ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 09-5092

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GENERAL ELECTRIC COMPANY,

Plaintiff-Appellant,

v.

LISA PEREZ JACKSON, Administrator, United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellees.

AMICUS BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Plaintiff-Appellant General Electric Company.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Plaintiff-Appellant General Electric Company.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by *amicus curiae* Chamber of Commerce of the United States of America of the following corporate interests:

a. Parent companies of the corporation:

None

b. Any publicly held company that owns ten percent (10%) or more of the corporation:

None

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* Authorities on which the Chamber principally relies are marked with an asterisk.

STATUTES

GLOSSARY OF TERMS

CFTC	Commodity Futures Trading Commission
Chamber	Chamber of Commerce of the United States of America
CPSC	Consumer Product Safety Commission
EPA	Environmental Protection Agency
GE	General Electric Company
Gen. Elec. II	*Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d (D.D.C. 2009)
NTSB	National Transportation Safety Board
PRP	Potentially Responsible Party
SEC	Securities and Exchange Commission
UAO	Unilateral Administrative Order

INTEREST OF *AMICUS*

Amicus curiae Chamber of Commerce of the United States of America ("Chamber") submits this brief in support of Plaintiff-Appellant General Electric Company ("GE"). Founded in 1912, the Chamber is the world's largest not-for-profit business federation, representing an underlying membership of over three million businesses and business organizations of every size, in every business sector, and from every geographic area. Ninety-six percent of the Chamber's members are businesses with fewer than 100 employees. As the Nation's preeminent business association, the Chamber has an abiding interest in the scope of federal regulatory authority in general and environmental regulation in particular. The Chamber participated as an *amicus* in this case in the district court, and all parties have consented to the filing of this brief.

This case is especially important to the Chamber because of the Environmental Protection Agency's ("EPA's") longstanding pattern and practice of issuing Unilateral Administrative Orders ("UAOs") as a matter of course, in non-emergency situations, without providing any pre-deprivation process before a neutral decisionmaker. Administrative law is full of flexible procedures that constitutionally balance the government's need for flexibility with private citizens' right to due process, including the right to a hearing before a neutral decisionmaker before (or, in an emergency, promptly after) any deprivation occurs. Not only is

EPA's UAO regime an outlier in that respect, the agency has repeatedly issued unilateral orders in thousands of routine, non-emergency situations to impose billions upon billions of dollars in clean-up costs. That practice threatens numerous members of the Chamber with violation of their most fundamental due process right—a pre-deprivation hearing before a neutral decisionmaker.

SUMMARY OF ARGUMENT

GE's brief explains the constitutional infirmity in EPA's issuance of aptly-named Unilateral Administrative Orders without any pre-deprivation process before a neutral decisionmaker. This *amicus* brief focuses on three points.

A. First, the district court's attempt to balance away the right to a pre-deprivation hearing before a neutral decisionmaker is not only clear legal error, it also underscores the flagrant nature of the due process violation here. Absent an extraordinary circumstance involving an urgent need for governmental action—which EPA concedes is never the case with UAOs—the right to a pre-deprivation hearing is fundamental. In light of the stakes, the combination of unilateral action and non-exigent circumstances amount to a due process violation. This is particularly true because the cost of a hearing would be minimal, while the private interests at stake are substantial, and indeed can involve a company's very existence. The court's concern that providing a hearing for every UAO would be too expensive considering that EPA routinely issues thousands of them without

pre-deprivation process only underscores the *magnitude* of EPA's constitutional violation. The sheer scope of a violation is no reason to countenance it.

In addition, the cost of a hearing does not vary in any material respect based on whether the government provides it before or after the deprivation. Accordingly, any cost savings from denying pre-deprivation process will result solely from the fact that post-deprivation process is inadequate and that UAOs are so coercive that, once they are issued, recipients have no choice but to comply. That is hardly a *legitimate* governmental interest that could justify denying pre-deprivation process.

While the district court thought that GE had to prove a high error rate in the issuance of unilateral orders, the value of a pre-deprivation hearing before a neutral decisionmaker is not something that must be factually proven in a due process case. Instead, the judgment concerning the value of such hearings was made long ago by the Framers who enshrined the due process guarantee of notice and an opportunity to be heard before a non-exigent deprivation into the Fifth Amendment. The very fact that the district court expected GE to justify the value of a pre-deprivation hearing as a factual matter confirms that the court lost sight of basic due process principles. The district court's approach would also raise a host of practical problems, including the difficulty of proving an error rate—in the absence of any pre-deprivation hearings at which such errors could be exposed—

until *after* the denial of pre-deprivation hearings had unconstitutionally led to numerous erroneous results.

B. EPA's due process violation is underscored by two additional points. First, EPA's unilateral orders are so highly coercive that the recipient of a UAO has no real choice but to comply—as evidenced by the fact the nearly every recipient of a UAO does just that. EPA's concession that compliance with a unilateral order constitutes a constitutional deprivation, coupled with the fact that UAOs are so coercive that recipients must comply, confirms the due process violation. Second, like a lien on property, UAOs directly encumber property rights as a practical matter. Thus, the long-settled principle that liens trigger due process protections provides further support for the conclusion that EPA's unilateral orders require such protections as well.

C. Precisely because EPA's unilateral orders violate the most basic of due process rights, they are an outlier in administrative law. Numerous administrative law schemes provide pre-deprivation process in circumstances involving far more exigency than here. And even in situations involving true emergencies, Congress routinely provides for *prompt* post-deprivation process, as the Constitution requires. But a UAO recipient receives neither pre-deprivation nor prompt post-deprivation process. Thus, holding that EPA's UAO regime violates due process would not have a sweeping impact on other agencies that issue

administrative orders. Instead, it would simply accord UAO recipients the same fundamental due process protections that others already receive.

ARGUMENT

Whether considered in the context of bedrock constitutional principles or administrative law statutes administered by other agencies, EPA's unilateral orders are an outlier and an affront to basic fairness.

I. THE UAO SCHEME VIOLATES DUE PROCESS BECAUSE IT DOES NOT PROVIDE PRE-DEPRIVATION PROCESS, OR EVEN PROMPT POST-DEPRIVATION PROCESS

Under fundamental due process principles, the district court found all of the predicates for a due process violation, but then jumped the tracks by concluding that there was no violation. The district court found that a recipient of a UAO is deprived of property without a prior hearing and that no extraordinary emergency justifies the denial of that most fundamental of procedural rights. *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 29, 32 (D.D.C. 2009) ("*Gen. Elec. II*"). That should have been the end of the analysis. While the district court went on to balance away a UAO recipient's due process rights, such balancing is inconsistent with bedrock due process principles. Balancing to decide the form of the hearing required is one thing, but the right to a pre-deprivation hearing when there is a substantial deprivation in the absence of exigency is not something that can be balanced away. And the factors on which the district court relied, such as the cumulative cost of

providing process to the thousands of UAO recipients, only underscore that EPA's UAOs violate due process *en gros*.

