

Lowering the Jurisdictional Bar: A Call for an Equitable-Factors Analysis Under CERCLA's Timing-of-Review Provision*

I. INTRODUCTION

Judicial review has been a core concept in American jurisprudence for over 200 years.¹ Despite its relatively long history, several recurring issues regarding judicial review still remain. One such issue involves the timing of review. In other words, assuming that judicial review is available, when can a party seek such review? Statutes sometimes attempt to regulate the timing of judicial review. One example of this phenomenon occurs in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).²

CERCLA emerged as part of Congress's broader attempt to create an effective legal and regulatory framework for waste management in the United States.³ Specifically, CERCLA's goal is to manage the cleanup of abandoned hazardous waste sites.⁴ It evidences Congress's recognition of the need to undo damage done to the environment because of human activity. This law was a bold step in the right direction when Congress passed it, but it has shortcomings. One particular problem is CERCLA's timing-of-review provision.⁵ This provision creates a jurisdictional bar, which limits judicial review of response actions that

* *Milos Jekic*. J.D. candidate 2011, University of Kansas School of Law; B.A. 2006, University of Kansas. I would like to thank the *Kansas Law Review* staff and board—in particular Alex Fehr and Melissa Plunkett—for their hard work during the editing process. Special thanks to Professor Richard Levy, Chris Grenz, and Chris Kaufman for their invaluable comments on earlier drafts. Finally, thank you to my family for their support during the process of writing this Comment.

1. The Supreme Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is customarily credited with establishing the power of judicial review. CHARLES A. SHANOR, *AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION* 17 (3d ed. 2006).

2. 42 U.S.C. §§ 9601–9675 (2006).

3. Another important aspect of this framework was the Resource Conservation and Recovery Act of 1976 (RCRA), which governs the disposal of solid and hazardous waste. *See id.* §§ 6901–6992.

4. Brian Patrick Murphy, Note, *CERCLA's Timing of Review Provision: A Statutory Solution to the Problem of Irreparable Harm to Health and the Environment*, 11 *FORDHAM ENVTL. L.J.* 587, 587 (2000).

5. 42 U.S.C. § 9613(h).

seek to clean up hazardous waste sites.⁶ The goal of the timing-of-review provision is to prevent delays in remediating these contaminated sites.⁷ Despite this laudable goal, and a seemingly sensible mechanism to achieve it, courts have been unable to agree on the appropriate meaning and application of the timing-of-review provision.

A recent circuit split between the Seventh and Tenth Circuits demonstrates the difficulties wrought by the timing-of-review provision. In *Frey v. EPA*⁸ and *Cannon v. Gates*,⁹ appellate courts reached starkly different conclusions about how to apply the timing-of-review provision under somewhat similar factual circumstances. This circuit split is only the most recent example of a long-simmering problem regarding the interpretation and application of the timing-of-review provision.

This Comment seeks to resolve the timing-of-review conundrum by calling for the Supreme Court to provide guidance to lower federal courts. Specifically, the Supreme Court should adopt an equitable-factors analysis for dealing with timing-of-review cases. Part II of this Comment will examine the background issues related to the timing-of-review provision. First, Part II will provide an overview of CERCLA. It will look at how and why Congress passed CERCLA and how Congress subsequently amended it to add the timing-of-review provision. Part II will then present a survey of the timing-of-review jurisprudence. Finally, Part II will examine *Frey* and *Cannon* in detail, explaining how the courts interpreted and applied the timing-of-review provision.

Part III will propose a solution to resolve the timing-of-review problem. First, it will discuss why the Supreme Court, rather than Congress, is best positioned to clarify the meaning and application of the timing-of-review provision. Second, it will examine the different bases for Supreme Court action. Third, it will lay out the equitable-factors analysis that the Supreme Court should adopt.

6. *See id.* § 9613(h)(4).

7. *See infra* Part II.A.2.

8. 403 F.3d 828 (7th Cir. 2005).

9. 538 F.3d 1328 (10th Cir. 2008).

