# RECENT CASES

ADMINISTRATIVE LAW — DUE PROCESS — D.C. CIRCUIT UPHOLDS EPA SUPERFUND AUTHORITY TO ISSUE CLEANUP ORDERS REVIEWABLE ONLY UNDER THREAT OF PENALTY. — *General Electric Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010).

Federal agencies possess broad authority to unilaterally compel action by private parties. As a check on that power, the Due Process Clauses of the Fifth and Fourteenth Amendments require the government to provide "some kind of hearing" before depriving a party of liberty or property,[1] and this "'opportunity to be heard' . . . must be granted at a meaningful time and in a meaningful manner."[2] But such platitudes leave courts to determine what *kind* of hearing is "due" in a particular circumstance, and what manner is "meaningful."[3] Recently, in *General Electric Co. v. Jackson* (*GE*),[4] the D.C. Circuit upheld provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[5] (CERCLA, or "Superfund") under which a party can obtain a hearing to contest an Environmental Protection Agency (EPA) order to clean up a site only by refusing to comply, defending against a subsequent enforcement action, and risking daily fines and treble damages should it ultimately lose.[6] To reach this result, the court adopted an unwise rule that the threat of even enormous penalties does not deprive a party of access to a hearing if such penalties are inapplicable to "good faith" challenges.[7] This rule emerged from an incorrect reading of precedent, is ill-suited to its task, and disregards the Supreme Court's repeated instruction that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[8]

Under CERCLA, the EPA has "broad power to command . . . private parties to clean up hazardous waste sites."[9] Among

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[1] Goss v. Lopez, 419 U.S. 565, 579 (1975) (emphasis omitted); Wolff v. McDonnell, 418 U.S. 539, 557 (1974); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2362 (2001) (noting the distinction between individualized adjudication, where a hearing is required, and general rulemaking, where it is not).

[2] Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

[3] *See generally* Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1975).

[4] 610 F.3d 110 (D.C. Cir. 2010).

[5] 42 U.S.C. §§ 9601–9675 (2006).

[6] *GE*, 610 F.3d at 113, 115.

[7] *Id.* at 118–19.

[8] Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)) (internal quotation marks omitted).

[9] Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994).

the statute's mechanisms is the unilateral administrative order (UAO), which requires a potentially responsible party (PRP) to take remedial cleanup actions at a polluted site.[10] Prior to issuing a UAO, the EPA must provide notice and an opportunity for comment;[11] however, the PRP is not entitled to a hearing,[12] and the statute explicitly restricts the jurisdiction of federal courts to review the order.[13] Instead, a PRP wishing to challenge a UAO has two options: First, it can comply, incur the full cost of cleanup, and then seek reimbursement from the EPA.[14] Second, it can refuse compliance and wait to challenge the order's validity in a subsequent enforcement action brought by the EPA.[15] Should the EPA prevail in the enforcement action, CERCLA authorizes punitive damages up to three times the cost of cleanup as well as fines of $37,500 per day from the time the UAO was issued.[16] However, those penalties apply only if the PRP refused compliance "without sufficient cause," and they "may" (rather than "shall") be assessed and thus permit judicial discretion.[17]

In 2000, General Electric (GE) filed suit asserting that CERCLA, by affording review of an administrative order only after compliance or under threat of substantial penalty, unconstitutionally deprives PRPs of property without due process of the law.[18] Nine years later, the district court granted summary judgment to the EPA.[19] The par-

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[10] *See* 42 U.S.C. § 9606(a); *GE*, 610 F.3d at 113–14. UAOs may be issued only in cases of "imminent and substantial endangerment." 42 U.S.C. § 9606(a). However, it has been shown that the EPA takes an average of eight years between identifying a site and issuing a UAO and instead acts directly in genuine emergencies. *See* Gen. Elec. Co. v. Jackson (*GE IV*), 595 F. Supp. 2d 8, 32 (D.D.C. 2009) (citation omitted).

[11] 42 U.S.C. § 9613(k)(2)(B) (other requirements include a public meeting in the area affected).

[12] Gen. Elec. Co. v. Whitman (*GE I*), 257 F. Supp. 2d 8, 14 (D.D.C. 2003).