A. Due Process, At A Minimum, Requires Pre-Deprivation Notice And An Opportunity To Be Heard Before A Neutral Decisionmaker

As GE explains, the most fundamental and irreducible requirement of due process is notice and an opportunity to be heard by a neutral decisionmaker *before* being deprived of a property interest. *See* GE Br. 23-25. That is the "essence," the "central meaning," and the "minimum" requirement of due process. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *Propert v. Dist. of Columbia*, 948 F.2d 1327, 1331 (D.C. Cir. 1991). Pre-deprivation process can be dispensed with only in "extraordinary" circumstances involving a "special need for very prompt action." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-679 (1974); *accord Fuentes*, 407 U.S. at 90-91; *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993) ("The question in the civil forfeiture context is whether *ex parte* seizure is justified by a pressing need for prompt action.").

Here, however, as the district court explained, "EPA lacks a 'special need for very prompt action' in issuing UAOs." *Gen. Elec. II*, 595 F. Supp. 2d at 32 (quoting *Fuentes*, 407 U.S. at 91). In fact, "the parties agree that EPA does not issue UAOs in true emergency situations." *Id.* Instead, in an emergency, EPA

cleans up a site itself and then seeks recovery of the costs. *Id.*; *see also* 42 U.S.C. §§ 9607(a)(4), 9611(a). Moreover, the agency issues a UAO only after years of study, sometimes nearly a decade. *Gen. Elec. II*, 595 F. Supp. 2d at 32. EPA's lumbering pace reinforces not only the absence of an emergency requiring prompt action, but also the eminent practicality of providing pre-deprivation process before a neutral decisionmaker as part of EPA's years-long process of issuing a UAO.

EPA, of course, has alternatives for forcing a party to clean up a site in a non-emergency situation that comply with due process. For example, Congress authorized EPA to seek an order from a federal district court compelling a potentially responsible party ("PRP") to perform a clean-up. 42 U.S.C. § 9606(a). But EPA has been unable to resist the temptation provided by UAOs. As a result, EPA no longer goes to court to seek a clean-up order. Instead, it relies upon the expedience of UAOs and has issued over 1,700 of them to more than 5,400 companies. *Gen. Elec. II*, 595 F. Supp. 2d at 38. Far from being an "extraordinary" circumstance, therefore, EPA's issuance of a UAO has become a matter of course. It is certainly understandable that EPA would prefer to issue unilateral orders rather than to prove its case before a neutral decisionmaker. But that is *exactly* why the Due Process Clause does not leave the choice up to the agency. *See Fuentes*, 407 U.S. at 90 & n.22.

B. Even In Extraordinary Circumstances Where Pre-Deprivation Process Is Not Required, Post-Deprivation Process Must Be Prompt

The flagrant nature of the due process violation here is further underscored by the government's failure to provide even a post-deprivation remedy promptly. As discussed above, post-deprivation process is "tolerate[d]" in lieu of pre-deprivation process only where circumstances would otherwise threaten the government's ability to act in a timely fashion. *James Daniel Good*, 510 U.S. at 53. Because the deferral of process can be justified only by a need for very prompt action, the permissible *length* of the deferral is necessarily limited by that justification as well, which means that a post-deprivation hearing must be "prompt." *Barry v. Barchi*, 443 U.S. 55, 66 (1979); *see also N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975); *Tri-County Indus., Inc. v. Dist. of Columbia*, 104 F.3d 455, 461 (D.C. Cir. 1997).

Thus, for example, if a job license must be suspended without prior notice, a due process hearing must be provided promptly thereafter. *See, e.g.*, *Barry*, 443 U.S. at 66. Immediate action may be justifiable in such circumstances, but further appreciable delay in providing a hearing is not. *See id.* To the contrary, if process cannot be provided before a deprivation, "the . . . interest in a speedy resolution of the controversy becomes paramount" after that time to protect against further, ongoing harm. *Id.*; *see also id.* at 71-72 (Brennan, J., concurring in relevant part).

Providing prompt, timely process not only permits private citizens to seek timely redress, it also deters government abuses from occurring in the first place.

In this respect as well, the UAO scheme fails to measure up to basic constitutional requirements. Because there is no exigency in issuing a UAO, pre-deprivation process is required, as explained above. Yet the UAO scheme not only fails to provide a pre-deprivation remedy, it likewise makes no effort to provide even prompt post-deprivation process. Instead, "the statute permits EPA to control the timing of any judicial intervention." *Gen. Elec. Co. v. Johnson*, 362 F. Supp. 2d 327, 342 (D.D.C. 2005) ("*Gen. Elec. I*"). Federal courts lack jurisdiction to entertain challenges to a UAO until a clean-up has been completed, which takes years on average, or until EPA has brought an enforcement action. *See* 42 U.S.C. § 9613(h). That delay underscores the extraordinary nature of the due process violation here. EPA can hardly claim a greater interest in deferring post-deprivation process in this non-emergency situation than the government has when responding to actual emergencies.

C. The District Court Erred By Balancing Away The Right To Pre-Deprivation Process

The fundamental right to a pre-deprivation (or, in an emergency, prompt post-depivation) hearing before a neutral decisionmaker is absolute and not subject to balancing where, as here, no extraordinary circumstances give rise to a need for unilateral action. In deciding which specific protections are required by due

process, the Supreme Court has sometimes looked to a three-part balancing test set forth in *Mathews*. *E.g.*, *Mathews*, 424 U.S. at 334-35. But the district court erred in asserting that the right to *any* pre-deprivation process, including the basic right to a pre-deprivation hearing, can be balanced away.

The *Mathews* Court fashioned its balancing analysis for the "identification of *the specific dictates* of due process," not to determine whether any pre-deprivation process is due. *Id.* at 335 (emphasis added). As this Court has explained, in the event of a deprivation, "the amount of process required can never be reduced to zero—that is, the government is never relieved of its duty to provide *some* notice and *some* opportunity to be heard prior to final deprivation of a property interest." *Propert*, 948 F.2d at 1332; *see also Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570-71 (1972) ("[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." (citation omitted)).

Balancing is then relevant only to the precise procedures afforded. *See Fuentes*, 407 U.S. at 86. And as this Court has held, the "constitutional requirement of some kind of hearing means, *at a minimum*, that the affected individual must have *a meaningful opportunity to present his case before a neutral decisionmaker*." *Propert*, 948 F.2d at 1333 (emphases added). That is exactly what the district court erroneously held *not* to be required here.

The factors the district court considered controlling only underscore the error of balancing away the right to a pre-deprivation hearing before a neutral decisionmaker.

1. The district court recognized that the burdens of a UAO are severe—they can literally put a company out of business. Nonetheless, the court held that the *cost* of providing a pre-deprivation hearing outweighs a company's interest in *survival*. *See Gen. Elec. II.*, 595 F. Supp. 2d at 30, 38. That is extraordinary. No one ever promised that providing due process would be cheap. But the Due Process Clause is not some suspect unfunded mandate that can be bargained away. As the Supreme Court has explained, "[a] prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right." *Fuentes*, 407 U.S. at 90 & n.22. In *Fuentes*, the Court held that costs do not offset the right to a pre-deprivation hearing before the seizure of a household appliance such as a humble toaster. *See id.* at 89-90. The cost of a judicial hearing may well exceed the value of a toaster. But pre-deprivation process is still required because our Nation values, and our Constitution demands, fair procedures before the government deprives a citizen of a property interest.