II. BACKGROUND

A. *An Overview of CERCLA*

Congress passed CERCLA in 1980 in response to rising public concern about toxic waste pollution across the United States.¹⁰ Specifically, Congress tried to close a gap in the existing environmental protection framework.¹¹ Congress had passed the Resource Conservation and Recovery Act (RCRA)¹² in 1976 “to regulate the methods of disposal and the amount of hazardous waste being dumped at functional hazardous waste facilities.”¹³ RCRA, however, only dealt with functional hazardous waste sites and thus did not address the increasing number of abandoned hazardous waste sites throughout the United States.¹⁴ Seeking to address this deficiency, Congress enacted CERCLA to “provide a swift, comprehensive federal program for the cleanup of abandoned hazardous waste sites throughout the United States.”¹⁵ To effectuate this broad goal, CERCLA focused on three areas: (1) identifying abandoned hazardous waste sites, (2) cleaning those sites up, and (3) holding the parties responsible for the contamination financially accountable for the cleanup costs.¹⁶

Congress’s motivation for passing CERCLA included not only environmental considerations, but political ones as well. Democrats had lost majorities in both houses of Congress in the 1980 elections.¹⁷ As a result, Congress hastily passed CERCLA “in the waning days of the Carter Administration.”¹⁸ To move CERCLA through Congress quickly, certain rules were suspended to limit debate in both houses.¹⁹ Because of the lack of debate, Congress did not work out procedural defects or potential conflicts between CERCLA and other laws.²⁰ The main consequence of CERCLA’s hasty passage was that federal courts

10. Murphy, *supra* note 4, at 587–88.

11. *See id.* at 591 (noting the insufficiency of the RCRA).

12. 42 U.S.C. §§ 6901–6992 (2006).

13. Murphy, *supra* note 4, at 591.

14. *See id.*

15. *Id.* (citing JACKSON B. BATTLE & MAXINE I. LIPELES, HAZARDOUS WASTE 180 (2d ed. 1993)).

16. *See id.*

17. *Id.* at 593.

18. Theresa Sauer, Comment, *DANGER! Bombs May Be Present*. Cannon v. Gates: *A Jammed Cannon Preempts Citizen Suit Indefinitely*, 86 DENV. U. L. REV. 1215, 1218 (2009).

19. Murphy, *supra* note 4, at 593–94.

20. *Id.* at 594.

repeatedly had to adjudicate disputes related to the “statutory absurdities and inconsistencies that permeated the statute.”²¹

1. The Mechanics of CERCLA

Congress gave the Environmental Protection Agency (EPA) the authority to implement CERCLA.²² Generally speaking, the EPA has three main tasks. The first task is to establish a national hazardous substance response plan, which includes a National Priorities List that ranks hazardous waste sites based on the risk they pose to public health and the environment.²³ The second task is to undertake response actions that will remove contaminants and remediate the affected sites.²⁴ The third task, if necessary, is for the EPA to recover its remediation expenses from certain statutorily defined groups that are liable for such costs.²⁵

The EPA’s most complex task under CERCLA is the second—undertaking response actions. Response actions fall into two categories: removal actions and remedial actions.²⁶ A removal action is a short-term measure designed to reduce urgent environmental threats.²⁷ A remedial action, meanwhile, is a long-term measure designed to provide a permanent remedy for hazardous waste contamination.²⁸ At the very minimum, a remedial action must clean up a contaminated site in a way that protects human health and the environment.²⁹

CERCLA specifies a process for the EPA to follow when undertaking a response action.³⁰ First, the EPA orders a remedial

21. *Id.*

22. Megan A. Jennings, Note, *Frey v. Environmental Protection Agency: A Small Step Toward Preventing Irreparable Harm in CERCLA Actions*, 33 *ECOLOGY L.Q.* 675, 678 (2006).

23. See 42 U.S.C. § 9605(a) (2006); see also Jennings, *supra* note 22, at 678 (“CERCLA directs EPA to establish a National Priorit[ies] List (NPL) by identifying the hazardous waste sites that pose the most serious threats . . .”).

24. See 42 U.S.C. § 9604(a)(1); see also Jennings, *supra* note 22, at 678 (noting that the EPA must “order or initiate response actions”).

25. See 42 U.S.C. § 9607(a); see also Jennings, *supra* note 22, at 678 (stating that the EPA can “recover costs from potentially responsible parties (PRPs) who fall into one of four specified categories of liability”).

