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# Sackett v. EPA: Does It Signal the End of Coercive CERCLA Enforcement?

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## ***Sackett v. EPA: Does It Signal the End of Coercive CERCLA Enforcement?***

### A HYPOTHETICAL

Mr. Richards, the owner of a small auto-part manufacturing company, purchases an old factory building in Michigan. He plans to repurpose it, ideally without spending too much money. Unbeknownst to Richards, the factory was previously owned by an industrial chemical producer. After operating without incident for five years, Richards begins to receive cease-and-desist notices from the Environmental Protection Agency (EPA). The EPA alleges that it has detected dangerous levels of chemicals in the soil under the factory, and it believes that Richards's company is to blame. The EPA states that Richards may have violated the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a federal statute regulating the cleanup and remediation of toxic waste sites.<sup>1</sup> Settlement talks between Richards and the EPA break down when Richards denies that his company had "anything whatsoever to do with the release of those chemicals." Using its "Enforcement First" policy,<sup>2</sup> the EPA issues Richards a Unilateral Administrative Order (UAO) charging him with a violation of CERCLA. Desperate, Richards makes a panicked call to his lawyer, Norman Smith, and tries to find a way out. "Look, Smith, can't we just sue the EPA to get this order off our back?" Richards asks. "Nope. You've landed in a whole mess of trouble," Smith replies. "You have two choices—neither of them good. Either you can foot the bill for the cleanup now and try to get compensation later, or you can wait for the EPA to take us to court with an enforcement action. Until then, we can't fight this thing."<sup>3</sup>

### INTRODUCTION

The above hypothetical is based on a real case<sup>4</sup> and illustrates the profound difficulties faced by individuals and businesses issued UAOs by the EPA under CERCLA. CERCLA explicitly denies any

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1. See generally 42 U.S.C. § 103 (2006).

2. See *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 127–28 (D.C. Cir. 2010). "[Plaintiff] GE points to EPA's 'enforcement first' policy, by which the agency issues UAOs whenever settlement negotiations fail . . ." *Id.*

3. See 42 U.S.C. § 9606 (2006). The hypothetical is based in part on *Solid State Circuits, Inc. v. E.P.A.*, 812 F.2d 383 (8th Cir. 1987).

4. See *Solid State Circuits*, 812 F.2d 383.

access to pre-enforcement judicial review of these EPA administrative orders, which have the force of law.<sup>5</sup> Those who violate the terms of a UAO can be hit with massive fines that could reach \$25,000 a day.<sup>6</sup> Because fines are calculated from the *day the UAO is issued*, parties who refuse to comply could face multi-million dollar contingent liabilities.<sup>7</sup> Additionally, those who are found to “willfully violate” a UAO “[w]ithout sufficient cause” are subject to treble punitive damages.<sup>8</sup>

Not surprisingly, distressed regulated parties have repeatedly challenged the constitutionality of both CERCLA and the EPA’s practice of issuing UAOs while allowing the potential fines and penalties to accumulate, alleging violations of their due process rights under the Fifth Amendment.<sup>9</sup> Thus far, these challenges have not proven successful.<sup>10</sup> Indeed, prior to the U.S. Supreme Court’s 2012 decision in *Sackett v. EPA*, the judicial support for non-reviewable administrative orders, including CERCLA UAOs, seemed well settled and consistent across the majority of federal circuits.<sup>11</sup> The use of such orders extends well beyond CERCLA and

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5. By “force of law,” it is meant that a UAO alone is sufficient to create a cause of action for the EPA to bring suit in federal district court. *See In re Katania Shipping Co.*, 8 E.A.D. 294 (EAB 1999).

6. *See* § 9606(b)(1).

7. *Id.*

8. *See id.*; *id.* § 9607(c)(3). Punitive damages are capped at three times the total response cost. *Id.* For example, if the total response cost is \$2 billion, punitive damages up to \$6 billion may be sought by the EPA in an enforcement action.

9. Parties have challenged all of the following: (1) the constitutionality of treble punitive damages; (2) the constitutionality of non-reviewable UAOs; and (3) the pattern and practice of resorting to UAOs for enforcement in almost every instance. *See infra* Part I.E.

10. *See infra* Part I.E. The only successful constitutional challenge to CERCLA UAOs to date occurred in *Aminoil, Inc. v. E.P.A.*, in which the California District Court granted a preliminary injunction against the EPA’s imposition of daily fines against an oil company. *See Aminoil, Inc. v. E.P.A.*, 599 F. Supp. 69, 74–75 (C.D. Cal. 1984). However, the *Aminoil* decision was subsequently superseded by statute when Congress amended CERCLA to expressly prohibit the type of constitutional challenge brought by the plaintiffs in that case. *Id.* *See also* JAMES T. O’REILLY, 1 SUPERFUND & BROWNFIELDS CLEANUP § 7:5 (Sept. 2012 Update) (describing the effects of the 1986 amendments passed by Congress to expressly restrict pre-enforcement review of CERCLA UAOs).

11. *Sackett v. E.P.A.*, 622 F.3d 1139 (9th Cir. 2010). *See also* Lowell Rothschild, *Before and After Sackett v. U.S. Environmental Protection Agency*, 59-JUL FED. LAW. 46, 48 (2012) (“By 1995, the bar was so firmly in place that the Tenth Circuit simply cited the opinions issued by the Seventh, Fourth, and Sixth Circuit in its own three-page decision, stating that those cases were indistinguishable and finding no reason to rule differently than those courts had.

occurs in the context of other federal environmental statutes—principally the Clean Water Act (CWA) and the Clean Air Act (CAA).<sup>12</sup>

In *Sackett*, a unanimous Supreme Court signaled its profound distaste for the EPA's use of non-reviewable orders.<sup>13</sup> Although *Sackett* was decided in the context of the CWA, the ruling represents a major shift from the traditional judicial support for non-reviewable orders, which have been used by the EPA for decades to enforce the CWA, in addition to CERCLA.<sup>14</sup>

This Comment argues that *Sackett v. EPA* discredits the efficiency-based arguments used to justify non-reviewable UAOs, thus rendering them unconstitutional under the Fifth Amendment's Due Process Clause. Further, this Comment suggests that the due process deficiency of CERCLA UAOs can only be remedied by providing greater access to pre-enforcement administrative hearings. In Part I, this Comment first examines how *Sackett v. EPA* represents a fundamental shift away from the previously widespread judicial agreement in favor of barring pre-enforcement review of compliance orders under the CWA. Part I continues by examining the key cases that interpret the Fifth Amendment's Due Process Clause as applied to CERCLA and the primary arguments that have been unsuccessfully used to challenge CERCLA UAOs in the past. In Part II, this Comment challenges the efficiency-based arguments that courts have used to justify the prohibition of all pre-enforcement judicial review of UAOs. Part II argues that the absolute bar on review is unnecessary to preserve the utility of UAOs and that meaningful alternatives to non-reviewable orders already exist within the framework of CERCLA enforcement. Finally, Part III of this Comment proposes that a pre-enforcement evidentiary hearing before an administrative law judge is the best means available to both protect the due process rights of regulated parties and minimize the EPA's administrative costs. This solution protects regulated parties by providing them with a meaningful opportunity to present evidence and challenge the EPA's claims

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The Tenth Circuit noted that the plaintiff's 'policy argument that it should not be necessary to violate an EPA order and risk civil and criminal penalties to obtain judicial review' was 'well taken, but did not offer them a better option.'" (quoting *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 566 (1995)).

12. See Rothschild, *supra* note 11, at 48.

13. See *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1370 (2012).

14. *Id.*

while providing a less expensive and time-consuming alternative to judicial proceedings before an Article III court.

## I. STATUTORY AND JUDICIAL HISTORY OF NON-REVIEWABLE ORDERS

To best understand the history of non-reviewable administrative orders such as CERCLA UAOs, it is most helpful to start with the broadest and arguably most important limitation on the power of government agencies: the Fifth Amendment's Due Process Clause.<sup>15</sup> The right to due process of law prior to a deprivation of property by the government is a fundamental principle that underlies many crucial legal challenges that have been launched against the EPA's use of UAOs to enforce the terms of CERCLA.<sup>16</sup> Thus, this Comment first outlines the Fifth Amendment's Due Process Clause, including the relevant Supreme Court jurisprudence applying due process rights to the area of administrative law.<sup>17</sup> After addressing the Fifth Amendment's role in limiting property deprivations by government agencies, this Part examines the relevant sections and legislative history of CERCLA<sup>18</sup> and discusses several of the key decisions that have shaped the interpretation of CERCLA's bar on pre-enforcement review.<sup>19</sup> Finally, this Part presents and thoroughly analyzes the Supreme Court's recent ruling in *Sackett v. EPA*.<sup>20</sup>

### A. The Fifth Amendment's Due Process Clause

The Fifth Amendment's Due Process Clause states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."<sup>21</sup> In the area of CERCLA (and other federal environmental statutes such as the CWA), the primary Fifth Amendment concern is deprivation of *property* without due process of law, which clearly includes fines, penalties, and contingent liabilities.<sup>22</sup>

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15. U.S. CONST. amend. V.

16. *See infra* Part I.D.

17. *See infra* Part I.B.1-2.

18. *See infra* Part I.C.

19. *See infra* Part I.D.

20. *See infra* Part I.E.

21. U.S. CONST. amend. V.

22. *See Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 30 (D.D.C. 2009), *aff'd*, 610 F.3d 110 (D.C. Cir. 2010) (holding that contingent effects such as reduced stock price and damaged brand value are protected property interests under the Fifth Amendment). *But see Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 128 (D.C.