Moreover, the notion that costs do not outweigh the interest in process before being deprived of a *toaster*, but do outweigh the interest in avoiding the

corporate equivalent of the *death penalty*, is manifestly absurd. While it is unlikely that a single UAO would bankrupt a large company like GE, a UAO's extraordinary consequences can put smaller businesses out of business, as the district court recognized. And while a company may or may not be greater than the sum of its parts, its very existence is surely a weightier due process interest than the toaster in its lunch room.

The district court's consideration of cost not only fails to justify the denial of pre-deprivation process, it actually underscores the extent of the constitutional violation here. The district court correctly recognized that "the costs of a single hearing before a presiding officer are minimal, especially considering the size of the private interests at stake." *Gen. Elec. II*, 595 F. Supp. 2d at 38. But the court then went on to focus on the *cumulative* cost of providing process to all UAO recipients. Even on its own terms, that analysis makes little sense, because if *costs* are considered in the aggregate, then *benefits* should be aggregated as well. *See* GE Br. 39-40. And the district court recognized that costs are minimal not only in the abstract, but also in relation to "the size of the private interests at stake." *Gen. Elec. II*, 595 F. Supp. 2d at 38.

The district court's view that the "minimal" cost of a single UAO proceeding would become constitutionally prohibitive across all UAOs only emphasizes the extraordinary scope of the constitutional violation the district court

permitted. The district court remarked that EPA issues "approximately six UAOs to nineteen PRPs every *month*." *Id.* at 33. But that simply reflects EPA's decision to issue unilateral orders as a matter of course, rather than in actual emergencies where some departure from the normal due process requirements might be justified. An agency cannot dispense with a hearing just because it violates due process *en gros*; instead, the more frequent the violation, the more need for the courts to step in.

Nor is there any reason to believe that pre-deprivation process would cost more than post-deprivation process in this context. The type of hearing would presumably be the same; only the timing would be different. As in *James Daniel Good*, therefore, "[f]rom an administrative standpoint it makes little difference whether that hearing is held before or after the [deprivation]." 510 U.S. at 59; *see also Connecticut v. Doehr*, 501 U.S. 1, 16 (1991). The only reason that postponing process could save the government money here is that PRPs might avail themselves of pre-deprivation process, but not post-deprivation process years after the fact. The district court's expectation that PRPs would exercise pre-deprivation due process rights more frequently is hardly a reason to deny those rights. The fact that a right is very useful is no basis for denying it. Pre-deprivation relief is readily availed of precisely because it prevents a deprivation from occurring. A post-

deprivation remedy years later may provide a hearing at the precise moment a company is ready to move ahead.

In addition, the fact that companies rarely avail themselves of post-deprivation process years after the fact only underscores the inadequacy of such tardy relief, as well as the extraordinarily coercive nature of a UAO. Such coercion is hardly a *legitimate* governmental interest in not providing pre-deprivation process. Instead, providing timely process would enable UAO recipients to seek timely redress, and the availability of timely process would also help to deter government abuses from occurring in the first place.

2. In addition to considering the cost of providing even minimal due process protections, the district court held that GE was required to prove, as a factual matter, that EPA's failure to provide pre-deprivation process had led to a significant number of erroneous decisions. *Gen. Elec. II*, 595 F. Supp. 2d at 33-37. As a matter of law, however, the value of a hearing before a neutral decisionmaker—as opposed to the particular form of the hearing—is no more open to debate than the value of notice, judicial review, or unbiased judges; those are time-honored and fundamental bulwarks of due process.

The district court noted that one of the *Mathews* balancing factors is the *risk* of error if additional procedures are not provided. *Id.* at 21, 33. The court thereby erred in two respects, first by applying the *Mathews* balancing test to the

fundamental question whether *any* pre-deprivation process must be supplied, and again by converting the risk-of-error factor into a proof-of-error test. The courts have long recognized an *inherent* "risk of error" in any potential deprivation of property. *Mathews*, 424 U.S. at 344. A pre-deprivation hearing before a neutral decisionmaker is the minimal, basic protection against that risk of error—not something that requires additional factual justification. *See Propert*, 948 F.2d at 1332. Thus, the Supreme Court has squarely held that there can be "no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property." *Fuentes*, 407 U.S. at 83. While "other, less effective, safeguards may be among the considerations that affect the *form* of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind." *Id.* at 83-84 (emphasis added).

Even when *Mathews* balancing is relevant, therefore, the *Mathews* "risk of error" analysis looks to whether the potential risk is so high that the Due Process Clause requires *additional* protections above the core requirement of a pre-deprivation hearing before a neutral decisionmaker. Indeed, *Mathews* considered "the fairness and reliability of the *existing pretermination procedures*, and the probable value, if any, of *additional procedural safeguards.*" 424 U.S. at 343 (emphases added). And as GE explains, numerous courts have found an unacceptable risk of error even in situations where, unlike here, a great deal of pre-

deprivation process was provided. *See* GE Br. 47-48 (citing cases). Thus, *Mathews* provides no support for excusing the government from providing *any* pre-deprivation hearing before a neutral decisionmaker.

Focusing on whether the most rudimentary of procedural protections would prevent erroneous *results* also threatens to inject an improper substantive component into procedural due process analysis. "Fair procedures are not confined to the innocent. The question before us is the legality of the seizure, not the strength of the Government's case." *James Daniel Good*, 510 U.S. at 62.

The district court's demand for evidence of past errors not only underscores the extent to which the court departed from traditional due process analysis, it also raises serious practical problems. At the outset, it is by no means clear what number or percentage of actual errors would have to be shown to give rise to a constitutional violation. Is one enough? 5? 10? 20? By asking the wrong question, the district court's approach gives rise to intractable line-drawing problems.

The district court's actual-error test could also insulate a statute from constitutional challenge until it had been in operation for some time, because a plaintiff could not prove a rate of error until there had been multiple past deprivations. There is no justification for effectively insulating a statute from constitutional attack until multiple unconstitutional deprivations have already led

to erroneous results. Here, the absence of a significant number of judicial opinions directly reviewing past UAOs simply reflects that companies have little choice but to comply, and that the companies then lack adequate post-deprivation remedies. *See* GE Br. at 11, 14-17. It would be at best perverse to hold that, when an agency consistently pursues the most draconian sanctions as a means of forcing compliance, and thereby discourages judicial review, the resulting paucity of past adjudications favors the government. That would mean that, as an evidentiary matter, it would be *hardest* to prove the need for process in cases involving the *greatest* deprivations.

II. EPA'S UAO REGIME IS AN ABERRATION IN ADMINISTRATIVE LAW

The unconstitutionality of EPA's UAO scheme is underscored by the extent to which it departs not only from fundamental due process principles, but also from other administrative law regimes. EPA's unilateral orders are so coercive, and their consequences so dire, that one would expect *heightened* procedures to apply to their issuance. UAOs are also analogous to liens, which trigger due process protections. Nonetheless, EPA issues them with far less process than other agencies use in contexts involving greater exigency and less weighty private interests. Holding EPA to bedrock constitutional requirements would not upend other administrative law regimes; rather, it would simply bring EPA's UAO

scheme in line with the procedures followed by other agencies. EPA's unilateral orders are, quite simply, an outlier that should not be permitted to persist.

A. UAOs Are Extraordinarily Coercive

The district court correctly found that the recipient of a UAO suffers a deprivation whether or not it complies. *Gen. Elec. II*, 595 F. Supp. 2d at 29. As a practical matter, however, there is no choice: a company must comply, as shown by the fact that, of the thousands of times that EPA has issued a UAO, there are only a few documented instances of a company choosing not to comply.

