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Environmental Law Blog

Supreme Court Denies GE's Petition on Suit Challenging Constitutionality of EPA's Unilateral Administrative Order Authority

Posted by [Michael Einhorn, Esq.](#) in [CERCLA](#), [Environmental Litigation](#) on June 17, 2011

On June 6, 2011, the Supreme Court denied a petition for certiorari by General Electric (GE) to hear the appeal of [General Electric v. Jackson](#), a lengthy case in which GE had unsuccessfully challenged the constitutionality of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals – D.C. Circuit. GE had argued that CERCLA Section 106 unconstitutionally violates due process because it authorizes the U.S. Environmental Protection Agency (EPA) to issue unilateral administrative orders (UAOs) to potentially responsible parties (PRPs) to clean up contaminated sites and effectively prohibited prior judicial review by making the risk of non-compliance penalties so onerous that no PRP would ever risk them. 42 USC §§ 9606, 9613(h).

Under CERCLA, when the EPA determines that an environmental cleanup is necessary at a contaminated site, the agency may: (1) negotiate a settlement with PRPs, 42 USC § 9622; (2) conduct the cleanup with "Superfund" money and then seek reimbursement from PRPs by filing suit, 42 USC §§ 9604(a), 9607(a)(4)(A); (3) file an abatement action in federal court to compel PRPs to conduct the cleanup, 42 USC § 9606; or (4) issue a UAO instructing PRPs to clean up the site, 42 USC § 9606. GE's suit challenged the constitutionality of option (4)—UAO issuance.

Once EPA issues a UAO, the recipient PRP has two choices. First, a PRP may comply with the UAO and seek reimbursement from EPA after completing the cleanup, 42 USC §9606(b)(2)(A). If the EPA refuses reimbursement, the PRP may sue the agency in federal court to recover its costs on the grounds that (1) the PRP was not liable, § 9606(b)(2)(B)–(C); or (2) it was liable, but EPA's selected response action was "arbitrary and capricious or . . . otherwise not in accordance with law, § 9606(b)(2)(D). Second, a PRP may refuse to comply with the UAO and wait for EPA to bring an enforcement or cost recovery action in federal court. 42 USC §§9606(b)(1); 9607(c)(3). However, if the court concludes that the PRP willfully failed to comply with an order without sufficient cause, the court may impose fines (currently \$37,500/day) which accumulate until EPA brings an action against the PRP (a period up to six years). See 73 Fed. Reg. 75,340, 75,340-46 (Dec. 11, 2008); 28 USC §2462; 42 USC §9613(g)(2). In addition, if EPA undertakes the cleanup, the district court may impose punitive damages of up to three times the amount of EPA's costs. 42 USC §§9606(c)(3). These two options are exclusive, as CERCLA Section 113(h) bars PRPs from obtaining immediate judicial review of a UAO. 42 USC § 9613(h). The inability to obtain judicial review of an UAO prior to compliance, other than in the context of non-compliance with the UAO and the attendant risk of penalties, gave rise to GE's claim of violation of its constitutional due process rights.

In the lower courts, and in its petition to the Supreme Court, GE argued that EPA's option to issue UAOs to PRPs violates due process requirements because it requires PRPs to clean up a site without first providing an opportunity for a hearing except in the context of an enforcement proceeding for failure to comply with the UAO. On June 29, 2010, the U.S. Court of Appeals – D.C. Circuit decided in favor of EPA, finding the CERCLA statutory scheme to be constitutional. [General Electric Co. v. Jackson](#), 610 F.3d 110 (D.C. Cir. 2010) ([pdf link available here](#)), affirming 595 F. Supp. 2d 8 (D.D.C. 2009). The D.C. Circuit ruled that the EPA's authority to issue UAOs under CERCLA satisfies constitutional due process requirements because recipients of a UAO may obtain a pre-deprivation hearing by refusing to comply and forcing EPA to sue in federal court.

GE argued that the penalties for disobeying a UAO and requiring EPA to file an enforcement action were so enormous as to intimidate and effectively preclude PRPs from ever resorting to the courts to test the validity of the UAOs, relying on [Ex Parte Young](#), 209 U.S. 123 (1908) and its progeny. As noted by the D.C. Circuit, "[a]ccording to GE, -[t]he unilateral orders regime . . . imposes a classic and unconstitutional Hobson's choice: because refusing to comply -risk[s] severe punishment [i.e., fines and treble damages] UAO recipients' only real option is to -comply . . . before having any opportunity to be heard on the legality and rationality of the underlying order." Thus, GE argued that CERCLA fails to provide any realistic avenue for pre-deprivation review, and is therefore unconstitutional. However, the D.C. Circuit reasoned that such fines satisfy due process if they are subject to "good faith" or "reasonable grounds" defenses, or if the imposition of penalties is subject to judicial discretion, citing to [Reisman v. Caplin](#), 375 U.S. 440, 446–50 (1964); [Okla. Operating Co. v. Love](#), 252 U.S. 331, 338 (1920); [Wagner Seed Co. v. Daggett](#), 800 F.2d 310, 316 (2d Cir. 1986); *cf.* [Brown & Williamson Tobacco Corp. v. Engman](#), 527 F.2d 1115, 1121 n.8 (2d Cir. 1975). The D.C. Circuit found that CERCLA adequately guarantees these safeguards, as CERCLA provides that a PRP faces daily fines and treble damages only if a federal court finds: (1) that the UAO was proper; (2) that the PRP willfully failed to comply without sufficient cause; and (3) that, in the court's discretion, fines and treble damages are appropriate. 42 U.S.C. §§ 9606(b)(1), 9607(c)(3). Accordingly, the D.C. Circuit concluded that CERCLA did not preclude a resort to the courts for the purpose of testing a UAO's validity, and held that the CERCLA statutory scheme is not unconstitutional.

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The D.C. Circuit denied GE's request for rehearing on September 30, 2010, and GE filed a petition for certiorari to the Supreme Court on December 29, 2010. The D.C. Circuit opinion now stands, following the Supreme Court's rejection of GE's petition.

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