*B. Fifth Amendment Cases**1. Ex Parte Young*

*Ex Parte Young* is the case most commonly cited to support the argument that the EPA's use of CERCLA UAOs violates the Fifth Amendment due process rights of regulated parties.<sup>23</sup> *Ex Parte Young* is an important, early due process case involving railroad rate-fixing statutes.<sup>24</sup> The controversy arose out of a rate-fixing statute passed by Minnesota in 1903 that fixed the maximum rate for passenger tickets at two cents per mile and established a schedule of other maximum rates for different types of cargo.<sup>25</sup> Most importantly, the statute carried severe monetary penalties for each violation, with escalating fines for each subsequent penalty.<sup>26</sup>

The rule announced by the Supreme Court in *Ex Parte Young* is that a statutory scheme violates Fifth Amendment due process if "the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate [an affected party] from resorting to the courts to test the validity of the legislation."<sup>27</sup> The basic due process argument of *Ex Parte Young*, used against CERCLA in later cases, is that statutory fines, when compounded with punitive damages, are so enormous that they discourage regulated parties from even attempting to challenge the EPA's administrative orders.<sup>28</sup>

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Cir. 2010) (overruling this interpretation and denying that such contingent effects are constitutionally cognizable property interests).

23. See *Solid State Circuits, Inc. v. E.P.A.*, 812 F.2d 383, 390–91 (8th Cir. 1987); *Aminoil, Inc. v. E.P.A.*, 599 F. Supp. 69, 74–75 (C.D. Cal. 1984); *Jackson*, 595 F. Supp. 2d at 13. *Ex Parte Young*, 209 U.S. 123 (1908), formed a core part of the plaintiffs' arguments in all of these cases.

24. *Ex Parte Young*, 209 U.S. 123.

25. *Id.* at 127.

26. *Id.* In pertinent part, the Minnesota statute at issue in *Ex Parte Young* provided that a violator "shall be punished by a find [sic] of not less than \$2,500, nor more than \$5,000 for the first offense, and not less than \$5,000 nor more than \$10,000 for each subsequent offense." *Id.* One prominent historical dollar calculator provides an "economic power" value of \$5,010,000 in 2012 dollars for \$10,000 in 1908. See MEASURING WORTH, <http://www.measuringworth.com/us/compare/relativevalue.php> (last visited Oct. 10, 2012) [<http://perma.cc/WPW3-AP32>] (archived June 2, 2014). Although a rough estimate, this figure provides some sense of the magnitude of the fines at issue in *Ex Parte Young*. See *id.*

27. *Ex Parte Young*, 209 U.S. at 147.

28. See *Solid State Circuits, Inc.*, 812 F.2d at 390–91; *Aminoil, Inc.*, 599 F. Supp. at 74–75; *Jackson*, 595 F. Supp. 2d at 13.

## 2. Mathews v. Eldridge

Decided more than half a century after *Ex Parte Young*, *Mathews v. Eldridge*<sup>29</sup> is another important Supreme Court decision that has been employed to both undermine and support the constitutionality of CERCLA UAOs.<sup>30</sup> *Mathews*, decided in 1965, established the basic requirements of due process in the area of administrative law.<sup>31</sup> The case involved a dispute over Social Security disability benefits.<sup>32</sup> The Social Security Administration made a final determination that Mr. Eldridge's disability had come to an end and denied his request to extend his eligibility.<sup>33</sup> Mr. Eldridge challenged the determination on the grounds that he had not been afforded an evidentiary hearing to dispute the Agency's final decision and present evidence to support his claim.<sup>34</sup>

Reversing the U.S. Fourth Circuit Court of Appeals, the Supreme Court held that Mr. Eldridge was not entitled to an evidentiary hearing under the Fifth Amendment's Due Process Clause before the termination of his disability benefits.<sup>35</sup> According to the *Mathews* Court, "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."<sup>36</sup> However, the Court went on to discuss the many differences, both in form and function, between the judicial system and administrative agencies.<sup>37</sup> Thus, the Court cautioned against the "wholesale transplantation" of strict rules of evidence and procedure that have evolved in Article III courts but may be inappropriate for agencies in many circumstances.<sup>38</sup> Looking at the situation presented in *Mathews*, in which the Social Security Administration had to efficiently process thousands of claims, the Court concluded that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of

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29. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

30. *See Jackson*, 595 F. Supp. 2d at 21-38. In that case, the plaintiff-corporation argued that *Mathews* mandated greater access to judicial review. *Id.* at 20. The D.C. District Court disagreed and ruled that, although *Mathews* provided the controlling test, *Mathews* actually indicated that no pre-enforcement process whatsoever was due to regulated parties issued a UAO under CERCLA. *Id.* at 38.

31. *Mathews*, 424 U.S. at 325.

32. *Id.* at 323.

33. *Id.* at 323-24.

34. *Id.* at 323.

35. *Id.* at 320-21.

36. *Id.* at 333.

37. *Id.* at 348.

38. *Id.*

decision-making in all circumstances.”<sup>39</sup> Instead, the Court proposed a four-factor test to determine whether access to an evidentiary hearing must be provided:

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: [1] First, the private interest that will be affected by the official action; [2] second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3] finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>40</sup>

The Court applied the first three factors to Mr. Eldridge’s claims and found that, although Eldridge did have a significant interest in the continuation of his Social Security benefits, the risk of error imposed by making final determinations based only on a medical officer’s report was low and the cost of adding additional evidentiary hearings would be an excessive burden on the Agency.<sup>41</sup>

Finally, the Court reached the fourth factor—the public policy balance: “In striking the appropriate due process balance the [fourth and] final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing . . . .”<sup>42</sup> In the context of Social Security benefits, the Court reasoned that it was more important to preserve the resources of the public benefits program than to impose the costs required to provide an evidentiary hearing every time benefits are denied.<sup>43</sup> While noting that financial cost alone was not a controlling factor in its decision, the Court concluded that the overall burden created by additional procedures was not in the public interest.<sup>44</sup>

### *C. CERCLA and Its Enforcement Mechanisms*

Originally passed in 1980, CERCLA was designed to force polluters to pay for the cleanup and remediation of environmental

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39. *Id.*

40. *Id.* at 334–35.

41. *Id.* at 340–47.

42. *Id.* at 347.

43. *Id.* at 349.

44. *Id.* at 348–49.



damage caused by the release of toxic substances.<sup>45</sup> Also commonly known as the “Superfund” law, CERCLA was created in response to public outrage at several nationally prominent ecological disasters in the 1970s, particularly the infamous Love Canal disaster, which occurred in Lewiston, New York, in 1978.<sup>46</sup> As passed by Congress in 1980, CERCLA was intended to create long-term liability for acts of industrial pollution and to establish an industry-funded trust, or “Superfund,” to pay for the cleanup of sites where the polluter was no longer solvent or could not be found.<sup>47</sup>

Under CERCLA section 106, the EPA is given three potential enforcement methods: (1) conduct the cleanup itself and bring suit to recover the costs; (2) bring an enforcement action in federal district court; or (3) issue a UAO to any potentially responsible party (PRP).<sup>48</sup> CERCLA section 106 also defines the procedures for issuance of UAOs.<sup>49</sup> Although CERCLA grants the President of the United States the authority to issue UAOs to PRPs, presidents have always delegated this authority to the EPA in its capacity as a federal agency within the executive branch.<sup>50</sup> Any person who violates a section 106 UAO can be fined up to \$25,000 for every day of the violation.<sup>51</sup> The EPA may seek punitive damages equal to three times the total response cost from anyone who “willfully violates” a UAO.<sup>52</sup>

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45. See generally 42 U.S.C. § 103 (2006).

46. Elizabeth Ann Glass, *Superfund and SARA: Are There Any Defenses Left?*, 12 HARV. ENVTL. L. REV. 385, 387–88 (1988) (“In 1978, President Carter declared a state of emergency at Love Canal, an upstate New York neighborhood which had been developed above an abandoned hazardous waste site. The long-buried chemicals on the site had contaminated the water supply in the area and were seeping into the surface ground near the homes. Inhabitants in the area reported a high incidence of health problems ranging from headaches to birth defects. These health effects were traced to the presence of hazardous wastes on the site.”).

47. *Id.*

48. 42 U.S.C. § 9606(a) (2006).

49. See *id.* § 9606(b)–(d).

50. See *id.* § 9606(a). See also *Sackett v. E.P.A.*, 622 F.3d 1139, 1141–42 (9th Cir. 2010).

51. § 9606(b)(1).

52. *Id.* § 9607(c)(3). The standard of “willful violation” implies either intentional or reckless disregard for an order issued under CERCLA. *Id.* When a party is found guilty of willful violation, “[s]uch person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action.” *Id.*

Section 113(h) creates a pre-enforcement bar to judicial review of UAOs.<sup>53</sup> This bar is “jurisdictional” in nature, purporting to divest federal courts of subject matter jurisdiction to hear the claims at all.<sup>54</sup> It is important to note, however, that section 113(h) is a product of the 1986 Superfund Amendments and Reauthorization Act (SARA), which amended CERCLA to include the explicit pre-enforcement review bar.<sup>55</sup> Originally, CERCLA was designed in much the same manner as the CWA and the CAA and did not contain an express, statutory bar against pre-enforcement review but only a judicially created bar.<sup>56</sup>

#### *D. Fifth Amendment Due Process Challenges to CERCLA*

##### *I. Aminoil, Inc. v. U.S. EPA*

Decided by California’s Central District Court in 1984, *Aminoil, Inc. v. U.S. EPA* was an important pre-SARA due process challenge to the judicially created pre-enforcement review bar in CERCLA.<sup>57</sup> In *Aminoil*, two oil companies, Aminoil, Inc. and McAuley Oil, brought suit to enjoin the assessment of daily fines for noncompliance with UAOs that the EPA had issued against them, arguing that the EPA’s denial of a pre-enforcement hearing violated their Fifth Amendment due process rights.<sup>58</sup> Although the court recognized the existence of a pre-enforcement bar to judicial review of specific UAOs, it found that the plaintiffs’ claims presented a constitutional challenge to CERCLA as a whole and concluded that

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53. *Id.* § 9613(h).

54. *See id.* (stating in pertinent part that “[n]o Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any [unilateral administrative] order issued under section 9606(a) of this title”).