Compliance with a UAO requires a heavy investment in clean-up costs, and even EPA admits that it constitutes a deprivation. *Id.* at 21, 27. UAO recipients have spent more than $5.5 billion to comply with UAOs, without any opportunity for a pre-deprivation challenge. GE Br. 13. Yet no matter how significant that deprivation is, non-compliance results in even greater harm. As the district court explained, "'the axe falls' at noncompliance." *Gen. Elec. II*, 595 F. Supp. 2d at 22. A PRP's decision not to comply results in *additional* harm—stock value suffers along with the corporate reputation. *Id.* at 22, 27. EPA thus finds itself in the curious position of conceding that the harm caused by complying with a UAO rises to the level of a constitutional deprivation, but the greater harm caused by the UAO when the company does not comply somehow does not rise to the constitutional level.

The fact is, the harm caused by not complying is so great that not complying is simply not a realistic option.

- A PRP that chooses not to comply with a UAO faces daily penalties of up to $32,500. *Id.* at 11-12 (citing 42 U.S.C. § 9606(b)). These penalties can accrue, at EPA's option, until EPA eventually brings suit to force compliance after an EPA funded clean-up. If a clean-up required the average time of three years, *id.* at 31, the fines would total approximately $36 million. If EPA waited another six years to bring suit, which it can, *see* 42 U.S.C. § 9613(g)(2), the fines could total approximately $130 million.
- EPA may also seek punitive damages of up to three times the clean-up costs, which tend to be substantial. 42 U.S.C. § 9607(c)(3).
- If a PRP does not comply with a UAO, it is "branded a recalcitrant actor," which "enhances the harm to stock price and brand value," "exposes PRPs to greater penalties, increases permitting times, bars PRPs from certain EPA programs, and impacts PRPs' relationships with certain stakeholders." *Gen. Elec. II*, 595 F. Supp. 2d at 22.

And all of those harms can hang over a company for years until EPA brings suit and the issues are finally adjudicated, years later, by a neutral decisionmaker.

In the meantime, as the district court noted, non-compliance can drive a company out of business. *Id.* at 30. It can also have a serious effect on a company's ongoing operations, such as "whether to bid for new projects or to hire additional employees," *id.*, which are additional irreparable harms.

Precisely because of the harms that result from non-compliance, companies rarely fail to comply with a UAO. There are only a few documented instances in which a company chose that route. *See* GE Br. 36. The dearth of non-complying PRPs reflects the exceptional coerciveness of UAOs and strongly supports GE's argument that the regulatory scheme amounts to a violation of due process under *Ex Parte Young*, 209 U.S. 123 (1908). *See* GE Br. 49 (UAOs "have intimidated PRPs from exercising the purported option of electing not to comply with a UAO so as to test an order's validity, giving rise to an independent due process violation under *Ex Parte Young.*"). The district court rejected GE's *Ex Parte Young* argument on the premise that the availability of a "sufficient cause" defense for PRPs in judicial proceedings would "adequately cur[e] any constitutional problems that steep CERLA fines and penalties could otherwise create." *Gen. Elec. II*, 595 F. Supp. 2d at 17. But with respect to the adequacy of the "sufficient cause" defense, the proof is in the proverbial pudding. The very factual record that was compiled in the district court demonstrates the inadequacy of the "sufficient cause" defense. If that were a meaningful defense, the near complete absence of

companies choosing the route of non-compliance with judicial review would be inexplicable. The explanation is straightforward: non-compliance is not a meaningful option and the "sufficient cause" defense does not alter that reality.

Indeed, the handful of PRPs that have elected to seek judicial review are the isolated exceptions that prove the rule—companies that either lacked the resources to comply with a UAO and had to take their chances, or perhaps miscalculated and provided a cautionary example for other companies. The district court's observation that the small non-compliance rate reflects an "acceptable rate of error," *id.* at 28, misses the point. It says little about accuracy but volumes about consequences: it confirms that non-compliance is not a viable option. It highlights the remarkable efficacy and payoff of UAOs for EPA and illustrates precisely why EPA issues UAOs as a matter of routine course, rather than as an emergency tool in exigent environmental circumstances. *See* GE Br. 45-46. The fact that virtually every UAO recipient chooses the path that EPA concedes to be a constitutional deprivation is all one needs to know about the unilateral orders' extraordinarily coercive effect.

B. UAOs Directly Encumber Property Rights In A Manner That Effects An Immediate Deprivation Analogous To Government Imposition Of Liens And Other Encumbrances

Whether or not a company ultimately decides to comply with a UAO, the government's imposition of the UAO effects an immediate and tangible

deprivation on the company. The deprivation is especially clear when, as is often the case, the UAO recipient is the owner of the property, because the property is immediately encumbered as a practical matter. Transferring the property at least without retaining environmental liability becomes difficult, if not impossible. The injury to the owner of the property is distinct, palpable and immediate, much the way a property owner suffers an immediate injury from the imposition of a lien. The Supreme Court has long made clear that when a lien or similar encumbrance is issued by the government, it works a deprivation and triggers the requirements of due process. "[E]ven temporary or partial impairments to property rights that attachments, liens, and *other similar encumbrances* entail are sufficient to merit due process protection." *Doehr*, 501 U.S. at 12 (emphasis added). UAOs fit comfortably within *Doehr*'s conception of "similar encumbrances," because their impact is immediate and the government imposition is public, notorious and cloaked in formality. *Cf. Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 298-300 (1981) (immediate cessation order halting surface mining operations was cognizable deprivation of property); *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 281, 288-91 (3d Cir. 2008) (assessment of inmate account for medical expenses, even absent deduction of funds, was cognizable deprivation of property); *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1258-59 (11th Cir. 2003) (administrative compliance order was more than "merely complaint-like

instrument with no legal significance" and violated due process); *United States v. 408 Peyton Road SW*, 162 F.3d 644, 650-51 (11th Cir. 1998) (en banc) (arrest and seizure warrants for property, even absent physical seizure, were cognizable deprivations of property). As the district court explained below, "UAOs may essentially be viewed as condensed prosecutions *and* adjudications," as their denomination as "Orders" strongly implies. Dkt. 122 at 28 n.5 (emphasis added). They are not merely a government complaint or accusation—"they constitute a statement that the PRP is legally responsible for the violation and require the PRP to remedy wrongs through the fulfillment of certain responsibilities and penalties." *Id.*

In *Doehr*, the Court held that due process required notice and a pre-deprivation hearing for a prejudgment attachment of real estate. The Court explained that, although there had been no permanent or physical deprivation or any final determination of ultimate liability, the attachment nonetheless significantly impaired Doehr's rights as a property owner: "attachment clouds title; impairs ability to sell or otherwise alienate the property; taints any credit rating; reduces chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." 501 U.S. at 11; *see also Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 85 (1988). In *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (en

banc), the First Circuit held that the EPA's filing of a CERCLA lien to recover clean-up costs from PRPs had "substantially the same effect . . . as the attachment had on the plaintiff in *Doehr*—clouding title, limiting alienability, affecting current and potential mortgages." *Id.* at 1518. The First Circuit thus concluded that CERCLA's lien provision denied due process by failing to provide for notice and a pre-deprivation hearing. *See id.* at 1523. As with a UAO, a CERCLA lien does not constitute a final determination of liability—the PRP still has the theoretical right to challenge EPA's conclusion, *see* 42 U.S.C. § 9607(*l*)(4)—but it nonetheless has an immediate real world impact on the affected property that demands due process protection.