26. Jennings, *supra* note 22, at 678.

27. See 42 U.S.C. § 9601(23); see also Jennings, *supra* note 22, at 678 (defining a removal action as “a short-term response to reduce environmental danger in an urgent situation”).

28. See 42 U.S.C. § 9601(24); see also Jennings, *supra* note 22, at 678 (defining a remedial action as one that is “intended to provide for the long-term viability of [a contaminated] site”).

29. See 42 U.S.C. § 9621(d); Jennings, *supra* note 22, at 678.

30. Jennings, *supra* note 22, at 678.

investigation to determine the scope of the contamination.³¹ Second, the EPA conducts a feasibility study to determine the costs and benefits of potential cleanup methods.³² The EPA can carry out the remedial investigation and the feasibility study itself, or it can supervise the owner or operator of the contaminated site in doing so.³³ Third, the EPA issues a report setting out a remedial action plan, which is based on the results of the remedial investigation and the feasibility study.³⁴ Fourth, the EPA must afford interested parties an opportunity to comment on its proposed remedy.³⁵ Finally, the EPA must publish a record of decision that officially establishes the selected remedy.³⁶

2. The Addition of the Timing-of-Review Provision

The original version of CERCLA “was silent on whether parties could seek judicial review of ongoing cleanup actions.”³⁷ After the passage of CERCLA, many potentially responsible parties sued the EPA in federal court in an attempt to “delay or evade financial responsibility.”³⁸ Because of the lack of guidance from the statute itself, courts dealing with these lawsuits initially reached inconsistent results. Some courts allowed challenges to CERCLA’s constitutionality at any time during remediation, while other courts prohibited both constitutional and statutory challenges while remediation was ongoing.³⁹ Over time, federal courts settled on a “clean up first, litigate later” doctrine, which was based on the idea that Congress intended to preclude all judicial review until remediation of a contaminated site was completed.⁴⁰

Recognizing CERCLA’s shortcomings, Congress overhauled the Act in 1986.⁴¹ This revision was called the Superfund Amendments and

31. See 42 U.S.C. § 9604(b); see also 40 C.F.R. § 300.430(d) (2010) (laying out the requirements for conducting a remedial investigation).

32. See 42 U.S.C. § 9621(b); see also 40 C.F.R. § 300.430(e) (laying out the requirements for conducting a feasibility study).

33. See 42 U.S.C. § 9604(a)(1).

34. See *id.* §§ 9617(a)(1), 9621(a)–(b).

35. See *id.* § 9617(a)(2).

36. See *id.* § 9617(b); see also 40 C.F.R. § 300.430(f) (laying out the requirements for selecting a remedy).

37. Jennings, *supra* note 22, at 679.

38. *Id.*

39. Sauer, *supra* note 18, at 1220.

40. Jennings, *supra* note 22, at 679.

41. Murphy, *supra* note 4, at 596–97.

Reauthorization Act (SARA).⁴² Among the many changes, SARA added § 9613(h)⁴³—the timing-of-review provision.⁴⁴ The goal of § 9613(h) was “to prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing EPA’s cleanup activities.”⁴⁵ Congress feared that “[w]ithout such a provision, responses to releases or threatened releases of hazardous substances could be unduly delayed, thereby exacerbating the threat of damage to human health or the environment.”⁴⁶ This section thus essentially adopted the “clean up first, litigate later” doctrine that the courts had fashioned before Congress enacted SARA.⁴⁷

Section 9613(h) expressly codified a general bar to judicial review of response actions taken under CERCLA, except for the limited situations spelled out in the subsections.⁴⁸ In relevant part, § 9613(h) reads:

No Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under section 9604 of this title [authorizing response actions], or to review any order issued under section 9606(a) of this title [authorizing abatement orders], in any action except . . . :

. . . .

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.⁴⁹

The statutory language in the timing-of-review provision holds two competing aspects. On the surface, § 9613(h)(4) appears to acknowledge that federal courts have jurisdiction to hear citizen suits challenging CERCLA response actions.⁵⁰ In practice, however, this section can actually limit jurisdiction over citizen suits.⁵¹ This dual nature has

42. Jennings, *supra* note 22, at 679.

43. 42 U.S.C. § 9613(h) (2006).