55. O’REILLY, *supra* note 10, § 7:5. “In the Superfund Amendments and Reauthorization Act (SARA), Congress enacted far reaching prohibitions on pre-enforcement review to ensure that the courts did not have a meaningful role in the remedy selection and review process.” *Id.*

56. *See Solid State Circuits, Inc. v. E.P.A.*, 812 F.2d 383, 386 (8th Cir. 1987); *Aminoil, Inc. v. E.P.A.*, 599 F. Supp. 69, 71 (C.D. Cal. 1984). Both *Aminoil* and *Solid State Circuits* were decided before the passage of SARA. *See Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1329 (7th Cir. 1990) (holding that the enactment of SARA in 1986 did not apply to actions filed before October 17, 1986, the date that SARA came into effect). Nevertheless, both courts noted that judicial precedents, combined with evidence of congressional intent, created a pre-enforcement review bar, at least as to challenges against *specific* UAOs. *See Solid State Circuits, Inc.*, 812 F.2d at 388; *Aminoil, Inc.*, 599 F. Supp. at 71.

57. *Aminoil*, 599 F. Supp. at 69.

58. *Id.* at 71.

it could properly exercise jurisdiction over the case.<sup>59</sup> Granting a preliminary injunction against the EPA's assessment of fines or punitive damages, the court used the *Mathews* test to find that the lack of pre-enforcement review violated due process.<sup>60</sup> Instead of applying all four factors described by the Supreme Court, the *Aminoil* court consolidated the test into three factors: (1) the private interest at stake, (2) the risk of erroneous deprivation, and (3) the government and public interest at stake.<sup>61</sup>

Looking to the first factor of *Mathews*—the private interest at stake—the court stated that the private interest was the fundamental right to be heard, rather than a mere financial interest in avoiding payment of penalties.<sup>62</sup> Further, the *Aminoil* court found that the EPA's use of UAOs fit within *Ex Parte Young*'s prohibition of coercive statutory schemes that deter legal challenges through massive fines and penalties: “[T]hat right [to judicial review] is merely nominal and illusory if the party affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law.”<sup>63</sup> The court thus found a way to shoehorn *Ex Parte Young* directly into the *Mathews* test, leading to a fundamentally different conclusion than later cases challenging CERCLA UAOs, such as *GE IV*.<sup>64</sup>

After finding that CERCLA UAOs, at least as used by the EPA, fit within the prohibition of *Ex Parte Young*, the court proceeded to analyze the second factor, the risk of erroneous deprivation.<sup>65</sup> Avoiding a lengthy discussion of the relative risk of error, the

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59. *Id.* at 72.

60. *Id.* at 74.

61. *See id.* (“In the case at bar, this Court must weigh: (1) plaintiffs’ interest in seeking judicial review of the administrative order without the deterrent effect of significant sanctions if they are ultimately unsuccessful, (2) the risk that plaintiffs may be coerced into complying with the administrative order and be precluded from asserting what may have been meritorious defenses, and (3) the government’s and public’s interest in addressing emergency hazardous waste situations promptly and effectively.”). Note that the court created this formula by combining the third and fourth factors from *Mathews*, joining the governmental and public interests into a single factor. *See Mathews v. Eldridge*, 424 U.S. 319, 333–48 (1976).

62. *Aminoil*, 599 F. Supp. at 74–75.

63. *Id.* at 75 (quoting *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, 661 (1915)) (internal quotation marks omitted).

64. *See Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 17–18 (D.D.C. 2009) (considering GE’s argument under *Ex Parte Young* as completely severable from the *Mathews* analysis).

65. *Aminoil*, 599 F. Supp. at 75.

*Aminoil* court simply stated that the plaintiffs faced a “substantial risk” that they would be erroneously deprived of any funds used to respond to the alleged CERCLA violations.<sup>66</sup> The court concluded that this financial cost was a sufficient property interest to trigger Fifth Amendment due process protection.<sup>67</sup>

Turning to the third and final *Mathews* factor, the court admitted that “[t]he government’s interest in the threat of significant sanctions also deserves serious consideration.”<sup>68</sup> The court concluded that the government does have a legitimate interest in compelling quick cleanup of industrial pollution and avoiding costly litigation.<sup>69</sup> Despite these powerful governmental interests, the court ruled that *Aminoil* was “likely to succeed” in its constitutional challenge to CERCLA’s pre-enforcement review bar because, “[a]lthough the government’s interest in handling emergency waste situations in an efficacious manner is significant, this Court is not convinced that this interest could not be addressed through a scheme that nevertheless provides the most rudimentary elements necessary to satisfy due process.”<sup>70</sup> Although *Aminoil* left these “rudimentary elements” undefined, in light of subsequent cases it appears that the court was referring to administrative hearings before an administrative law judge (ALJ), rather than full access to Article III courts, which would be far more expensive.<sup>71</sup>

## 2. Solid State Circuits, Inc. v. E.P.A.

Decided by the U.S. Eighth Circuit Court of Appeals three years after *Aminoil*, *Solid State Circuits v. E.P.A.* was another high-profile due process challenge to the EPA’s use of CERCLA UAOs.<sup>72</sup> The *Solid State Circuits* case grew out of a 1985 UAO issued jointly to two Missouri corporations, Solid State Circuits, Inc. and Paradyne Corp.<sup>73</sup> In that UAO, the EPA alleged that chemicals used by the two corporations for copper plating at their Republic, Missouri,

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66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 76.

71. *See* Gen. Elec. Co. v. Jackson, 595 F. Supp. 2d 8, 38 (D.D.C. 2009) (rejecting the feasibility of judicial review of UAOs but subsequently addressing the possibility that adjudications before an ALJ or presiding officer could be used instead).

72. *Solid State Circuits, Inc. v. E.P.A.*, 812 F.2d 383 (8th Cir. 1987).

73. *Id.* at 385–86.

plant had leached into the surrounding soil and posed an imminent threat to the town's groundwater supply.<sup>74</sup>

The plaintiffs filed suit, seeking a ruling that both the pre-enforcement review bar and the treble punitive damages portions of CERCLA violated their Fifth Amendment due process rights.<sup>75</sup> The Eighth Circuit Court of Appeals analyzed the plaintiffs' claims using the rule of *Ex Parte Young* and found that a judicial gloss on CERCLA was necessary to save the punitive damages provision from violating due process.<sup>76</sup> The court recognized that a "good faith defense" against the imposition of punitive damages must be made available to regulated parties who have an "objectively reasonable belief" that the UAO issued against them is legally incorrect.<sup>77</sup> Thus, while the court ultimately upheld CERCLA as constitutional, it had to reach far beyond the plain language of the statute to do so.<sup>78</sup> Evidently, the Eighth Circuit viewed CERCLA as teetering on the very edge of violating due process protections.<sup>79</sup>

### 3. *The General Electric Co. v. Jackson Litigation*

The *General Electric Co. v. Jackson* case was a post-SARA constitutional challenge to the EPA's use of CERCLA UAOs.<sup>80</sup> The challenge was brought by GE in response to some 68 UAOs issued to GE by the EPA under CERCLA over a period of years.<sup>81</sup> This Comment focuses on the final two decisions in GE's long-running series of appeals. First, it examines the D.C. District Court's

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74. *Id.*

75. *Id.* at 385.

76. *Id.* at 391. The Eighth Circuit explained the requirements of *Ex Parte Young* this way: "[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." *Id.*

77. *See id.* at 392–93.

78. *Id.* at 392 ("[W]e hold that if neither CERCLA nor applicable EPA regulations or policy statements provides the challenging party with meaningful guidance as to the validity or applicability of the EPA order, *Ex Parte Young* and its progeny require that the burden rest with the EPA to show that the challenging party lacked an objectionably reasonable belief in the validity or applicability of a clean-up order.")

79. *Id.*

80. *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8 (D.D.C. 2009), *aff'd*, 610 F.3d 110 (D.C. Cir. 2010).

81. *Id.* at 12–13.

decision (*GE IV*), followed by the final appeal to the D.C. Circuit Court of Appeals (*GE V*).<sup>82</sup>

*i. General Electric Co. v. Jackson (GE IV)*

In *GE IV*, the District Court for the District of Columbia considered both a facial constitutional challenge against CERCLA and a claim that the EPA's "pattern and practice" of issuing UAOs violated GE's due process rights.<sup>83</sup> The first claim essentially repeated the plaintiffs' action in *Solid State Circuits*, and the plaintiffs argued that the massive fines and punitive damages provisions of CERCLA rendered the statute unconstitutional under the rule of *Ex Parte Young* because they dissuaded GE from even trying to challenge the validity of the EPA's order.<sup>84</sup> The court dismissed this claim, ruling that judicial discretion over the imposition of punitive damages formed a well-recognized exception to *Ex Parte Young* and satisfied the requirements of due process.<sup>85</sup>

GE's second claim alleged that the EPA's "pattern and practice" of resorting to UAOs in almost every instance to enforce CERCLA also violated due process.<sup>86</sup> GE's argument in support of the pattern and practice claim was based on the economics of publicly traded companies.<sup>87</sup> When reduced to its essence, GE's argument asserted that the mere issuance of a CERCLA UAO damages a public company's property, provoking sharp declines in stock price, tarnishing the brand's value in the minds of the public, and ultimately reducing the company's all-important ability to attract future investment.<sup>88</sup>

The *GE IV* court analyzed GE's pattern-and-practice claim through the lens of the four-factor *Mathews* test.<sup>89</sup> Applying the first factor, the court expressed doubts about the \$76.4 million loss that the company claimed was a result of the UAO issued against it but ultimately ruled that the reduction in stock price suffered by GE did

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82. To maintain internal consistency, the *GE* decisions in this Comment follow the numbering scheme recognized by the D.C. District Court, which labeled the decision being appealed from the court below as "*GE III*." *See id.* at 13.

83. *Id.*

84. *See Solid State Circuits, Inc. v. E.P.A.*, 812 F.2d 383, 391 (8th Cir. 1987); *Jackson*, 595 F. Supp. 2d at 12–13.