EPA's issuance of a UAO to a property owner, much like a lien on the allegedly contaminated property, limits alienability and deters potential buyers and mortgage lenders. A UAO does not deprive the owner of the physical use or possession of the property. But the issuance of a UAO immediately reduces the property's value and impairs the PRP's right to dispose of the property. Moreover, a UAO, like a lien, "is not for any sum certain" and therefore may leave potential buyers and mortgage lenders uncertain as to the extent of the ultimate liability and the consequential ultimate value of the property. *Reardon*, 947 F.2d at 1519; *see also Burns*, 544 F.3d at 289. And a UAO, like a lien, "may be in place for a considerable time without an opportunity for a hearing" because CERCLA's

statute of limitations throws the judicial determination "so far into the future as to render it inadequate." *Reardon*, 947 F.2d at 1520. Accordingly, EPA's very issuance of a UAO effects a cognizable deprivation of a degree and kind directly analogous to that of a lien, and warrants similar due process protections, or at least some due process protections. Yet EPA imposes these immediate and potentially ruinous consequences without so much as a nod in the direction of the Due Process Clause.

C. Denial Of Pre-Deprivation Or Even Prompt Post-Deprivation Process Is Aberrational

The UAO regime is aberrational because it imposes such severe deprivations without any pre-deprivation process even in the absence of emergency or other extraordinary circumstances. Nor do PRPs have a right to prompt post-deprivation process. These extreme features of the UAO regime set it apart from other administrative law statutes, including ones that involve real emergencies.

1. Most administrative law statutes provide pre-deprivation process, even when there is a greater governmental need for speed than here and the private interests are, if anything, less weighty. For example, the Consumer Product Safety Act permits the Consumer Product Safety Commission ("CPSC") to file an action in district court against an "imminently hazardous consumer product" and the "manufacturer, distributor, or retailer of such product." 15 U.S.C. § 2061(a). The Act defines such a product as "a consumer product which presents imminent and

unreasonable risk of death, serious illness, or severe personal injury." *Id.* Even so, the CPSC must bring an action in an Article III court *before* halting the manufacture or distribution of a hazardous product. *See id*. §§ 2061(a)-(b).

Likewise, the Occupational Safety and Health Act permits the Secretary of Labor to petition a federal district court to "restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter." 29 U.S.C. § 662(a). Thus, even in cases where the employer's violation places employees at "immediate[]" risk of death, Congress required pre-deprivation process.

Especially where, as here, there is no emergency, administrative law statutes typically require pre-deprivation process. For instance, the Federal Trade Commission may bring suit in federal district court to seek an injunction where a person "is violating, or is about to violate, any provision of law enforced by the [Commission]" and an injunction "would be in the interest of the public." 15 U.S.C. § 53(b).

2. Even in true emergencies (unlike here), other administrative law statutes typically provide for prompt post-deprivation process. Needless to say, there is a vital governmental interest in maintaining the secrecy associated with

nuclear weapons and nuclear energy, as well as preventing the proliferation of nuclear weapons. Thus, the Atomic Energy Act authorizes the Secretary of Energy to issue orders to "prohibit the dissemination" of sensitive information related to nuclear weapons and atomic energy. 42 U.S.C. § 2168(a)(2). The Secretary may issue such orders where "dissemination of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of (A) illegal production of nuclear weapons, or (B) theft, diversion, or sabotage of nuclear materials, equipment, or facilities." *Id.* But anyone affected by such an order may seek immediate judicial review. *See id.* § 2168(d) (citing 5 U.S.C. § 552(a)(4)(B)). Even in this extreme scenario, the statutory regime provides immediate post-deprivation review.

In a less potentially apocalyptic realm, the Securities Exchange Act of 1934 authorizes the Securities and Exchange Commission ("SEC") to prevent major disruptions in financial markets without providing pre-deprivation process. The SEC may "in an emergency" "summarily take" action to restore order to financial markets and to ensure proper settlement of transactions. 15 U.S.C. § 78*l*(k)(2). The Act defines "emergency" as, in part, "a major market disturbance" such as "sudden and excessive fluctuations of securities prices generally" or "a major disturbance" that disrupts "the functioning of securities markets." *Id.*

§ 78*l*(k)(7)(A). The Act justifies the lack of a pre-deprivation remedy with prompt post-deprivation process in a United States Court of Appeals. *Id.* § 78y(a).

The Commodity Futures Trading Commission Act mirrors the Securities Exchange Act of 1934 in some ways. It authorizes the Commodity Futures Trading Commission ("CFTC") "to direct" certain parties, for example, to set "temporary emergency margin levels on any futures contract" when the Commission "has reason to believe that an emergency exists." 7 U.S.C. § 12a(9). While the Act allows unilateral action in emergencies, it also permits an affected party to seek review immediately before a United States Court of Appeals. *Id.*

3. Several statutes explicitly provide dual tracks for emergencies and non-emergencies. These statutes provide perhaps the best snapshot of constitutional due process principles in action.

For example, the Federal Aviation Act authorizes the Administrator of the Federal Aviation Administration to suspend or revoke an operating license for purposes of safety or otherwise to protect the public interest. 49 U.S.C. § 44709(b). "Except in an emergency," notice and "an opportunity to answer" are required. *Id.* § 44709(c). In emergency situations, the Administrator's order becomes effective immediately, *id.* § 44709(e)(2), but the affected party may immediately submit a petition for review by the National Transportation Safety

Board ("NTSB"), *id.* § 44709(e)(3). The NTSB must review and decide the petition no more than *five days* after it is filed. *Id.*

Likewise, under the Surface Mining Control and Reclamation Act, the Secretary of the Interior has authority to investigate violations. In non-emergency situations, the Secretary must "issue a notice to the permittee" and "provid[e] opportunity for public hearing." 30 U.S.C. § 1271(a)(3). In situations involving "imminent danger to the health or safety of the public" or "imminent environmental harm," the Secretary has authority to issue a cessation order in the absence of pre-deprivation process. *Id.* § 1271(a)(2). The adversely affected party may immediately seek relief from the order by the Secretary, and the Secretary must respond within five days. *Id.* § 1275(c). If unsuccessful, the affected party may then seek an adjudicatory hearing followed by judicial review. *Id.* § 1276. Because the "mine operators are afforded prompt and adequate post-deprivation administrative hearings and an opportunity for judicial review," these emergency cessation orders provide adequate due process. *Hodel*, 452 U.S. at 303.

4. Outside of the context of EPA's issuance of UAOs under various statutes, the Chamber is aware of *no* administrative law regime comparable to the one at issue here. And there is nothing unique about EPA that warrants an exception to normal constitutional principles. Indeed, if anything, EPA's authority to seek an abatement order in court or to undertake clean-ups directly—which it

does in true emergencies—makes its unilateral impositions in non-emergencies all the more troubling. Moreover, under multiple *other* environmental statutes, EPA provides pre-deprivation process, or at least prompt post-deprivation process in the event of an actual emergency. *See* GE Br. 40-41. Thus, holding the UAO scheme unconstitutional would only uphold the most basic of due process principles, and it would hardly threaten the operation of the modern administrative state

CONCLUSION

For the reasons stated above, the Chamber urges this Court to reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, glossary, certificates of service and compliance, but including footnotes) contains 6932 words as determined by the word-counting feature of Microsoft Word 2000.