[13] 42 U.S.C. § 9613(h); *see also GE I*, 257 F. Supp. 2d at 14 ("The thrust of [§ 9613(h)] is that one cannot obtain pre-enforcement review of EPA orders . . . .").

[14] 42 U.S.C. § 9606(b)(2). However, review may still be difficult to obtain if the EPA refuses to consider the PRP's efforts sufficient and cleanup complete. *See* Emp'rs Ins. of Wausau v. Browner, 52 F.3d 656, 666 (7th Cir. 1995).

[15] *See* 42 U.S.C. § 9606(b)(1).

[16] *Id.* (daily fines); *id.* § 9607(c)(3) (treble damages). CERCLA establishes a fine of $25,000 per day, but that amount has been increased via an inflationary index. *See Adjustment of Civil Monetary Penalties for Inflation*, 40 C.F.R. § 19.4 (2010). The treble damages are incremental to the liability for cleanup, leading to a quadrupling of total costs for the PRP. *See* United States v. Parsons, 936 F.2d 526, 528 (11th Cir. 1991).

[17] 42 U.S.C. § 9606(b)(1) (daily fines); *id.* § 9607(c)(3) (treble damages).

[18] Gen. Elec Co. v. Johnson (*GE III*), 362 F. Supp. 2d 327, 332 (D.D.C. 2005). GE advanced two separate claims: a facial challenge directed to the statute's text, and a "pattern and practice" challenge asserting that the EPA utilized UAOs in an unconstitutional manner. *Id.* While this separate pattern and practice challenge posed substantial jurisdictional issues for the D.C. Circuit, *see GE*, 610 F.3d at 124–27, the court found it could "quickly dispose of its merits," *id.* at 127, and relied primarily on its analysis of the facial challenge to do so, *id.* at 128. This discussion therefore focuses on the facial challenge.

[19] The district court initially dismissed the suit, holding that the prohibition on pre-enforcement review deprived it of subject matter jurisdiction. *GE I*, 257 F. Supp. 2d 8, 31

ties agreed that costs incurred in a cleanup are protected property interests.[20] Thus, because a PRP's first option (comply, *then* seek review) imposes the costs prior to a hearing, CERCLA would pass constitutional muster only if the other statutory avenue (refuse to comply, receive hearing in subsequent enforcement action) sufficed as an adequate hearing at a meaningful time in a meaningful manner.

GE asserted that the hearing afforded via enforcement action suffered two fatal flaws, but the court rejected both arguments. First, GE claimed that noncompliance itself produced an immediate deprivation by impacting a PRP's stock price, brand equity, and financing costs.[21] The court agreed that a deprivation occurred,[22] but found that the EPA's error rate was sufficiently low[23] to render the lack of hearing unproblematic.[24] Second, GE claimed that the threatened penalties were so severe as to entirely preclude noncompliance, and thus recourse to a hearing, as a meaningful option.[25] Here, the court endorsed the conclusion of other circuits[26] that limitations on the penalties — making penalties applicable only for noncompliance without sufficient cause, and always subject to a judge's discretion — served as sufficient safeguards for PRPs with legitimate challenges and thus "adequately cur[ed] any constitutional problems."[27]

The D.C. Circuit affirmed.[28] Writing for the panel, Judge Tatel[29]

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(D.D.C. 2003). The D.C. Circuit reversed because challenges to specific orders were prohibited but challenges to the statute itself were not. Gen. Elec. Co. v. EPA (*GE II*), 360 F.3d 188, 191 (D.C. Cir. 2004) (per curiam). The district court then granted summary judgment to the EPA on GE's facial challenge in 2005. *GE III*, 362 F. Supp. 2d at 344. Four years later, the district court granted summary judgment to the EPA on GE's pattern and practice challenge as well, *see GE IV*, 595 F. Supp. 2d 8, 39 (D.D.C. 2009), at which point GE appealed both rulings, *GE*, 610 F.3d at 117.