85. *Jackson*, 595 F. Supp. 2d at 12–13.

86. *Id.* at 13.

87. *Id.* at 21–22.

88. *Id.*

89. *See Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

qualify as a protected property interest: “The Court is persuaded that noncomplying PRPs suffer a significant decrease in brand and market value, albeit something less than \$76.4 million. The Court will proceed with the *Mathews* . . . assessment based on that estimate of the private interest impacted by noncompliance.”<sup>90</sup>

Looking to the private interest at stake, the court reasoned that, although the potential financial loss resulting from a UAO is very large, not all regulated parties will be affected to the same degree.<sup>91</sup> As the court noted, some smaller companies cannot survive even one UAO and will likely be put out of business, either due to the cost of compliance or the penalties accruing from noncompliance.<sup>92</sup> Overall, the court concluded that the high cost of complying with a UAO (\$4 million on average),<sup>93</sup> when combined with the range of potential collateral losses (stock price reduction and brand value damage), constituted a significant private interest.<sup>94</sup>

The court then examined the government’s interest in prompt action and in avoiding additional pre-deprivation process.<sup>95</sup> Highlighting evidence that the average response time to a CERCLA waste site is eight years, the court found that the EPA lacked a “special need for very prompt action.”<sup>96</sup> Assessing the government’s interest in avoiding additional pre-deprivation process, the court found that the costs of providing access to Article III courts in every case would be excessive given the high volume of UAOs issued by the EPA.<sup>97</sup>

However, the court also identified a lower-cost alternative to judicial review before an Article III court—an administrative hearing before an ALJ or presiding officer.<sup>98</sup> Because the attendant

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90. *Jackson*, 595 F. Supp. 2d at 30.

91. *Id.* at 30.

92. *Id.* (“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.” (internal citations omitted)).

93. *See id.*

94. *Id.* (“[A] general conclusion is possible: although the private interests are less constitutionally significant because they are primarily financial, they are sufficiently large and have enough potential collateral effects to constitute weighty private interests.”).

95. *Id.* at 32.

96. *Id.*

97. *Id.* at 33 (“The cost of the additional process also depends on how often the government must provide it. Between August 16, 1982 and May 25, 2006—a period of 285 months—EPA issued 1,705 UAOs to more than 5,400 PRPs. On average, then, EPA has issued approximately six UAOs to nineteen PRPs every month.” (internal citations omitted)).

98. *See, e.g., id.* at 38.

costs are less, the court reasoned that the EPA has a lower interest in avoiding administrative hearings.<sup>99</sup> Nevertheless, the court concluded that the overall cost of allowing access to *any* evidentiary hearing in the CERCLA UAO context would add large administrative costs, projecting that many regulated parties would choose to challenge UAOs if offered any opportunity to do so.<sup>100</sup>

Turning to the fourth and final *Mathews* factor, the district court assessed the risk of erroneous deprivation of property resulting from the EPA's use of UAOs.<sup>101</sup> The court found that of 68 UAOs issued to GE by the EPA, only 5 contained evidence indicating that they were issued in error.<sup>102</sup> Pointing to precedents from the Seventh and Ninth Circuits, the court called this 4.4% rate of error "acceptable."<sup>103</sup> Focusing on what it perceived as a low rate of erroneous deprivation, the court concluded that even administrative hearings before a presiding officer or ALJ are too burdensome and costly to impose on the EPA when it issues a UAO under CERCLA.<sup>104</sup>

*ii. General Electric Co. v. Jackson (GE V)*

Decided in 2010, *General Electric Co. v. Jackson (GE V)*<sup>105</sup> was the appeal of the district court's decision in *GE IV* to the D.C. Circuit Court of Appeals and marked the culmination of this long line of constitutional challenges to CERCLA.<sup>106</sup> Once again, the legal precedent used to support the argument that UAOs violated due process was *Ex Parte Young*.<sup>107</sup> The D.C. Circuit resolved GE's facial challenge somewhat differently than the Eighth Circuit did in *Solid State Circuits*.<sup>108</sup> In *GE V*, the court found that CERCLA section 106 (governing UAOs) fit within not just one but two well-

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99. *Id.* ("At first glance, the burden on the government interest appears minimal. For any given UAO, a hearing before a presiding officer would add only weeks or a few months to an issuance process that usually takes years. Moreover, the costs of a single hearing before a presiding officer are minimal, especially considering the size of the private interests at stake." (internal citations omitted)).

100. *See id.* at 39.

101. *Id.* at 33.

102. *Id.* at 37.

103. *Id.*

104. *See id.* at 36–38.

105. *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 113 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (2011).

106. *See id.* After the Supreme Court denied certiorari, GE's long series of appeals was brought to a close.

107. *Id.* at 119.

108. *See Solid State Circuits, Inc. v. E.P.A.*, 812 F.2d 383, 391 (8th Cir. 1987).



recognized exceptions to the rule of *Ex Parte Young*.<sup>109</sup> The court concluded that where the fines and punitive damages are imposed at the discretion of an Article III judge, Fifth Amendment due process is satisfied.<sup>110</sup> Additionally, the court noted that *Solid State Circuits* ruled that plaintiffs benefit from a good faith defense to the imposition of punitive damages.<sup>111</sup>

Although GE argued that the D.C. Circuit should follow the district court below and apply the *Mathews* test to resolve its pattern and practice claim, the D.C. Circuit rejected this approach, holding that GE had not demonstrated a sufficient protected property interest to support the claim.<sup>112</sup> The court also rejected the findings of GE's study of CERCLA UAOs and dismissed the district court's reliance on that evidence.<sup>113</sup> The *GE V* court thus dodged the question of whether the *Mathews* test mandated greater access to evidentiary hearings in the CERCLA context, providing no guidance as to whether the *Mathews* analysis in *GE IV* was correct.<sup>114</sup>

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109. See, e.g., *Jackson*, 610 F.3d at 117–19.

110. *Id.* at 118 (“Courts have also held that ‘there is no constitutional violation if the imposition of penalties is subject to judicial discretion.’” (quoting *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2d Cir. 1986))).

111. *Id.* at 118–19 (“[C]ERCLA’s ‘sufficient cause’ defense is constitutionally equivalent to a good faith defense and thus satisfies due process[.]” (quoting *Solid State Circuits, Inc. v. E.P.A.*, 812 F.2d 383, 391–92 (8th Cir. 1987))).

112. *Id.* at 120–21. The court attacked GE’s reliance on “consequential impacts” to establish its property interest: “GE’s case boils down to this: by declaring that a PRP is responsible for cleaning up a hazardous waste site, a UAO harms the PRPs reputation, and the market, in turn, devalues its stock, brand, and credit rating. Viewed this way, GE’s argument is foreclosed by *Paul v. Davis*.” *Id.* (citations omitted).

113. *Id.* at 128. The study surveyed all the reported UAOs issued by the EPA under CERCLA over a period of several years. *Id.* Out of 1,638 parties issued UAOs in the study period, only 75 or some 4.6% did not choose voluntary compliance with their respective UAOs. *Id.* However, the court found that the low rates of noncompliance could be easily explained: “[R]ecipients may be complying in large numbers not because they feel coerced, but because they believe that UAOs are generally accurate and would withstand judicial review.” *Id.*

114. *Id.* (“Thus, because we have held that these consequential effects do not qualify as constitutionally protected property interests . . . we need not—indeed, we may not—apply *Mathews v. Eldridge* to determine what process is due. In other words, even if GE is correct that EPA’s implementation of CERCLA results in more frequent and less accurate UAOs, the company has failed to identify any constitutionally protected property interest that could be adversely affected by such errors.”).

*E. Sackett v. EPA*

After the Supreme Court denied certiorari on *GE V* in 2011, it appeared that the D.C. Circuit Court of Appeals would have the final word on CERCLA's pre-enforcement review bar.<sup>115</sup> From then on, it seemed, regulated parties would simply have to accept the idea of non-reviewable UAOs and punishing fines for noncompliance. Yet remarkably, only one year later the Supreme Court decided a case that cast considerable doubt on the EPA's reliance on non-reviewable orders as an enforcement mechanism. That case was *Sackett v. EPA*,<sup>116</sup> and although it was technically decided under the aegis of the CWA, the reasoning used by the Court, and especially Justice Alito's concurring opinion, casts grave doubts on the legal underpinnings of *GE V*.<sup>117</sup>

*1. Facts of the Case*

The controversy in *Sackett* began when Michael and Chantell Sackett started to excavate and fill part of their 0.63 acre home site located near Priest Lake, Idaho.<sup>118</sup> Unfortunately, the Sacketts' home construction project ran into a seemingly insurmountable obstacle—a letter from the EPA. On November 26, 2007, the EPA issued a compliance order.<sup>119</sup> That compliance order classified the Sacketts' home site on Priest Lake, Idaho, as a “wetland” under the Clean Water Act (CWA) and mandated that they remove all the gravel fill material and restore the land to its original condition, putting the construction of their home on hold indefinitely.<sup>120</sup> Even worse for the Sacketts, the compliance order threatened massive fines for any violation—up to \$75,000 a day, every day.<sup>121</sup>

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115. See *Gen. Elec. Co. v. Jackson*, 131 S. Ct. 2959 (2011).

116. *Sackett v. E.P.A.*, 132 S. Ct. 1367 (2012).

117. See *infra* Part I.E.4–5.

118. *Sackett*, 132 S. Ct. 1367.

119. *Id.*

120. See 40 C.F.R. § 232.2 (granting EPA's administrator jurisdiction over “navigable waters of the United States”); see also *Sackett*, 132 S. Ct. at 1370–71 (discussing the ambiguous reach of this nebulous term); *Rapanos v. United States*, 547 U.S. 715 (2006) (holding that even freshwater wetlands not adjacent to navigable waters could be covered by the CWA).

121. *Sackett*, 132 S. Ct. at 1375 (“If the owners do not do the EPA's bidding, they may be fined up to \$75,000 per day (\$37,500 for violating the Act and another \$37,500 for violating the compliance order).”).