/s/ Daryl Joseffer
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A D D E N D U M

Addendum to Statutory and Regulatory Provisions

In accordance with Rule 28 of the Federal Rules of Appellate Procedure, and D.C. Circuit Rule 28(a)(5), this Addendum sets forth the relevant parts of the pertinent statutes and regulations cited in the brief of *Amicus Curiae* Chamber of Commerce of the United States of America. Except for the following, all applicable statutes are contained in the Brief of Plaintiff-Appellant.

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7 U.S.C. § 12a

Title 7. Agriculture
Chapter 1. Commodity Exchanges

§ 12a. Registration of commodity dealers and associated persons; regulation of registered entities

The Commission is authorized--

* * *

(9) to direct the registered entity, whenever it has reason to believe that an emergency exists, to take such action as in the Commission's judgment is necessary to maintain or restore orderly trading in or liquidation of any futures contract, including, but not limited to, the setting of temporary emergency margin levels on any futures contract, and the fixing of limits that may apply to a market position acquired in good faith prior to the effective date of the Commission's action. The term “emergency” as used herein shall mean, in addition to threatened or actual market manipulations and corners, any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity. Any action taken by the Commission under this paragraph shall be subject to review only in the United States Court of Appeals for the circuit in which the party seeking review resides or has its principal place of business, or in the United States Court of Appeals for the

District of Columbia Circuit. Such review shall be based upon an examination of all the information before the Commission at the time the determination was made. The court reviewing the Commission's action shall not enter a stay or order of mandamus unless it has determined, after notice and hearing before a panel of the court, that the agency action complained of was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Nothing herein shall be deemed to limit the meaning or interpretation given by a registered entity to the terms “market emergency”, “emergency”, or equivalent language in its own bylaws, rules, regulations, or resolutions;

* * *

15 U.S.C. § 53

Title 15. Commerce and Trade
Chapter 2. Federal Trade Commission; Promotion of Export Trade and Prevention of Unfair Methods of Competition
Subchapter I. Federal Trade Commission

§ 53. False advertisements; injunctions and restraining orders

* * *

(b) Temporary restraining orders; preliminary injunctions

Whenever the Commission has reason to believe--

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public--

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be

specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

* * *

15 U.S.C. § 78*l*

Title 15. Commerce and Trade
Chapter 2B. Securities Exchanges

§ 78*l*. Registration requirements for securities

* * *

(k) Trading suspensions; emergency authority

(1) Trading suspensions

If in its opinion the public interest and the protection of investors so require, the Commission is authorized by order--

(A) summarily to suspend trading in any security (other than an exempted security) for a period not exceeding 10 business days, and

(B) summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding 90 calendar days.

The action described in subparagraph (B) shall not take effect unless the Commission notifies the President of its decision and the President notifies the Commission that the President does not disapprove of such decision. If the actions described in subparagraph (A) or (B) involve a security futures product, the Commission shall consult with and consider the views of the Commodity Futures Trading Commission.

(2) Emergency orders

(A) In general

The Commission, in an emergency, may by order summarily take such action to alter, supplement, suspend, or impose requirements or restrictions with respect to any matter or action subject to regulation by the Commission or a self-regulatory organization under the securities laws, as the Commission determines is necessary in the public interest and for the protection of investors--

(i) to maintain or restore fair and orderly securities markets (other than markets in exempted securities);

(ii) to ensure prompt, accurate, and safe clearance and settlement of transactions in securities (other than exempted securities); or

(iii) to reduce, eliminate, or prevent the substantial disruption by the emergency of--

(I) securities markets (other than markets in exempted securities), investment companies, or any other significant portion or segment of such markets; or

(II) the transmission or processing of securities transactions (other than transactions in exempted securities).

(B) Effective period

An order of the Commission under this paragraph shall continue in effect for the period specified by the Commission, and may be extended. Except as provided in subparagraph (C), an order of the Commission under this paragraph may not continue in effect for more than 10 business days, including extensions.

(C) Extension

An order of the Commission under this paragraph may be extended to continue in effect for more than 10 business days if, at the time of the extension, the Commission finds that the emergency still exists and determines that the continuation of the order beyond 10 business days is necessary in the public interest and for the protection of investors to attain an objective described in clause (i), (ii), or (iii) of subparagraph (A). In no event shall an order of the Commission under this paragraph continue in effect for more than 30 calendar days.

(D) Security futures

If the actions described in subparagraph (A) involve a security futures product, the Commission shall consult with and consider the views of the Commodity Futures Trading Commission.

(E) Exemption

In exercising its authority under this paragraph, the Commission shall not be required to comply with the provisions of--

(i) section 78s(c) of this title; or

(ii) section 553 of Title 5.

(3) Termination of emergency actions by President

The President may direct that action taken by the Commission under paragraph (1)(B) or paragraph (2) of this subsection shall not continue in effect.

(4) Compliance with orders

No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in contravention of an order of the Commission under this subsection unless such order has been stayed, modified, or set aside as provided in paragraph (5) of this subsection or has ceased to be effective upon direction of the President as provided in paragraph (3).

(5) Limitations on review of orders

An order of the Commission pursuant to this subsection shall be subject to review only as provided in section 78y(a) of this title. Review shall be based on an examination of all the information before the Commission at the time such order

was issued. The reviewing court shall not enter a stay, writ of mandamus, or similar relief unless the court finds, after notice and hearing before a panel of the court, that the Commission's action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(6) Consultation

Prior to taking any action described in paragraph (1)(B), the Commission shall consult with and consider the views of the Secretary of the Treasury, the Board of Governors of the Federal Reserve System, and the Commodity Futures Trading Commission, unless such consultation is impracticable in light of the emergency.

(7) Definitions

For purposes of this subsection--

(A) the term “emergency” means--

(i) a major market disturbance characterized by or constituting--

(I) sudden and excessive fluctuations of securities prices generally, or a substantial threat thereof, that threaten fair and orderly markets; or

(II) a substantial disruption of the safe or efficient operation of the national system for clearance and settlement of transactions in securities, or a substantial threat thereof; or

(ii) a major disturbance that substantially disrupts, or threatens to substantially disrupt--

(I) the functioning of securities markets, investment companies, or any other significant portion or segment of the securities markets; or

(II) the transmission or processing of securities transactions; and

(B) notwithstanding section 78c(a)(47) of this title, the term "securities laws" does not include the Public Utility Holding Company Act of 1935.

* * *

15 U.S.C. § 78y

Title 15. Commerce and Trade
Chapter 2B. Securities Exchanges

§ 78y. Court review of orders and rules

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(1) A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

(2) A copy of the petition shall be transmitted forthwith by the clerk of the court to a member of the Commission or an officer designated by the Commission for that purpose. Thereupon the Commission shall file in the court the record on which the order complained of is entered, as provided in section 2112 of Title 28 and the Federal Rules of Appellate Procedure.