[20] *GE IV*, 595 F. Supp. 2d at 27. Testimony by an expert witness for GE estimated the average cost of UAO compliance at $4 million, *see id.* at 30, but major cleanups can be orders of magnitude more expensive. GE's ongoing cleanup of the Hudson River, one of the largest Superfund cleanups ever, could cost the company well over $1 billion. *See* Andrew C. Revkin, *After Decades, Dredges Begin Cleaning Hudson*, N.Y. TIMES, May 16, 2009, at A1.

[21] *GE IV*, 595 F. Supp. 2d at 22.

[22] *Id.* at 27.

[23] Given the difficulty of challenging a UAO, evidence of errors is not readily available. GE presented evidence that three of the sixty-eight UAOs it had received were erroneous, but the court found that rate "acceptable." *Id.* at 37.

[24] *Id.* at 38–39. The court's conclusion on this point is likely wrong. While the requirement of "some kind of hearing" prior to a deprivation of property leaves a great deal of flexibility, it would seem rather clearly to exclude the option of *no* hearing. The D.C. Circuit did not reach this issue.

[25] *Id.* at 28.

[26] *See* Emp'rs Ins. of Wausau v. Browner, 52 F.3d 656, 666 (7th Cir. 1995); Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 391–92 (8th Cir. 1987); Wagner Seed Co. v. Daggett, 800 F.2d 310, 316 (2d Cir. 1986).

[27] *GE IV*, 595 F. Supp. 2d at 17.

[28] *GE*, 610 F.3d at 114.

[29] Judge Tatel was joined by Judges Rogers and Griffith.

rejected the notion that noncompliance itself created a deprivation.[30] The "pre-hearing stock price and brand value deprivations"[31] were merely "consequential"[32] injuries stemming from "damage [to] the PRP's reputation" and not legally cognizable.[33] With no property deprived, no particular process was due. The important question left before the court, then, was whether the potential penalties would in fact preclude a PRP from seeking review and thus leave it with no access to a hearing prior to the deprivation that accompanied compliance. And because its challenge was a facial one, GE would have to establish not that *it* had been precluded from seeking review but rather that CERCLA's structure would preclude review in virtually all cases.[34]

Judge Tatel framed GE's position as "hing[ing] on the Supreme Court's decision in *Ex Parte Young* and its progeny," under which "a statutory scheme violates due process if 'the penalties for disobedience are by fines so enormous . . . as to intimidate the [affected party] from resorting to the courts.'"[35] But, he found that an exception to *Ex parte Young* controlled the issue: "The Supreme Court has made clear . . . that statutes imposing fines — even 'enormous' fines — on noncomplying parties may satisfy due process if such fines are subject to a 'good faith' or 'reasonable ground[s]' defense."[36] Because CERCLA's sufficient cause defense is "quite similar to the . . . defenses the Supreme Court has found sufficient to satisfy due process,"[37] he found he had "no basis for concluding" that CERCLA ran afoul of *Ex parte Young*'s prohibition on coercive penalties.[38]

The D.C. Circuit erred by relying on what is effectively a per se rule that penalties do not "preclude a resort to the courts" so long as those penalties are subject to a "good faith" safeguard.[39] While Judge

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[30] *GE*, 610 F.3d at 119–24.

[31] *GE IV*, 595 F. Supp. 2d at 28.

[32] *GE*, 610 F.3d at 119.

[33] *Id.* at 121.

[34] *Id.* at 117.

[35] *Id.* at 118 (second and third alterations in original) (citation omitted) (quoting *Ex parte* Young, 209 U.S. 123, 147 (1908)).

[36] *Id.* (alteration in original) (quoting Reisman v. Caplin, 375 U.S. 440, 446–50 (1964); Okla. Operating Co. v. Love, 252 U.S. 331, 338 (1920)).

[37] *Id.* Although CERCLA's "sufficient cause" standard appears stricter than mere "good faith," courts have equated the two to avoid the more serious constitutional issues that a stricter standard would raise. *See* Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 390–92 (8th Cir. 1987).

[38] *GE*, 610 F.3d at 119. Judge Tatel thus "join[ed] three . . . sister circuits that have rejected similar *Ex Parte Young* challenges." *Id.*; *see* cases cited *supra* note 26.