## 2. Legal Background

At first, the Sacketts requested an administrative hearing with the EPA to review the compliance order, which was promptly denied by the EPA.<sup>122</sup> Next, the Sacketts filed suit in federal district court in Idaho, seeking declaratory and injunctive relief.<sup>123</sup> The district court granted the EPA's motion to dismiss for lack of subject matter jurisdiction, finding that judicial precedent clearly established that Congress intended to prohibit pre-enforcement judicial review of EPA compliance orders issued under the CWA.<sup>124</sup>

The Sacketts appealed the district court's dismissal to the U.S. Ninth Circuit Court of Appeals. Deciding the case *de novo*, the Ninth Circuit closely reviewed both the legislative history of the CWA<sup>125</sup> and the decisions of other federal circuits on pre-enforcement review of CWA compliance orders.<sup>126</sup> Ultimately, the court concluded that "[i]n this assessment, we do not work from a blank slate. Every circuit that has confronted this issue has held that the CWA implicitly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court."<sup>127</sup> Rejecting the Sacketts' claim that the lack of an administrative hearing violated their Fifth Amendment due process rights, the court ruled that post hoc judicial discretion over the imposition of penalties satisfied due process.<sup>128</sup>

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122. *See Sackett v. E.P.A.*, 622 F.3d 1139 (9th Cir. 2010).

123. *Id.* ("[The Sacketts] challenged the compliance order as (1) arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A); (2) issued without a hearing in violation of the Sacketts' procedural due process rights; and (3) issued on the basis of an "any information available" standard that is unconstitutionally vague.").

124. *See id.* at 1141.

125. *Id.* at 1144 ("[W]e consider the legislative history of the CWA. The enforcement provisions of the CWA were modeled on enforcement provisions in the Clean Air Act ("CAA"), and many courts have relied on similar provisions in the CAA in concluding that the CWA precludes pre-enforcement judicial review of compliance orders.").

126. *Id.* at 1143 ("In this assessment, we do not work from a blank slate. Every circuit that has confronted this issue has held that the CWA impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court.").

127. *Id.*

128. *Id.* at 1146 ("The amount of the penalty for noncompliance with a CWA compliance order is to be determined by a court and is determined on the basis of six factors: (1) the seriousness of the violation, (2) the economic benefit resulting from the violation, (3) any history of CWA violations, (4) good-faith efforts to comply, (5) the economic impact of the penalty on the violator, and (6) such other matters as justice may require.").

### 3. Issues

When the case arrived before the Supreme Court, the issues were narrowed by the Court's grant of certiorari.<sup>129</sup> In its grant, the Court refined the controversy to two major questions: whether pre-enforcement review was allowed under the CWA and whether the Sacketts' inability to seek pre-enforcement judicial review of the compliance order violated their procedural due process rights under the Fifth Amendment.<sup>130</sup>

### 4. Opinion

Justice Scalia wrote the majority opinion, which held that there was insufficient evidence of congressional intent in the CWA to deny judicial review of EPA compliance orders and that the Administrative Procedure Act (APA) creates a strong presumption favoring judicial review where Congress has not spoken to the issue.<sup>131</sup> Scalia said that "finality" in the APA context essentially depends on whether the Agency is willing to reconsider its determinations.<sup>132</sup> Here, the EPA denied the Sacketts an agency hearing and was unwilling to reconsider, so the compliance order was final and judicially reviewable.<sup>133</sup> Scalia also disagreed with the government's claims that pre-enforcement review of the EPA's orders would harm enforcement of the CWA<sup>134</sup> and greatly reduce the Agency's efficiency.<sup>135</sup>

Justice Ginsburg's concurrence sought to narrow the majority opinion, establishing that the Court did not reach the issue of whether the compliance order was correct, merely that the Sacketts

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129. *Sackett v. E.P.A.*, 131 S. Ct. 3092 (2011).

130. *See id.*

131. *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1374 (2012).

132. *See id.* at 1371–72. Scalia noted that the Agency had shut down the formal negotiation process and solidified its position against the Sacketts: "The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal." *Id.* at 1372.

133. *Id.*

134. *Id.* at 1374 ("Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.").

135. *Id.* ("The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review . . .").

could challenge the EPA's determination that their home site qualifies as a wetland under the CWA.<sup>136</sup> Finally, Justice Alito wrote an aggressive concurrence attacking the "unthinkable" methodology of the EPA, and he strongly suggested that the core issue in the case was the violation of the Sacketts' due process rights under the Fifth Amendment.<sup>137</sup> Alito also chastised Congress for failing to clarify the issue for many years.<sup>138</sup>

### 5. *The Impact of Sackett on the Administrative Law Landscape*

Before *Sackett*, there was broad agreement that the CWA (much like the CAA) implicitly prohibited pre-enforcement judicial review of compliance orders.<sup>139</sup> While the majority opinion ultimately rests on the lack of congressional intent to prohibit pre-enforcement review in the CWA, the due process claim made by the Sacketts clearly underlies the dismay expressed by the Court at the unfair tactics used by the EPA to avoid judicial review and coerce landowners into compliance.<sup>140</sup> Alito's concurrence serves to elevate the due process issue to the forefront and condemns the EPA's methods in the strongest terms.<sup>141</sup>

## II. CERCLA'S PRE-ENFORCEMENT REVIEW BAR IS UNCONSTITUTIONAL

Part II of this Comment argues that *Sackett v. EPA* fundamentally undercut the legal justifications that have been used to sustain CERCLA's pre-enforcement review bar. First, *Sackett* renews the viability of arguments tracing their theoretical basis to *Ex Parte Young* and the notion that parties should not have to face devastating fines merely to challenge the validity of a UAO.<sup>142</sup> Second, this Part contends that the application of *Mathews* to CERCLA, as found in *GE IV*, is flawed and that a correct

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136. *Id.* at 1367.

137. *See id.* at 1375. Alito argued that the CWA: (1) is of uncertain jurisdictional reach; (2) imposes large penalties for noncompliance; and (3) greatly restricts the opportunity for judicial review. *Id.* (Alito, J., concurring). Based on these three features, he concluded that, "[i]n a nation that values due process, not to mention private property, such treatment is unthinkable." *Id.*

138. *Id.*

139. *Sackett v. E.P.A.*, 622 F.3d 1139 (9th Cir. 2010), *rev'd sub nom. Sackett*, 132 S. Ct. 1367. *See also* Rothschild, *supra* note 11, at 48.

140. *See supra* notes 121–123 and accompanying text.

141. *See supra* note 137.

142. *See infra* Part II.A.

interpretation of *Mathews* militates against the current use of UAOs.<sup>143</sup> Third, Part II argues that the logic of *Sackett* should apply to CERCLA and mandates a change away from the EPA's current use of UAOs to address every possible CERCLA violation.<sup>144</sup>

*A. Sackett v. EPA Gives New Strength to Due Process Arguments Based on Ex Parte Young*

If one word could be used to characterize the due process arguments based on *Ex Parte Young* that were used by the plaintiffs in *Solid State Circuits*<sup>145</sup> and *GE IV*,<sup>146</sup> that word would probably be “stale.” *Ex Parte Young* was decided in a world that operated on principles and assumptions fundamentally different from those of the 21st century. Most importantly for the purposes of this Comment, federal environmental regulations of the kind embodied by CERCLA did not exist in 1908.<sup>147</sup> Thus, although the principle that no person should have to face a damning “Hobson’s Choice” between facing massive fines or challenging a regulation that he or she knows to be illegal remains good law, cases such as *GE IV* and *GE V* show that courts no longer give as much weight to the due process considerations of *Ex Parte Young*.<sup>148</sup> The results in these two cases are not surprising—on the one hand, the plaintiffs presented a case dating to the early 1900s; on the other hand, the EPA articulated policy objectives and administrative efficiency arguments pertinent to the modern world.<sup>149</sup> It was therefore perfectly reasonable to find that the rule of *Ex Parte Young*, at least

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143. See *infra* Part II.B.

144. See *infra* Part II.C.

145. See *Solid State Circuits, Inc. v. E.P.A.*, 812 F.2d 383, 391 (8th Cir. 1987).

146. See *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 118–19 (D.C. Cir. 2010).

147. See Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 *FORDHAM ENVTL. L.J.* 89, 131 (2002) (“The relative lack of federal financing for local pollution control efforts in the 1960s reflected the low priority that federal officials placed on environmental concerns. In prior decades, it could be argued that Congress’ failure to appropriate money represented the traditional view that federal government should focus federal resources on truly national concerns, leaving state and local governments to fund state and local projects, including river cleanup.”).

148. See *infra* Part II.E.

149. See *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 19 (D.D.C. 2009), *aff’d*, 610 F.3d 110 (D.C. Cir. 2010); *Jackson*, 610 F.3d at 118 (“We therefore join three of our sister circuits that have rejected similar *Ex Parte Young* challenges to CERCLA’s UAO regime.”).

as it was presented in the *GE* cases, must bow before the demands of CERCLA.<sup>150</sup>

Moreover, the original rule of *Ex Parte Young* has been progressively weakened by numerous exceptions over nearly a century of judicial interpretation.<sup>151</sup> The most devastating of these exceptions from the viewpoint of the CERCLA-regulated party is surely the one recognized by the D.C. Circuit in *GE V*.<sup>152</sup> In that case, the court found that judicial discretion over the imposition of fines and punitive damages completely satisfied Fifth Amendment due process concerns, regardless of the potential size or punitive nature of those damages.<sup>153</sup> Simply put, this exception is so large that it “swallows the rule” of *Ex Parte Young*. In the context of environmental statutes such as CERCLA or the CWA, fines and penalties will never be enforced without some degree of judicial discretion.<sup>154</sup> Of additional concern is the low rate at which judicial discretion enters into the equation *at all*, given the highly coercive nature of the EPA’s use of UAOs.<sup>155</sup> The harsh reality is that most regulated parties will simply buckle to the EPA’s demands, fearing the outcome of a long-postponed enforcement action that could multiply fines and penalties into the multimillion dollar range.<sup>156</sup>

This same problem—allowing fines to pile up while the private party must patiently wait for judicial review—was at the heart of the Supreme Court’s concern with the EPA’s conduct in *Sackett v. EPA*.<sup>157</sup> In that case, the Sacketts had absolutely no power to initiate

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150. See *Jackson*, 610 F.3d at 118.

