

# Client Alert.

---

July 6, 2010

## Pay Now, Challenge Later: D.C. Circuit Court of Appeals Upholds Constitutionality of EPA Unilateral Administrative Orders in *General Electric Company v. Jackson*

By Peter Hsiao, Andrea Tozer, and Megan Low

An important decision has upheld the government's power to order private parties to take expensive cleanup actions with little ability to challenge the order until after completing the work. On June 29, 2010, the U.S. Court of Appeal for the D.C. Circuit upheld the constitutionality of the statutory scheme that allows the Environmental Protection Agency ("EPA") to issue orders requiring potentially responsible parties ("PRPs") to front the costs of hazardous waste cleanup or risk fines and punitive damages for the refusal to comply. *General Elect. Co. v. Jackson*, No. 1:00-cv-02855-JDB, Jun. 29, 2010. The orders, referred to as unilateral administrative orders ("UAOs"), are a major tool in EPA's arsenal to force cleanups under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

### PROCEDURAL REQUIREMENTS FOR ISSUANCE OF A UAO

To issue a UAO, EPA must determine "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." Next, EPA must select a response action, provide a public notice and comment period, and create an administrative record that responds to the concerns of interested persons and states the basis for EPA's ultimate decision.

### TO COMPLY OR NOT TO COMPLY?

PRPs may not obtain immediate judicial review of a UAO, which is barred by CERCLA section 113(h). If it complies with a UAO, a PRP may seek reimbursement of its costs from EPA after completing the cleanup. If EPA refuses reimbursement, the PRP may file suit to recover its costs. A cost recovery action against EPA will only be successful if the PRP can show that (1) it was not liable for the cleanup or (2) it was liable but EPA's selected response action (or some portion thereof) was arbitrary and capricious or otherwise not in accordance with law.

If the PRP refuses to comply, EPA may (1) bring an action in federal court to enforce the UAO or (2) clean the site itself and sue the PRP to recover costs. In either situation, if a court finds that the PRP "willfully" failed to comply with the UAO "without sufficient cause," it may impose fines of \$37,500 per day. If EPA cleans the site and a court finds the PRP failed to comply with the UAO "without sufficient cause," the court may impose punitive damages of up to three times the amount of any costs EPA incurs.

### GENERAL ELECTRIC'S DUE PROCESS CHALLENGE

General Electric Company ("GE") sought declaratory relief on the basis that UAOs impose a "classic and unconstitutional Hobson's choice" by forcing companies to comply with the orders or risk fines and treble damages. GE argued that UAOs

## Client Alert.

---

deprive recipients of protected property interests without an opportunity to contest the UAO before a neutral decision-maker.

To succeed on its facial due process challenge, GE was required to show (1) that it was deprived of a protected interest in liberty or property and (2) that a balancing of its property interest, the government's interest, and the risk of erroneous deprivation and value of additional procedural safeguards weigh in its favor. GE attempted to show that it was deprived of property interests in (1) its costs of compliance, fines, and damages, and (2) depressed stock prices, harm to brand value, and increased cost of financing.

Both parties agreed that GE's costs of compliance, fines, and damages are protected property interests, but they disagreed about whether CERCLA provides a realistic opportunity for pre-deprivation review. EPA argued that PRPs may obtain judicial review by refusing to comply with the UAO, but GE claimed that the potential fines and damages intimidate parties from exercising this option. The Court held that CERCLA has sufficient safeguards because it includes "willfulness" and "sufficient cause" requirements and the imposition of penalties is subject to judicial discretion. Because of these safeguards, the Court agreed with EPA that judicial review is realistically available to PRPs who refuse to comply with the order.

The more difficult analysis is whether GE's adverse and irreparable impacts resulting from depressed stock prices, harm to brand value, and increased cost of financing are protected property interests. Although these impacts cannot be remedied through a challenge after EPA issues a UAO, the Court found that these consequential impacts are not a protected property interest because they result from "independent reactions to the issuance of a UAO" and do not result from the "EPA's extinguishing or modifying a right recognized by state law." The Court relied on a line of cases holding that reputational harm or stigma alone is insufficient to invoke due process protections.

GE also argued that even if CERCLA's UAO provisions are facially constitutional, the manner in which EPA implements them (*i.e.*, "pattern and practice") violates due process. GE claimed that EPA's practice favoring enforcement whenever settlement negotiations fail results in more frequent UAOs and decreased accuracy. The Court, however, promptly rejected this argument because it found that with no showing of a protected property interest, no balancing is needed.

Finally, the Court rejected GE's claim that the way EPA administers the UAO provisions intimidates PRPs and prevents them from challenging an order by refusing to comply. The Court rationalized that "in light of the extensive procedures CERCLA requires EPA to follow before issuing a UAO," PRPs may comply because they believe UAOs are accurate and would withstand judicial review and not because they feel coerced.

### EFFECT OF RULING

Compliance with UAOs can result in substantial financial consequences with less process than other administrative enforcement schemes, as the Court acknowledged. Because the Court rejected GE's due process challenge, however, EPA will continue to use UAOs whenever settlement negotiations fail, which gives EPA its bargaining power. The GE case is the most significant challenge to this enormous grant of federal power and a petition for review to the U.S. Supreme Court would not be surprising.

## Client Alert.

---

Morrison & Foerster LLP is widely recognized as a leader among law firms on actions under CERCLA, and maintains a full service environmental law practice.

**Contact:**

**Peter Hsiao**

(213) 892-5731

[phsiao@mofo.com](mailto:phsiao@mofo.com)

**Andrea Tozer**

(213) 892-5690

[atozer@mofo.com](mailto:atozer@mofo.com)

**Megan Low**

(213) 892-5920

[mlow@mofo.com](mailto:mlow@mofo.com)

**Michèle Corash**

(415) 268-7124

[mcorash@mofo.com](mailto:mcorash@mofo.com)

**Robert Falk**

(415) 268-6294

[rfalk@mofo.com](mailto:rfalk@mofo.com)

**William Tarantino**

(415) 268-6358

[wtarantino@mofo.com](mailto:wtarantino@mofo.com)

**About Morrison & Foerster:**

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, Fortune 100 companies, investment banks and technology and life science companies. Our clients count on us for innovative and business-minded solutions. Our commitment to serving client needs has resulted in enduring relationships and a record of high achievement. For the last six years, we've been included on *The American Lawyer's* A-List. *Fortune* named us one of the "100 Best Companies to Work For." We are among the leaders in the profession for our longstanding commitment to pro bono work. Our lawyers share a commitment to achieving results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofo.com](http://www.mofo.com).

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.*