[39] *See id.* (quoting *Young*, 209 U.S. at 146). Judge Tatel identified three safeguards: the sufficient cause defense (treated as a "good faith" defense), judicial discretion, and de novo review. *Id.* at 118. But these protections in effect collapse to a single good faith standard. Insofar as a good faith determination falls primarily to the subjective evaluation of a judge, an additional and explicit invocation of discretion adds little. A PRP would be unlikely to take comfort in the prospect of a judge's finding its challenge to be in bad faith, but nevertheless declining to impose a

Tatel properly stated the rule tentatively — a good faith safeguard "may" satisfy due process — he applied it uncritically. He conducted no analysis of, for instance, the deprivation at stake or the magnitude of the penalty, the feasibility of an earlier hearing, the clarity of the statute and the predictability of what might constitute good faith, or the degree to which a party might ultimately feel coerced by the interaction of those factors. Rather, the presence of the good faith safeguard per se established that, "[c]ontrary to GE's claim, . . . PRPs face no Hobson's choice" between complying and facing penalties.[40]

But the Supreme Court has not "made clear" that such a broadly applicable rule exists, and creating one is inappropriate. The issue before the court was whether the statute's penalties prevent parties from seeking a hearing; while the presence of a good faith safeguard might factor into that equation, it cannot alone provide an answer. Rather, ensuring meaningful access to a hearing requires a far more searching inquiry into a statute's operation.[41] Regardless of whether CERCLA would survive such an approach, analysis of the relevant factors would establish the proper boundaries for Congress when authorizing, and agencies when implementing, similar statutes in the future.

The *GE* court interpreted the Supreme Court's holding in *Reisman v. Caplin*[42] as providing "clear" precedent that penalties for seeking a hearing are permissible if inapplicable to good faith challenges;[43] however, this reliance was misplaced. As a preliminary matter, *Reisman* predates the Court's requirement of "some kind of hearing."[44] But more importantly, the *Reisman* Court gave no indication that it was establishing a general rule, provided no analysis that might buttress one, and ultimately held only that the availability of a "good faith" defense was "sufficient" to dispose of the case before it.[45]

Nor did the facts in *Reisman* bear similarities sufficient to justify an extension of its reasoning to *GE*. The administrative order in *Reisman* was a tax summons and the only "deprivation" was the requirement to appear at a hearing, and potentially to produce evidence.[46] While a targeted party was forced to appear at the hearing, it

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penalty. Similarly, while the promise of de novo review might improve a PRP's chances on the merits, it would not impact the determination of good faith that governs imposition of a penalty.

[40] *Id.* at 119.

[41] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970) ("The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.").

[42] 375 U.S. 440 (1964).

[43] *GE*, 610 F.3d at 118. The court cited *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 338 (1920), as further support, but that case is traditionally read as standing for the opposite proposition. *See, e.g.*, *Reisman*, 375 U.S. at 446 (describing *Love* as a "leading case[]" for the proposition that penalties can be so onerous as to preclude review).

[44] *See* cases cited *supra* notes 1–2, 8.

[45] *Reisman*, 375 U.S. at 447. Nor has the Court ever cited *Reisman* for the proposition.

[46] *Id.* at 445.

could use that venue to challenge any production order prior to complying.[47] Thus *Reisman* accounted for neither the substantial deprivation nor the direct comply-or-face-penalty tradeoff at the heart of the coercion alleged by GE. A good faith safeguard may ensure that a party receiving a tax summons is not coercively precluded from pursuing a hearing, but that conclusion offers little insight into the calculus faced by a PRP receiving a UAO.