151. *Id.*

152. *Id.* at 118 (“Courts have also held that ‘there is no constitutional violation if the imposition of penalties is subject to judicial discretion.’” (quoting *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2d Cir.1986))).

153. *Id.* at 128.

154. See 42 U.S.C. § 9607 (2006) (providing for civil actions under CERCLA); 33 U.S.C. § 1319 (2006) (providing for civil actions under the CWA). Both statutes provide judicial discretion over the imposition and amount of statutory fines and penalties but give complete control over the timing of review to the EPA. See also *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1372 (2012) (noting the lack of control regulated parties have over judicial review).

155. See *Jackson*, 610 F.3d at 128 (noting the tiny 4.6% rate of noncompliance in more than 1,638 CERCLA-regulated parties studied). Over the total lifespan of CERCLA (1982–2006), the percentage of noncompliance was an even smaller 3.5%. *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 19 (D.D.C. 2009), *aff’d*, 610 F.3d 110 (D.C. Cir. 2010).

156. O’REILLY, *supra* note 10, § 7:6.

157. *Sackett*, 132 S. Ct. at 1372 (“In Clean Water Act enforcement cases, judicial review ordinarily comes by way of a civil action brought by the EPA under 33 U.S.C. § 1319. But the Sacketts cannot initiate that process, and each day

the judicial review process; instead, the couple was only entitled to “wait and see” if the EPA would ever file an enforcement action, and all the while, penalties of \$75,000 per day loomed over their heads.<sup>158</sup> The hope that at some point within the next five years, a judge would consider whether those penalties were proper must have been small comfort to the Sacketts.<sup>159</sup> Although the court in *GE IV* found “no hard evidence” that the EPA routinely waits the maximum five years before filing an enforcement action, the mere prospect that the EPA *could* wait that long creates devastating uncertainty.<sup>160</sup> The essential fact remains that the Sacketts, much like CERCLA-regulated parties, had no control whatsoever over when, or even if, judicial review of their cases would occur.<sup>161</sup> It is this second factor, the lack of control and excessive uncertainty of judicial review, that strengthens the Fifth Amendment argument based on *Ex Parte Young*. *Sackett v. EPA* thus makes it clear that massive fines are not the only problem with “non-reviewable” administrative orders, whether they occur under the CWA or CERCLA.

*B. Properly Applied, the Mathews Test Mandates Additional Access to Evidentiary Hearings Under CERCLA*

Despite the fact that the D.C. Circuit refused to apply the *Mathews* test in *GE V*,<sup>162</sup> there is broad agreement that *Mathews* determines whether Fifth Amendment due process requires that an evidentiary hearing be provided by an administrative agency prior to

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they wait for the agency to drop the hammer, they accrue, by the Government’s telling, an additional \$75,000 in potential liability.”).

158. *Id.*

159. *See* 28 U.S.C. § 2462 (2006) (establishing a five-year statute of limitations for all actions by the federal government seeking monetary damages); *see also* *Friends of the Earth v. Facet Enters., Inc.*, 618 F. Supp. 532. (W.D.N.Y. 1984) (ruling that 28 U.S.C. § 2462 applies to CWA enforcement actions for civil penalties). Assuming that the EPA waited the maximum period to file suit against the Sacketts, a staggering maximum potential penalty of \$136,875,000 would have resulted (\$75,000 multiplied by 1,825 days). *See Sackett*, 132 S. Ct. at 1370 (establishing a maximum penalty of \$75,000 per day).

160. *Jackson*, 595 F. Supp. 2d at 24. *But see* O’REILLY, *supra* note 10, § 7:6. (arguing that PRPs are coerced by the specter of long delays before any enforcement action is brought, together with the resulting daily penalties).

161. 42 U.S.C. § 9607 (2006); 33 U.S.C. § 1319 (2006); *Sackett*, 132 S. Ct. at 1372.

162. *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 128 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (2011).



a deprivation of property.<sup>163</sup> Therefore, the true inquiry is whether *Mathews* would require such a hearing in the context of CERCLA UAOs. The paradigm case applying *Mathews* to CERCLA UAOs after the 1986 SARA amendments is *GE IV*.<sup>164</sup> However, the D.C. District Court made significant mistakes when it applied the four-factor *Mathews* test.<sup>165</sup>

*1. GE IV Assigns Too Much Weight to the Risk of Erroneous Deprivation*

The primary error of *GE IV* was its application of the third factor of the *Mathews* test regarding the risk of erroneous deprivation. After deciding that “abstract concepts” of whether the UAO process is likely to be error prone are inconclusive,<sup>166</sup> the court relied almost entirely on the evidence produced by GE in discovery.<sup>167</sup> Based on this data, the court concluded that the rate of error in UAOs issued under CERCLA in the study period was less than or equal to 4.4%, a rate that it deemed acceptable.<sup>168</sup> The court assumed that where the risk of error is small, the risk of harm is equivalently small; but in the CERCLA context, this approach creates inequitable results.<sup>169</sup> As the *GE IV* court admitted, “CERCLA-regulated party” is a term with a very broad reach, covering some individuals as well as many businesses of every size and description.<sup>170</sup> Although some of these regulated parties, such as the General Electric Co. in *GE IV*, clearly have the financial strength to survive the financial and reputational damage inflicted by an erroneous UAO, many do not.<sup>171</sup> As the court noted, even one UAO is sufficient to bankrupt many smaller

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163. See, e.g., *id.* The court would have applied *Mathews* but for its ruling that GE had no constitutionally protected property interest under the Fifth Amendment. *Id.* See also *Jackson*, 595 F. Supp. 2d at 20–22; *Aminoil, Inc. v. E.P.A.*, 599 F. Supp. 69, 74 (C.D. Cal. 1984).

164. *Jackson*, 595 F. Supp. 2d at 20–38.

165. *Id.*

166. See *id.* at 33–35 (“Therefore, although several aspects of the pre-UAO issuance process suggest, in the abstract, a high risk of error, others suggest neither a high nor a low risk of error, and still others suggest a low risk of error.”).

167. See *id.* at 35–37.

168. *Id.* at 37.

169. *Id.* at 30 (“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.” (internal citations omitted)).

170. *Id.*

171. See, e.g., *id.*

businesses, even if the expected response costs fall short of GE's claimed figure of \$4 million.<sup>172</sup>

Another problem with the *GE IV* court's approach to erroneous deprivation is the weight given to the statistical data produced by GE.<sup>173</sup> In effect, the court allowed the risk of erroneous deprivation to control the result in *GE IV* and used a specific subset of the data provided by GE to establish the risk of error in CERCLA UAOs.<sup>174</sup> Instead of basing its conclusion on such a narrow set of data, which pertained only to GE, the *GE IV* court should have considered the broader effects of the UAO enforcement scheme on *all* regulated parties.<sup>175</sup> As the Supreme Court noted in *Mathews*, "[b]are statistics rarely provide a satisfactory measure of the fairness of a decision-making process."<sup>176</sup> Such statistics are an even less reliable test of due process fairness when they only pertain to a particular party in a particular case.<sup>177</sup>

The net effect of the district court's ruling in *GE IV* is to allow data produced by GE to determine the due process rights of all other CERCLA-regulated parties, regardless of their size, situation, or relative means. Big, multinational companies like GE are thus lumped together with much smaller businesses, leading to punishing results for those relatively tiny companies. Because of the post-SARA ban on constitutional challenges against individual UAOs,<sup>178</sup> only broad facial challenges against the UAO enforcement scheme

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172. *Id.* 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.")

173. *See id.* at 35–37.

174. *Id.* at 37 ("In sum, when all four categories of evidence proffered by GE are carefully scrutinized, GE has pointed to just five instances of error—four examples from specific sites described in GE's declarations and one example of a complying PRP successfully obtaining reimbursement from the government.")

175. *See id.* at 28–30. Of the evidence provided by GE, the most important measure is surely the paltry 4.6% of regulated parties who actually chose not to comply with a UAO during the study period. *See also* O'REILLY, *supra* note 10, § 7:6 ("Because the risks, in terms of increased costs or penalties, are often too great for PRPs to refuse to settle with the Agency in the hope of later challenging EPA's remedy, PRPs frequently agree to perform EPA-selected work even when they have strong arguments that the Agency's remedy is inappropriate.")

176. *Mathews v. Eldridge*, 424 U.S. 319, 346 (1976).

177. *Jackson*, 595 F. Supp. 2d at 37.

