[160] If Congress wanted to go further when the EPA seeks to impose liability against small businesses, there are other ways it could do so.

Because of the distinct risk that the issuance of a single UAO can drive a small business into bankruptcy, Congress could force the EPA to seek an order from a district court under § 106(a) of CERCLA when it desires to hold these businesses liable for their contributions to hazardous waste sites.[161] While this method has always been available to the EPA as an enforcement method, at least one PRP has claimed that the agency has not used it since the late 1980s because district courts frequently sided with PRPs.[162] By completely eliminating the availability of UAOs as an enforcement method against small businesses, Congress could ensure that the private property interests of a vulnerable class of PRPs are protected to the greatest extent possible under the statute.

VI. Conclusion

In conclusion, the goal of this Note was to show how the enforcement of CERCLA against smaller businesses, as a class, leads to serious constitutional concerns that can be easily overlooked by the courts. It has been shown that small businesses are deprived of significant private property interests that go beyond the purely financial, that the pre-deprivation procedures currently provided are not adequate enough to protect these interests, and that the effect of these deprivations and the judicial review provisions of CERCLA can entirely preclude any chance the business would have of gaining review of the government's action before an impartial decision-maker. The result is that small businesses should be able

---

160. *See* 42 U.S.C. § 9601(35) (2006) (describing the appropriate inquiries for the administrator to establish that the defendant has satisfied CERLCA requirements).

161. *See* 42 U.S.C. § 9606(a) (2006) (allowing the agency to seek to enforce CERCLA liabilities either through pursuing a district court order against the PRP or through issuing a UAO).

162. *See* General Electric Co.'s Mot. for Summ. J. & Mem. of Law in Supp. Thereof at 33–34, Gen. Elec. Co. v. Jackson, 595 F.Supp. 2d 8 (D.D.C. 2009) (No. 00-2855), 2007 WL 5022421 (asserting that after the cases of United States v. Hardage, 750 F. Supp. 1460 (W.D. Okla. 1990) *aff'd in part, rev'd in part on other grounds*, 982 F.2d 1436 (10th Cir. 1992) and United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990) were decided against the EPA, the agency stopped bringing judicial enforcement actions under § 106 of CERCLA).

to mount significant due process challenges to the enforcement of CERCLA under both *Ex parte Young* and *Mathews v. Eldridge*.

Under *Young*, the due process concerns stem from the fact that small businesses are unable to resort to the courts to test the validity of the government's action. Despite assurances that the "sufficient cause" defense and the discretion of an Article III judge in imposing fines are adequate to protect a PRP who wishes to challenge agency action, the fact is that the availability of a defense and of a judge's discretion are little comfort when a business is faced with the question of how to survive long enough to challenge agency action with questionable financing and operating prospects caused by looming, unchallengeable environmental liabilities. While these provisions may cure *Ex parte Young* problems that CERCLA faces when it is applied against big businesses, they cannot solve those same due process concerns when it is a small business on the receiving end of CERCLA liability.

And under *Mathews*, the more significant private property interests of small businesses and the small amount of additional costs that the government would face in providing additional procedural protections to this small class of businesses suggest that the EPA is not doing enough to protect small businesses from the potentially crippling effects of CERCLA liability. While allowing every PRP that receives a UAO the ability to challenge agency action before enforcement would be difficult, providing an opportunity to be heard before an impartial decision-maker for the 7–9% of companies that are most vulnerable under the act seems to be not only reasonable, but constitutionally required.