Absent controlling precedent, the rule adopted in *GE* is a difficult one to defend and the court made no attempt to do so. The rule's crucial flaw is its failure to acknowledge that litigation has risks, and risks are costs. A party always faces *some* possibility that a court will issue an unfavorable ruling,[48] and the probability of such a ruling multiplied by the magnitude of its negative impact represents a genuine ex ante cost for a litigant to consider.[49] It follows, then, that when the government penalizes a party for pursuing ultimately unsuccessful review it has placed a cost — no matter the safeguards interposed — on obtaining a hearing. Any approach to determining whether that cost is too high, such that a statute violates due process, should be capable of distinguishing between those situations where the cost is impermissibly coercive, and those situations where it is not.[50]

An evaluation of the risk-cum-cost imposed by a particular statute depends upon both the magnitude and risk of penalty. The relevance of magnitude is most obvious: the prospect of a $5 penalty is unlikely to coerce, whereas $5 billion might. More precisely, it is the *proportional* magnitude that should be of concern. The same $5 billion penalty will have a very different effect on a party seeking to appeal $5 million in liability than on one facing $50 billion. But even the threat of a thousand-fold increase in liability would not preclude legitimate appeals if a party could know with absolute certainty that any good

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[47] *See id.* at 445–46; *see also* Wagner Elec. Corp. v. Thomas, 612 F. Supp. 736, 745–46 (D. Kan. 1985) (noting that cases like *Reisman* "construe statutes granting administrative hearings"); Frank B. Cross, *Procedural Due Process Under Superfund*, 1986 BYU L. REV. 919, 947–48.

[48] *See* Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980, 988–89 (2009); *cf.* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 885 (1998) ("[N]on-negligent parties sometimes will be found liable by mistake . . . .").

[49] *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–79 (1968); Feldman & Teichman, *supra* note 48, at 988; Polinsky & Shavell, *supra* note 48, at 874–75. Note that the traditional calculus entails a wrongdoer considering whether to commit a crime given the probability of being caught and magnitude of subsequent punishment. Here, the PRP has already acted and its "punishment" is the UAO. The decision at issue is whether to obtain review via noncompliance, and the variables are the probability that the challenge will fail and the magnitude of the incremental punitive damages and fines above the cost of compliance.

[50] *Cf.* Corbitt v. New Jersey, 439 U.S. 212, 225 (1978) (finding a particular plea bargaining scheme constitutionally permissible because the court was "unconvinced that the [statute] exerts such a powerful influence to coerce inaccurate pleas").

faith claim would not be penalized. Therein lies the importance of the second factor: risk of an unfavorable outcome. As the risk of the threatened penalty increases, so too does the expected cost of pursuing a hearing and thus the coercive effect of the threat.

Applying this analysis to CERCLA is illustrative. The good faith inquiry is a notoriously subjective one,[51] and "CERCLA's miasmatic provisions"[52] compound the uncertainty. The statute imposes "strict liability,"[53] while offering a series of ill-defined defenses that have left "many parties to wonder if a [PRP] may successfully raise any defenses" at all.[54] Liability turns on "fact intensive and case specific" determinations,[55] and circuit splits persist.[56] Even the safeguard itself, phrased as requiring "sufficient cause" rather than "good faith," has left courts and scholars confused as to its contours.[57] In the face of uncertainty as to the statutory scope of liability, the availability of defenses, the grounds for penalty, and the judge's own application of the good faith standard, the risk of treble damages for miscalculation along any of those dimensions becomes a very real cost standing between an improperly identified PRP and a constitutionally guaranteed hearing.[58] The D.C. Circuit, by halting its analysis upon identification of the good faith safeguard alone, never reached the issue.

The inquiry in *GE* should have begun with whether CERCLA created enough uncertainty that a legitimately aggrieved PRP would rationally decline to pursue its objections via noncompliance.[59] A

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[51] The standard's unpredictability has been recognized in a variety of contexts. *See, e.g.*, Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 369–70 (1980) (contracts); Gerald L. Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 375 (2009) (government searches); David A. Simon, *Teaching Without Infringement: A New Model for Educational Fair Use*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 453, 550 n.510 (2010) (copyright fair use).

[52] Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 326 (2d Cir. 2000).

[53] Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1878 (2009).

[54] Elizabeth Ann Glass, *Superfund and SARA: Are There Any Defenses Left?*, 12 HARV. ENVTL. L. REV. 385, 386 (1988).

[55] *Burlington N.*, 129 S. Ct. at 1879; *see also id.* at 1881.

[56] *See* City of Colton v. Am. Promotional Events, Inc.-West, 614 F.3d 998, 1006–07 (9th Cir. 2010); Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 875–77 (9th Cir. 2001).