178. *See* 42 U.S.C. § 9613(h) (2006) (creating the current pre-enforcement review bar); O'REILLY, *supra* note 10, § 7:5 ("[Section] 113(h) bars judicial review of an EPA removal or remedial action until the Agency has taken some enforcement action . . ."); *see also* *Aminoil, Inc. v. E.P.A.*, 599 F. Supp. 69, 72 (C.D. Cal. 1984) (holding that judicial review of facial constitutional challenges to CERCLA was not precluded).

in general will ever be possible.<sup>179</sup> Further, since only the largest regulated parties can afford to mount lengthy constitutional challenges to CERCLA, the interests of smaller entities will not be adequately represented.<sup>180</sup> Therefore, as long as these broad challenges are based on data collected by individual plaintiffs, as in the *GE* cases, the results will be skewed and detrimentally affect many smaller regulated parties who cannot bear the cost of such litigation.<sup>181</sup>

## 2. *Sackett v. EPA Supports Aminoil's Conclusion That the Public Interest Weighs Against the Pre-Enforcement Review Bar*

Although the *GE IV* opinion does contain a detailed segment dedicated to balancing the other three factors with one another,<sup>182</sup> it ultimately neglects to properly consider the “public interest” factor listed by the Supreme Court in *Mathews*.<sup>183</sup> For a proper analysis of the public interest at stake in CERCLA, it is necessary to look instead to *Aminoil, Inc. v. U.S. EPA* in which the court did attempt to define and weigh the public interest factor.<sup>184</sup> In *Aminoil*, the court did not discount the “significant” interest of the public and government in prompt handling of toxic waste disasters but ruled that some “rudimentary” due process protections could be provided to regulated parties without greatly compromising CERCLA’s goals.<sup>185</sup>

As noted by the D.C. District Court in *GE IV*, there are other, more “rudimentary” options for ensuring due process, besides full trials before an Article III court.<sup>186</sup> Such options include administrative hearings, whether before an ALJ or a presiding

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179. See *Aminoil, Inc.*, 599 F. Supp. 2d at 72 (holding that judicial review of facial constitutional challenges to CERCLA was not precluded); see also *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 116 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (2011) (noting that even after SARA and the addition of CERCLA section 113(h), a facial constitutional challenge against CERCLA is not prohibited, so long as it “does not challenge any particular action or order by EPA”).

180. See, e.g., *Jackson*, 610 F.3d 110. By the time *GE*’s petition for certiorari was denied by the Supreme Court in 2011, *GE*’s constitutional challenge had been in near constant litigation for more than ten years.

181. See *supra* note 169, 175.

182. See *Jackson*, 595 F. Supp. 2d at 37–39.

183. *Mathews v. Eldridge*, 424 U.S. 319, 335, 347 (1976) (“In striking the appropriate due process balance the final factor to be assessed is the public interest.”).

184. *Aminoil, Inc. v. E.P.A.*, 599 F. Supp. 69, 75–76 (C.D. Cal. 1984).

185. *Id.* at 76.

186. See, e.g., *Jackson*, 595 F. Supp. 2d at 38.

officer.<sup>187</sup> Unlike *Aminoil*, however, the *GE IV* court ultimately concluded that the additional costs imposed by even administrative hearings could not be justified.<sup>188</sup> Wholly accepting the EPA's efficiency-based arguments, the D.C. District Court found that forcing the Agency to provide any kind of evidentiary hearing would impermissibly frustrate the goals of CERCLA enforcement as contemplated by Congress.<sup>189</sup> *GE IV* thus stands for the principle that the pre-enforcement review bar in CERCLA must be upheld against due process challenges to protect the EPA's administrative efficiency.<sup>190</sup>

Despite the court's decision in *GE IV*, the Supreme Court's ruling in *Sackett v. EPA* provides strong evidence that *Aminoil* was fundamentally correct, at least in terms of the *Mathews* public policy balance.<sup>191</sup> Like *Aminoil*,<sup>192</sup> the majority opinion in *Sackett* expressed grave concern with the coercive effects of non-reviewable administrative orders.<sup>193</sup> However, *Sackett* went even further than *Aminoil* and rejected the substance of the EPA's efficiency-based arguments for the maintenance of a pre-enforcement review bar.<sup>194</sup> Ultimately, Justice Scalia's majority opinion rejected the notion that non-reviewable orders are essential to the EPA's enforcement efforts.<sup>195</sup> Instead, he argued that administrative orders will continue to be an effective mechanism for enforcement, wherever they are essentially correct and supported by the weight of evidence.<sup>196</sup>

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187. *Id.*

188. *Id.* at 38–39.

189. *Id.* at 36–38.

190. *Id.*

191. *See supra* Part I.E; *Aminoil, Inc. v. E.P.A.*, 599 F. Supp. 69, 76 (C.D. Cal. 1984).

192. *Aminoil, Inc.*, 599 F. Supp. at 76.

193. *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1373–74 (2012).

194. *Id.* at 1374 (“Finally, the Government notes that Congress passed the Clean Water Act in large part to respond to the inefficiency of then-existing remedies for water pollution. Compliance orders, as noted above, can obtain quick remediation through voluntary compliance. The Government warns that the EPA is less likely to use the orders if they are subject to judicial review. That may be true—but it will be true for all agency actions subjected to judicial review.”).

195. *See, e.g., id.*

196. *Id.* (“Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.”).

*C. UAOs Must Not Be the EPA's Default Method of CERCLA Enforcement*

Under CERCLA section 106, the EPA has three different options for enforcement: (1) conduct the cleanup itself and sue for compensation; (2) bring an enforcement action in district court; or (3) issue a UAO against a potentially responsible party (PRP) charging a violation of CERCLA.<sup>197</sup> When it passed CERCLA, Congress created a range of enforcement choices to suit different kinds of pollution emergencies.<sup>198</sup> For example, option one, in which the EPA conducts the cleanup itself, is ideally suited for environmental catastrophes that pose such an imminent threat that the government simply cannot wait for a PRP to conduct its own cleanup.<sup>199</sup> While this still does occasionally occur, in the overwhelming majority of cases, issuance of a UAO is the only response chosen by the EPA to enforce CERCLA.<sup>200</sup>

In effect, UAOs have become a kind of “super order” that renders every other alternative enforcement mechanism largely irrelevant.<sup>201</sup> The reasons for this development are not difficult to grasp—the EPA enjoys complete insulation from judicial review for up to five years when using UAOs.<sup>202</sup> Further, the practice of allowing fees to accrue pending some hypothetical enforcement action in the future creates a level of coercion that cannot be matched by the other two alternatives under CERCLA section 106.<sup>203</sup>

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197. See 42 U.S.C. § 9606(b) (2006).

198. See *id.* § 9606(a); *Aminoil, Inc.*, 599 F. Supp. at 71 (“Congress plainly gave the President authority to address situations endangering ‘public health and welfare and the environment,’ and such authority necessitates broad flexibility in promptly and effectively responding to the emergency.” (citations omitted)).

199. *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 32 (D.D.C. 2009), *aff’d*, 610 F.3d 110 (D.C. Cir. 2010) (“In true emergency situations, EPA cleans up a site itself and later files a cost recovery action.”).

200. See *id.* at 33 (noting the vast number of UAOs issued over the existence of CERCLA). “Between August 16, 1982 and May 25, 2006—a period of 285 months—EPA issued 1,705 UAOs to more than 5,400 PRPs. On average, then, EPA has issued approximately six UAOs to nineteen PRPs every month.” *Id.* (internal citations omitted). The court also notes that, over the same period, only 3.5% of PRPs chose noncompliance, meaning that the EPA only had to file some 189 enforcement actions under CERCLA section 106. See *id.* at 28.

201. See, e.g., *id.*

202. See 28 U.S.C. § 2462 (establishing a five-year statute of limitations for all actions by the federal government seeking monetary damages); see also *Friends of the Earth v. Facet Enterprises, Inc.*, 618 F. Supp. 532 (W.D.N.Y. 1984) (ruling that 28 U.S.C. § 2462 applies to CWA enforcement actions for civil penalties).

203. 42 U.S.C. § 9606(b); *Jackson*, 595 F. Supp. 2d at 32.

The Court in *Sackett v. EPA* ruled against an identical enforcement structure under the CWA, arguing that administrative orders (such as UAOs) are still useful to the EPA, even if they are subject to judicial review.<sup>204</sup> The reasoning used by Justice Scalia to support this conclusion, namely that the great majority of orders will not be challenged because they are factually correct, is actually supported by the evidence analyzed by the *GE IV* court.<sup>205</sup> There is no reason to believe that the EPA's methods of investigation and enforcement differ greatly between the CWA and CERCLA.<sup>206</sup> Thus, there is simply no reason why the Court's conclusion in *Sackett v. EPA* should not also apply to CERCLA. Therefore, even if UAOs are made subject to judicial review, it is likely that the EPA will still be able to obtain quick compliance in a majority of cases.<sup>207</sup>

### III. THE ALJ SOLUTION

In *Sackett*, the Court proposed one potential solution to the problem of non-reviewable compliance orders—allowing pre-enforcement judicial review.<sup>208</sup> However, there is another possibility—a solution founded upon the very structure of administrative law. This Comment argues that the best available means of satisfying the requirements of Fifth Amendment due process is the use of adjudications or hearings presided over by ALJs.<sup>209</sup> Agency hearings are typically much more informal and

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204. *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1374 (2012).

205. *See* *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 128 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (2011). The evidence collected by GE in *GE V* showed that only around 4.6% of parties issued a UAO by the EPA in the study period did not comply with that order. *Id.* As the *GE V* court noted, there is a strong possibility that the low level of noncompliance observed was due in large part to most of the UAOs being correct. *Id.*

206. *See Sackett*, 132 S. Ct. at 1372–73. CWA compliance orders are functionally the same as CERCLA UAOs. *Compare* 42 U.S.C. § 9606 (2006), *with* 33 U.S.C. § 1319 (2006). They are used for the same purpose—to obtain compliance from regulated parties. *Id.* In both cases, fines for noncompliance are calculated from the date the orders are issued. *Id.* Until recently, both were also immune from pre-enforcement judicial review. *Sackett*, 132 S. Ct. at 1372–73.

207. *See Jackson*, 595 F. Supp. 2d at 32 (finding that the average time for cleanup of a CERCLA waste site is eight years). Although the court did not provide a separate average for those parties who choose noncompliance, it is logical to assume that the average time to clean up sites owned by noncomplying PRPs is substantially longer, on account of lengthy legal challenges. *Id.*

208. *See Sackett*, 132 S. Ct. at 1374.