44. Jennings, *supra* note 22, at 679.

45. H.R. REP. NO. 99-253(I), at 266 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2941.

46. H.R. REP. NO. 99-253(V), at 25 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3148.

47. Jennings, *supra* note 22, at 679.

48. *Id.* at 680.

49. 42 U.S.C. § 9613(h) (2006).

50. Jennings, *supra* note 22, at 680.

51. *Id.*

created difficulties for courts trying to interpret the timing-of-review provision.

B. A Survey of Timing-of-Review Jurisprudence

The interpretation of the timing-of-review provision raises three distinct issues for courts.⁵² First, when is a response action “selected,” thus precluding judicial review?⁵³ Second, when is the response action completed, thus lifting the bar on judicial review?⁵⁴ Third, should courts recognize an exception to the general bar on judicial review in certain situations?⁵⁵ This last issue, in particular, is not surprising given the divided opinions evident in SARA’s legislative history.⁵⁶ The case law in the wake of SARA reveals disparate answers to these questions. Specifically, two competing interpretations of the timing-of-review provision emerged after SARA. Some courts adopted a relaxed interpretation of the timing-of-review provision where its operation depends on the type of harm alleged. Other courts adhered to a strict interpretation where the type of harm alleged is immaterial to the operation of the timing-of-review provision.

1. Relaxed Interpretations of the Timing-of-Review Provision

a. *Cabot Corp. v. U.S. EPA*⁵⁷

The contaminated site in *Cabot Corp.* was Moyer’s Landfill, located in Montgomery County, Pennsylvania.⁵⁸ The EPA began planning a response action at Moyer’s Landfill in 1983 and issued a record of decision in September of 1985.⁵⁹ In December of 1986, a group of potentially responsible parties petitioned the EPA to modify its record of decision and adopt an alternative cleanup plan devised by the parties.⁶⁰ The EPA rejected the alternative plan, and, once it was clear the two sides could not reach an accommodation, the potentially responsible

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *See infra* Part III.C.1.

57. 677 F. Supp. 823 (E.D. Pa. 1988).

58. O’Leary v. Moyer’s Landfill, Inc., 677 F. Supp. 807, 809 (E.D. Pa. 1988).

59. *Cabot Corp.*, 677 F. Supp. at 824–25.

60. *Id.* at 825.

parties sued.⁶¹ They argued that the EPA had violated CERCLA because it failed to select the most cost-effective cleanup remedy.⁶² In response, the EPA moved to dismiss the case for lack of subject-matter jurisdiction or, in the alternative, for summary judgment for the same reason.⁶³

The district court analyzed the timing-of-review provision's legislative history.⁶⁴ The legislative history revealed that some members of Congress made a "distinction between suits focusing on health or environmental concerns and suits alleging monetary harm."⁶⁵ This distinction was reinforced by Congress's "decision to enable EPA to clean up hazardous waste sites prior to litigating the allocation of the expenses of those cleanups."⁶⁶ Based on these considerations, the court concluded that "[h]ealth and environmental hazards must be addressed as promptly as possible rather than awaiting the completion of an inadequately protective response action."⁶⁷ If the potentially responsible parties had alleged "that EPA's chosen response action posed a risk of irreparable harm to health or the environment," their claim would not be barred by the timing-of-review provision.⁶⁸ But because the parties were alleging essentially monetary harms, the court barred their claim.⁶⁹ Under the *Cabot Corp.* analysis, the timing-of-review provision does not always act as an absolute bar to judicial review. Rather, the operation of the timing-of-review provision depends on the type of harm alleged.

b. *United States v. Princeton Gamma-Tech, Inc.*⁷⁰

In *Princeton Gamma-Tech*, the defendant owned property above the Passaic Formation aquifer in New Jersey.⁷¹ Trichloroethylene contaminated the groundwater on Gamma-Tech's property at two different sites.⁷² Under CERCLA, the EPA placed both sites on the

61. *Id.*

62. *Id.*

63. *Id.* at 826.

64. *Id.* at 829.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *See id.* at 829–30.

70. 31 F.3d 138 (3d Cir. 1994), *overruled en banc* by *Clinton Cnty. Comm'rs v. U.S. EPA*, 116 F.3d 1018 (3d Cir. 1997).