[57] *See* Solid State Circuits, Inc. v. EPA, 812 F.2d 383, 392 (8th Cir. 1987) ("[T]he EPA has failed to promulgate regulations or to issue position statements that could allow a party to weigh in advance the probability that the clean-up order is valid . . . . Absent such guidance, it will also be difficult for a court to determine the reasonableness of a challenge."); *GE IV*, 595 F. Supp. 2d 8, 19 (D.D.C. 2009) (observing that, twenty-two years later, the "EPA's unwillingness to issue guidance regarding the meaning of sufficient cause may be poor policy"); *see also* J. Wylie Donald, *Defending Against Daily Fines and Punitive Damages Under CERCLA: The Meaning of "Without Sufficient Cause,"* 19 COLUM. J. ENVTL. L. 185, 210 (1994); Glass, *supra* note 54, at 425.

[58] *Cf.* Note, *Awards of Attorneys' Fees to Unsuccessful Environmental Litigants*, 96 HARV. L. REV. 677, 685 (1983) ("[E]ven the most astute and responsible environmental groups will often be unable to predict accurately which of their suits will succeed.").

[59] Where the penalty quadruples total liability, the expected cost of refusing compliance ex-

complete due process analysis would also have considered whether the government had a legitimate administrative interest in discouraging resort to a hearing[60] or, as has been suggested in the case of CERCLA, was wielding the power "to extract maximum dollars from the private sector."[61] Elimination or conditioning of access to procedural checks is less justifiable if providing them would be cost-effective; the Supreme Court has developed balancing tests to make these assessments, and a similar approach would be appropriate here.[62]

Had the D.C. Circuit adopted a properly tailored test to evaluate CERCLA's significantly restricted access to a hearing, it may still have reached the same result. Regardless, the due process determination should have been made through this lens. The court's per se approach invites Congress to coercively limit access to a hearing at will, by coupling an enormous penalty with a good faith exception that may be of little comfort in practice. In place of this blank check, scrutiny of the actual costs, risks, and justifications would have established a substantive check on the government's power to circumvent the right to a hearing on which due process may depend.

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ceeds the cost of complying if the PRP perceives a greater than twenty-five percent chance that the penalty will be imposed. This analysis is particularly well suited to a facial challenge, because every party subject to the statute faces the same equation regardless of its own resources or the nature of the cleanup ordered. A court would ideally be able to look to empirical data to determine whether penalties were precluding legitimate challenges; however, a very low appeal rate could indicate either a low error rate, *see GE IV*, 595 F. Supp. 2d at 28, or widespread coercion.

[60] *See, e.g.*, Corbitt v. New Jersey, 439 U.S. 212, 222 (1978) (noting prior cases that "unequivocally recognized the State's legitimate interest in encouraging the entry of guilty pleas"). For an in-depth discussion balancing coercion concerns against legitimate government objectives in the plea bargaining process, see Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 915–36 (1980).

[61] George Clemon Freeman, Jr., *Constitutional Constraints on Punitive Damages and Other Monetary Punishments*, 57 BUS. LAW. 587, 635 (2002); *see also* Donald, *supra* note 57, at 210. While the EPA may be motivated by a concern that PRPs would stall via bad faith litigation, that interest appears less compelling where the preorder investigation typically lasts for years. *See supra* note 10. Furthermore, Congress could address this concern by affording a limited administrative hearing rather than immediate recourse to the courts. *See* Cross, *supra* note 47, at 951–52.

[62] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (evaluating the adequacy of an administrative hearing based in part on "the Government's interest, including the function involved and the fiscal and administrative burdens" of additional requirements); *cf.* Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 606 (2009) ("The crucial question . . . is whether deferring review [of a collateral discovery order] until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders."). A lively debate persists over how widely the *Mathews* test itself should be applied to due process inquiries. *Compare* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 331 (1993) ("[T]he Supreme Court has treated *Mathews* as furnishing a test for all seasons . . . ."), *with* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631, 698 (1988) ("The Supreme Court would surely admit that [*Mathews*] does not set forth a comprehensive framework under which all procedural due process questions must be decided.").