209. *See infra* Part III.A–B.

thus much less costly than Article III trials.<sup>210</sup> Like Article III judges, ALJs are neutral decision-makers.<sup>211</sup> However, unlike federal judges, ALJs possess specialized training in their respective fields, allowing them to accurately assess the validity of the complex scientific evidence that is crucial to CERCLA cases. Additionally, hearings can be completed in a relatively short amount of time, especially when compared to Article III trials.<sup>212</sup> In adjudications, both parties have the chance to present their evidence and make arguments before a neutral decision-maker who is not controlled by the administrative agency.<sup>213</sup>

Allowing a PRP to contest a UAO at an early date would alleviate many of the devastating financial consequences identified by the D.C. District Court in *GE IV*.<sup>214</sup> The increased certainty provided by a swift and fair ALJ adjudication should reduce damaging fluctuations in stock price and serve to reassure a PRP's creditors and investors.<sup>215</sup> Finally, the use of an ALJ would satisfy Fifth Amendment due process requirements under *Mathews v. Eldridge* because it would provide a meaningful opportunity for PRPs to confront the evidence against them and present any available defenses to CERCLA liability.<sup>216</sup>

#### *A. Proposed Procedure for CERCLA Administrative Hearings*

To complete the proposed ALJ solution to due process deficiencies in CERCLA UAOs, this Comment proposes both procedures and effective remedies to facilitate administrative hearings. For ALJ adjudication to form an effective alternative to Article III courts, ALJs must have broad powers to resolve disputes over all parts of the UAO regime, including whether issuance was proper, the appropriate scope of the UAO, and what cleanup

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210. *Jackson*, 595 F. Supp. 2d at 38; *Aminoil, Inc. v. E.P.A.*, 599 F. Supp. 69, 76 (C.D. Cal. 1984).

211. *Jackson*, 595 F. Supp. 2d at 32–33 (“[C]ourts have held that an administrative law judge (“ALJ”), and a detached “presiding officer” within an agency, are both adequate neutral decision-makers.” (internal citations omitted)).

212. *Id.* at 38. Another option discussed by the *GE IV* court is a hearing before a presiding officer, a neutral Agency employee with decision-making power. See *id.* at 32–33.

213. *Id.*

214. *Id.* at 36–38.

215. *E.g., id.* Although *GE IV* resolved the balance of interests in favor of preserving the pre-enforcement bar, the court acknowledged that PRPs would greatly benefit from early review of *some type*. *Id.*

216. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

activities should be required. Fully addressing these issues demands a multi-stage procedural approach to each challenged UAO.

First, the ALJ must examine all the relevant evidence provided by the EPA in support of the UAO, together with any evidence submitted by the regulated party.<sup>217</sup> Because CERCLA imposes strict liability, most defenses would likely revolve around whether the toxic substance allegedly released falls under CERCLA or whether contamination was caused by an act of God or other unforeseeable cause, such as sabotage by a third party.<sup>218</sup> At this stage, the ALJ would employ his or her vast experience, drawn from deciding countless similar disputes, to quickly sort through the scientific evidence and determine whether the UAO was properly issued and whether the alleged violation falls within the scope of CERCLA.<sup>219</sup> This faster speed of resolution would greatly reduce the time for large, daily fines to run against the PRP and would make contesting the UAO an economically viable solution.<sup>220</sup>

If the ALJ is satisfied that the evidence supports the issuance of the UAO, then the ALJ could proceed to the next stage—determining the proper scope of that UAO. In most cases, this second step should be quite brief. If the EPA has provided the appropriate scientific justification for issuance of the UAO, the Agency should be afforded some level of deference on its determination of scope. Because the ALJ has no first-hand experience of the pollution problem, the ALJ must give deference to the testimony and reports of EPA investigators. However, such

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217. Although this process may seem unfairly weighted in favor of the Agency, the requirement that all evidence be presented is in fact the best guarantee of fairness. Through this process, the EPA would be forced to substantiate all charges at an early stage and would be dissuaded from issuing a UAO prematurely on scant evidence. Note that currently, all CERCLA requires for the issuance of a UAO is the administrator's "belief" that a violation has occurred, on the basis of "any information available." See 33 U.S.C. § 1319(a)(3) (2006). The effect of this change, if effectively implemented, would be to force the administrator to consider whether the information presented to him is *reliable* enough to survive review by an ALJ. *Id.*

218. See Glass, *supra* note 46, at 395.

219. The depth of experience developed by ALJs hearing CERCLA UAO challenges is a primary difference between ALJs and Article III judges and is essential to the efficient resolution of such claims. See, e.g., Martin v. Occupational Safety & Health Review Com'n, 499 U.S. 144, 152 (1991) (noting the depth of expertise administrative agencies develop in interpreting and applying their own regulations).

220. See Gen. Elec. Co. v. Jackson, 595 F. Supp. 2d 8, 38 (D.D.C. 2009), *aff'd*, 610 F.3d 110 (D.C. Cir. 2010) (establishing an average deprivation of \$4 million for three years to PRPs under the current CERCLA enforcement regime for a *single* UAO).



deference should not be absolute. Where regulated parties can substantially rebut the EPA's contentions through competent evidence of their own, the ALJ should be cognizant of the possibility that the scope of the UAO may need to be reduced.<sup>221</sup>

The last stage of an ALJ's examination of a UAO should be the degree and kind of cleanup required. Much like the second step, this third phase should receive considerable deference in the great majority of cases. Only where the record reveals a significant disparity between the risks posed by contamination and the extent of the proposed cleanup should the ALJ consider altering the terms of the UAO.

### *B. Proposed Administrative Remedies for ALJ Review of UAOs*

This Comment proposes that an effective regime of ALJ adjudications must have meaningful remedies at its disposal to solve the current due process deficiencies in CERCLA's UAO enforcement scheme. Essentially, ALJs should have access to three basic remedies when confronting a challenged UAO: (1) accept and endorse the order as it stands, (2) reject it for insufficient evidence, or (3) modify its terms. These three options will be addressed in turn.

The first option, to accept and endorse the UAO as issued, should be the result whenever the EPA can produce sufficient scientific evidence to support the UAO. There is little reason to believe that endorsement would not be the "default option" for most cases that come before an ALJ. Because the efficiency and cost savings of the ALJ system depend, at least in part, on greatly relaxed rules of procedure, a formal standard of proof for the EPA cannot and should not be imposed on ALJ adjudications. Nevertheless, this Comment proposes that the ALJ should examine scientific evidence and hear testimony from both sides whenever it is available and that the ALJ should adjudicate the case using something approaching a preponderance of the evidence standard of proof generally applied to civil actions.<sup>222</sup> Thus, whenever the EPA's evidence presents a

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221. As a hypothetical example, assume the EPA produces investigative reports alleging toxic contamination of three of the PRP's industrial facilities. However, the PRP commissions a thorough, independent scientific evaluation that reveals only two of the properties are contaminated by measureable amounts of toxin. In this scenario, the ALJ should properly limit the scope of the UAO to the two contaminated properties.

222. It must be emphasized that ALJs cannot and should not be constrained to a single approach. Other standards of proof may well be appropriate in individual cases. This flexibility forms a large part of the ALJ system's appeal.

more plausible version of events, the UAO should stand as issued. Through this process, a record would undoubtedly be produced—a record that would greatly assist the EPA in forcing settlement of the many clear-cut cases identified by the court in *GE IV*.<sup>223</sup> This benefit to the EPA must not be minimized; by producing a clear record of *all* the available evidence at an early stage, the clarity of the facts would force many (if not the majority of) cases into settlement, avoiding costly litigation.

The second option for an ALJ examining a UAO must be rejection for insufficient evidence. The possibility that a UAO could be rejected, no matter how unlikely, gives real teeth to the role of the ALJ adjudication as a means of protecting regulated parties' due process rights.<sup>224</sup> Clearly, some impetus is also needed to encourage the EPA to be careful about when and how it issues UAOs. Rejection would provide this impetus and serve as a warning that UAOs based on merely speculative evidence will not be tolerated. Of course, such power should be used sparingly.

The third and final remedy available to an ALJ should be modification of the challenged UAO. As a remedy, modification is necessitated by the reality that either the scope or proposed cleanup responsibilities contained in a challenged UAO may be incorrect. For these cases, efficiency dictates an intermediate remedy, which is neither approval nor complete rejection of the UAO. In such cases, the ALJ could effectively resolve the dispute and protect the interests of both the EPA and the regulated party by modifying the terms of the UAO.<sup>225</sup>

Overall, the efficiency of the ALJ solution to the due process deficiencies of CERCLA UAOs depends greatly on the availability of effective remedies. Without such powers, any adjudication would be a fruitless exercise and no help to those adversely affected by an improper UAO. Moreover, through careful use of the remedies proposed by this Comment, an ALJ can actually *aid* the EPA by producing a complete factual record at an early stage of the dispute. When this record reflects that the EPA has correctly issued a UAO,

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223. *See* Gen. Elec. Co. v. Jackson, 610 F.3d 110, 128 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (2011) (noting the strong likelihood that the overwhelming rate of compliance with UAOs indicates that most of them are fundamentally correct).

224. *See supra* note 217.

225. Modification would most likely be in favor of the regulated party, but it need not always be so. Where the facts reveal that the challenged UAO is in fact *too narrow*, the ALJ should retain the power to expand its terms or geographic reach. In this way, ALJ adjudications can actually assist the EPA in the efficient administration of CERCLA.

the ALJ adjudication would serve to compel swift settlement and reduce the need for costly litigation.

#### CONCLUSION

After *Sackett v. EPA*, courts should find that CERCLA's non-reviewable UAOs violate the Fifth Amendment due process rights of regulated parties. Striking down the prohibition on pre-enforcement review of UAOs will not destroy either CERCLA or the EPA. Instead, with a well-established and efficient ALJ process in place, regulated parties would be able to effectively assert their rights in the face of contested UAOs and quickly obtain guidance from a qualified, neutral decision-maker. The speedy resolution of claims by ALJs would undoubtedly reduce litigation expenses for all parties. Ultimately, the size of CERCLA fines and even their necessity as a means of coercing compliance should diminish. As the court stated in *Mathews*, "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.'"<sup>226</sup> Through the proposed administrative hearings, regulated parties in jeopardy of devastating CERCLA fines would finally gain an opportunity to contest the EPA's charges against them.

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226. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

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