

EPA's AUTHORITY TO ISSUE PRPs UNILATERAL ORDERS AFFIRMED



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On June 7, 2011, the U.S. Supreme Court refused to hear the case of *General Electric Co. v. U.S.*, ending a hard-fought battle between General Electric Company (GE) and the Environmental Protection Agency (EPA). For the past 10 years, GE challenged the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as unconstitutional. Specifically, GE claimed the EPA violates due process requirements when it issues a unilateral administrative order to a potentially responsible party (PRP) under Section 106 of CERCLA requiring PRP cleanup of a contaminated site without providing an opportunity for a hearing. GE lost that claim most recently in the District of Columbia Circuit Court in 2010.

This week's refusal by the Supreme Court to hear the case means PRPs receiving unilateral administrative orders from the EPA under CERCLA ordering cleanup of superfund sites will have two options; (1) either comply by cleaning up the property and later attempt to obtain reimbursement from the EPA (or others) or (2) fail to comply and force the EPA to sue to enforce the order with the attendant significant risks of treble damages and fines.

In its Circuit Court arguments, GE claimed PRPs receiving a unilateral order should have the right to immediately go to court to challenge the order. The D.C. Circuit opinion, which stands after denial of GE's Supreme Court petition, found Section 106 unilateral orders do not violate due process requirements because a PRP may obtain a hearing either at the conclusion of the cleanup or in an enforcement lawsuit by the EPA after the unilateral order is issued.

GE also argued that the significant risks posed by failure to comply with unilateral orders affect a PRP's stock price and credit rating and thereby constitute a deprivation of property. The D.C. Circuit acknowledged that the financial consequences of unilateral administrative orders can be substantial, but those consequences were the result of market reaction and not from the unilateral order itself.

Denial of the petition leaves GE and other PRPs subject to these unilateral orders with a Hobson's choice: comply or assume the considerable risk of enforcement litigation. Given the looming specter of a Section 106 unilateral order, PRPs may wish to consider how best to resolve CERCLA liability through, for example, entering into early negotiation with the EPA or state authorities.