(3) On the filing of the petition, the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.

(4) The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

(5) If either party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there was reasonable ground for failure to adduce it before the Commission, the court may remand the case to the Commission for further proceedings, in whatever manner and on whatever conditions the court considers appropriate. If the case is remanded to the Commission, it shall file in the court a supplemental record containing any new evidence, any further or modified findings, and any new order.

* * *

15 U.S.C. § 2061

Title 15. Commerce and Trade
Chapter 47. Consumer Product Safety

§ 2061. Imminent hazards

(a) Filing of action

The Commission may file in a United States district court an action (1) against an imminently hazardous consumer product for seizure of such product under subsection (b)(2) of this section, or (2) against any person who is a manufacturer, distributor, or retailer of such product, or (3) against both. Such an action may be filed notwithstanding the existence of a consumer product safety rule applicable to such product, or the pendency of any administrative or judicial proceedings under any other provision of this chapter. As used in this section, and hereinafter in this chapter, the term "imminently hazardous consumer product" means a consumer product which presents imminent and unreasonable risk of death, serious illness, or severe personal injury.

(b) Relief; product condemnation and seizure

(1) The district court in which such action is filed shall have jurisdiction to declare such product an imminently hazardous consumer product, and (in the case of an action under subsection (a)(2) of this section) to grant (as ancillary to such declaration or in lieu thereof) such temporary or permanent relief as may be necessary to protect the public from such risk. Such relief may include a

mandatory order requiring the notification of such risk to purchasers of such product known to the defendant, public notice, the recall, the repair or the replacement of, or refund for, such product.

(2) In the case of an action under subsection (a)(1) of this section, the consumer product may be proceeded against by process of libel for the seizure and condemnation of such product in any United States district court within the jurisdiction of which such consumer product is found. Proceedings and cases instituted under the authority of the preceding sentence shall conform as nearly as possible to proceedings in rem in admiralty.

* * *

29 U.S.C. § 662

Title 29. Labor
Chapter 15. Occupational Safety and Health

§ 662. Injunction proceedings

(a) Petition by Secretary to restrain imminent dangers; scope of order

The United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.

* * *

30 U.S.C. § 1271

Title 30. Mineral Lands and Mining
Chapter 25. Surface Mining Control and Reclamation
Subchapter V. Control of the Environmental Impacts of Surface Coal Mining

§ 1271. Enforcement

(a) Notice of violation; Federal inspection; waiver of notification period; cessation order; affirmative obligation on operator; suspension or revocation of permits; contents of notices and orders

(1) Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of

significant environmental harm exists and that the State has failed to take appropriate action. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection.

(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this chapter or any permit condition required by this chapter, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to paragraph (5) of this subsection. Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety

of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm.

(3) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 1252, or section 1254(b) of this title, or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this chapter or any permit condition required by this chapter; but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement of the violation and providing opportunity for public hearing.

If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Secretary or his authorized representative, the Secretary or his authorized representative finds

that the violation has not been abated, he shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to paragraph (5) of this subsection. In the order of cessation issued by the Secretary under this subsection, the Secretary shall determine the steps necessary to abate the violation in the most expeditious manner possible, and shall include the necessary measures in the order.

(4) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 1252 or section 1254 of this title or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that a pattern of violations of any requirements of this chapter or any permit conditions required by this chapter exists or has existed, and if the Secretary or his authorized representative also find that such violations are caused by the unwarranted failure of the permittee to comply with any requirements of this chapter or any permit conditions, or that such violations are willfully caused by the permittee, the Secretary or his authorized representative shall forthwith issue an order to the permittee to show cause as to

why the permit should not be suspended or revoked and shall provide opportunity for a public hearing. If a hearing is requested the Secretary shall inform all interested parties of the time and place of the hearing. Upon the permittee's failure to show cause as to why the permit should not be suspended or revoked, the Secretary or his authorized representative shall forthwith suspend or revoke the permit.

(5) Notices and orders issued pursuant to this section shall set forth with reasonable specificity the nature of the violation and the remedial action required, the period of time established for abatement, and a reasonable description of the portion of the surface coal mining and reclamation operation to which the notice or order applies. Each notice or order issued under this section shall be given promptly to the permittee or his agent by the Secretary or his authorized representative who issues such notice or order, and all such notices and orders shall be in writing and shall be signed by such authorized representatives. Any notice or order issued pursuant to this section may be modified, vacated, or terminated by the Secretary or his authorized representative. A copy of any such order or notice shall be sent to the State regulatory authority in the State in which the violation occurs: *Provided*, That any notice or order issued pursuant to this section which requires cessation of mining by the operator shall expire within thirty days of actual notice to the operator unless a public hearing is held at the site or within such reasonable

proximity to the site that any viewings of the site can be conducted during the course of public hearing.

* * *

30 U.S.C. § 1275

Title 30. Mineral Lands and Mining
Chapter 25. Surface Mining Control and Reclamation
Subchapter V. Control of the Environmental Impacts of Surface Coal Mining

§ 1275. Review by Secretary

(a) Application for review of order or notice; investigation; hearing; notice

(1) A permittee issued a notice or order by the Secretary pursuant to the provisions of paragraphs (2) and (3) of subsection (a) of section 1271 of this title, or pursuant to a Federal program or the Federal lands program or any person having an interest which is or may be adversely affected by such notice or order or by any modification, vacation, or termination of such notice or order, may apply to the Secretary for review of the notice or order within thirty days of receipt thereof or within thirty days of its modification, vacation, or termination. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of the applicant or the person having an interest which is or may be adversely affected, to enable the applicant or such person to present information relating to the issuance and continuance of such notice or order or the modification, vacation, or termination thereof. The filing of an application for review under this subsection shall not operate as a stay of any order or notice.

(2) The permittee and other interested persons shall be given written notice of the

time and place of the hearing at least five days prior thereto. Any such hearing shall be of record and shall be subject to section 554 of Title 5.

(b) Findings of fact; issuance of decision

Upon receiving the report of such investigation, the Secretary shall make findings of fact, and shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the notice or order, or the modification, vacation, or termination of such notice or order complained of and incorporate his findings therein. Where the application for review concerns an order for cessation of surface coal mining and reclamation operations issued pursuant to the provisions of paragraph (2) or (3) of subsection (a) of section 1271 of this title, the Secretary shall issue the written decision within thirty days of the receipt of the application for review, unless temporary relief has been granted by the Secretary pursuant to subsection (c) of this section or by the court pursuant to subsection (c) of section 1276 of this title.

(c) Temporary relief; issuance of order or decision granting or denying relief

Pending completion of the investigation and hearing required by this section, the applicant may file with the Secretary a written request that the Secretary grant temporary relief from any notice or order issued under section 1271 of this title, a Federal program or the Federal lands program together with a detailed statement giving reasons for granting such relief. The Secretary shall issue an order or

decision granting or denying such relief expeditiously: *Provided*, That where the applicant requests relief from an order for cessation of coal mining and reclamation operations issued pursuant to paragraph (2) or (3) of subsection (a) of section 1271 of this title, the order or decision on such a request shall be issued within five days of its receipt. The Secretary may grant such relief, under such conditions as he may prescribe, if--

(1) a hearing has been held in the locality of the permit area on the request for temporary relief in which all parties were given an opportunity to be heard;

(2) the applicant shows that there is substantial likelihood that the findings of the Secretary will be favorable to him; and

(3) such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources.

(d) Notice and hearing with respect to section 1271 order to show cause

Following the issuance of an order to show cause as to why a permit should not be suspended or revoked pursuant to section 1271 of this title, the Secretary shall hold a public hearing after giving written notice of the time, place, and date thereof. Any such hearing shall be of record and shall be subject to section 554 of Title 5. Within sixty days following the public hearing, the Secretary shall issue and furnish to the permittee and all other parties to the hearing a written decision, and the reasons therefor, concerning suspension or revocation of the permit. If the

Secretary revokes the permit, the permittee shall immediately cease surface coal mining operations on the permit area and shall complete reclamation within a period specified by the Secretary, or the Secretary shall declare as forfeited the performance bonds for the operation.

(e) Costs

Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper.

42 U.S.C. § 2168

Title 42. The Public Health and Welfare
Chapter 23. Development and Control of Atomic Energy
Division a. Atomic Energy
Subchapter XI. Control of Information

§ 2168. Dissemination of unclassified information

(a) Dissemination prohibited; rules and regulations; determinations of Secretary prerequisite to issuance of prohibiting regulations or orders; criteria

(1) In addition to any other authority or requirement regarding protection from dissemination of information, and subject to section 552(b)(3) of Title 5, the Secretary of Energy (hereinafter in this section referred to as the "Secretary"), with respect to atomic energy defense programs, shall prescribe such regulations, after notice and opportunity for public comment thereon, or issue such orders as may be necessary to prohibit the unauthorized dissemination of unclassified information pertaining to--

(A) the design of production facilities or utilization facilities;

(B) security measures (including security plans, procedures, and equipment) for the physical protection of (i) production or utilization facilities, (ii) nuclear material contained in such facilities, or (iii) nuclear material in transit; or

(C) the design, manufacture, or utilization of any atomic weapon or component if the design, manufacture, or utilization of such weapon or component was contained in any information declassified or removed from the Restricted Data

category by the Secretary (or the head of the predecessor agency of the Department of Energy) pursuant to section 2162 of this title.

(2) The Secretary may prescribe regulations or issue orders under paragraph (1) to prohibit the dissemination of any information described in such paragraph only if and to the extent that the Secretary determines that the unauthorized dissemination of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of (A) illegal production of nuclear weapons, or (B) theft, diversion, or sabotage of nuclear materials, equipment, or facilities.

(3) In making a determination under paragraph (2), the Secretary may consider what the likelihood of an illegal production, theft, diversion, or sabotage referred to in such paragraph would be if the information proposed to be prohibited from dissemination under this section were at no time available for dissemination.

(4) The Secretary shall exercise his authority under this subsection to prohibit the dissemination of any information described in paragraph (1) of this subsection--

(A) so as to apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security; and

(B) upon a determination that the unauthorized dissemination of such information could reasonably be expected to result in a significant adverse effect on the health

and safety of the public or the common defense and security by significantly increasing the likelihood of (i) illegal production of nuclear weapons, or (ii) theft, diversion, or sabotage of nuclear materials, equipment, or facilities.

(5) Nothing in this section shall be construed to authorize the Secretary to authorize the withholding of information from the appropriate committees of the Congress.

* * *

(d) Judicial review

Any determination by the Secretary concerning the applicability of this section shall be subject to judicial review pursuant to section 552(a)(4)(B) of Title 5.

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49 U.S.C. § 44709

Title 49. Transportation
Subtitle VII. Aviation Programs
Part A. Air Commerce and Safety
Subpart III. Safety
Chapter 447. Safety Regulation

§ 44709. Amendments, modifications, suspensions, and revocations of certificates

(a) Reinspection and reexamination.--The Administrator of the Federal Aviation Administration may reinspect at any time a civil aircraft, aircraft engine, propeller, appliance, design organization, production certificate holder, air navigation facility, or air agency, or reexamine an airman holding a certificate issued under section 44703 of this title.

(b) Actions of the Administrator.--The Administrator may issue an order amending, modifying, suspending, or revoking--

(1) any part of a certificate issued under this chapter if--

(A) the Administrator decides after conducting a reinspection, reexamination, or other investigation that safety in air commerce or air transportation and the public interest require that action; or

(B) the holder of the certificate has violated an aircraft noise or sonic boom standard or regulation prescribed under section 44715(a) of this title; and

(2) an airman certificate when the holder of the certificate is convicted of violating section 13(a) of the Fish and Wildlife Act of 1956 (16 U.S.C. 742j-

1(a)).

(c) Advice to certificate holders and opportunity to answer.--Before acting under subsection (b) of this section, the Administrator shall advise the holder of the certificate of the charges or other reasons on which the Administrator relies for the proposed action. Except in an emergency, the Administrator shall provide the holder an opportunity to answer the charges and be heard why the certificate should not be amended, modified, suspended, or revoked.

(d) Appeals.--(1) A person adversely affected by an order of the Administrator under this section may appeal the order to the National Transportation Safety Board. After notice and an opportunity for a hearing, the Board may amend, modify, or reverse the order when the Board finds--

(A) if the order was issued under subsection (b)(1)(A) of this section, that safety in air commerce or air transportation and the public interest do not require affirmation of the order; or

(B) if the order was issued under subsection (b)(1)(B) of this section--

(i) that control or abatement of aircraft noise or sonic boom and the public health and welfare do not require affirmation of the order; or

(ii) the order, as it is related to a violation of aircraft noise or sonic boom standards and regulations, is not consistent with safety in air commerce or air transportation.

(2) The Board may modify a suspension or revocation of a certificate to imposition of a civil penalty.

(3) When conducting a hearing under this subsection, the Board is not bound by findings of fact of the Administrator but is bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law.

(e) Effectiveness of orders pending appeal.--

(1) In general.--When a person files an appeal with the Board under subsection (d), the order of the Administrator is stayed.

(2) Exception.--Notwithstanding paragraph (1), the order of the Administrator is effective immediately if the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the order to be effective immediately.

(3) Review of emergency order.--A person affected by the immediate effectiveness of the Administrator's order under paragraph (2) may petition for a review by the Board, under procedures promulgated by the Board, of the Administrator's determination that an emergency exists. Any such review shall be requested not later than 48 hours after the order is received by the person. If the

Board finds that an emergency does not exist that requires the immediate application of the order in the interest of safety in air commerce or air transportation, the order shall be stayed, notwithstanding paragraph (2). The Board shall dispose of a review request under this paragraph not later than 5 days after the date on which the request is filed.

(4) Final disposition.--The Board shall make a final disposition of an appeal under subsection (d) not later than 60 days after the date on which the appeal is filed.

(f) Judicial review.--A person substantially affected by an order of the Board under this section, or the Administrator when the Administrator decides that an order of the Board under this section will have a significant adverse impact on carrying out this part, may obtain judicial review of the order under section 46110 of this title. The Administrator shall be made a party to the judicial review proceedings. Findings of fact of the Board are conclusive if supported by substantial evidence.

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have on this 22nd day of September, 2009, served a copy of the foregoing document by first-class mail, postage prepaid, upon:

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Dated at Washington, DC, this 22nd day of September, 2009.

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