71. *Id.* at 140.

72. *Id.*

National Priorities List.⁷³ The EPA issued a record of decision in 1988 outlining its cleanup plan, which focused on treating the contaminated water and monitoring water quality.⁷⁴ The EPA sued Gamma-Tech in 1991, seeking reimbursement for response costs it incurred at the two contaminated sites.⁷⁵ Gamma-Tech filed a cross-motion for a preliminary injunction to stop the EPA from pursuing its cleanup plan, arguing that the EPA's proposed remedy would "exacerbate the existing environmental damage and cause further irreparable harm to the environment."⁷⁶ The district court stated that, based on the language of the statute and interpretive case law, it did not have subject-matter jurisdiction over claims challenging a remedial action by the EPA until a distinct phase of the cleanup was complete.⁷⁷

On appeal, the Third Circuit began by analyzing the overall structure of § 9613(h). While § 9613(h) generally barred preliminary judicial review of response actions by the EPA, it did include several exceptions.⁷⁸ The existence of these exceptions showed that Congress did not intend to create an absolute bar to judicial review.⁷⁹ Thus, like the district court in *Cabot Corp.*, the Third Circuit did not view the judicial review bar in absolute terms.

Having examined the overall structure of § 9613(h), the Third Circuit then turned to the citizen-suit exception under § 9613(h)(4). It first examined prior interpretive case law, which held that citizen suits were barred until the cleanup remedy was completed.⁸⁰ Those cases were distinguishable because they did not deal with "bona fide assertions of irreparable environmental damage resulting from violations of CERCLA's policies."⁸¹ The court felt that in situations "where irreparable environmental damage will result from a planned response action, forcing parties to wait until the project has been fully completed before hearing objections to the action would violate the purposes of CERCLA."⁸² Moreover, forcing parties to wait in such situations would "effectively nullif[y]" the citizen-suit provision.⁸³ Such a statutory

73. *Id.*

74. *Id.* at 140–41.

75. *Id.* at 141.

76. *Id.*

77. *Id.*

78. *Id.* at 142.

79. *Id.*

80. *Id.* at 144.

81. *Id.*

82. *Id.* at 144–45.

83. *Id.* at 146.

construction would yield an absurd result.⁸⁴ Based on its analysis, the Third Circuit concluded “that when irreparable harm to the public health or the environment is threatened, an injunction may be issued under the citizens’ suit exception of subsection 9613(h)(4) even though the cleanup may not yet be completed.”⁸⁵ *Princeton Gamma-Tech* thus supported the same reasoning as *Cabot Corp.*—courts should not categorically apply the timing-of-review provision without consideration of the type of harm alleged.

2. Strict Interpretations of the Timing-of-Review Provision

a. *McClellan Ecological Seepage Situation v. Perry*⁸⁶

The McClellan Air Force Base, located near Sacramento, California, served as an aircraft depot and maintenance center since the 1930s.⁸⁷ As such, various toxic materials were used at the base.⁸⁸ After these toxic materials served their purpose, they became hazardous waste in need of disposal.⁸⁹ For decades, McClellan Air Force Base responded to this problem by disposing of vast quantities of hazardous waste in underground pits on the base.⁹⁰ Unfortunately, some of this buried waste leaked into the surrounding groundwater.⁹¹ In an attempt to remedy the contamination, McClellan Air Force Base initiated a two-phase cleanup program. First, it began monitoring groundwater quality in 1979.⁹² Second, it implemented a groundwater extraction system, which mechanically extracted contaminated groundwater from the earth and treated it.⁹³ McClellan Ecological Seepage Situation (MESS), a citizens group, challenged this cleanup program, alleging myriad violations of various environmental statutes.⁹⁴ The district court ruled that § 9613(h) of CERCLA barred MESS’s suit because MESS challenged selected removal and remediation actions.⁹⁵

84. *Id.*

85. *Id.* at 148.

86. 47 F.3d 325 (9th Cir. 1995).

87. *Id.* at 327.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 328.

On appeal, the Ninth Circuit rejected MESS's argument that § 9613(h) did not apply to its suit.⁹⁶ Examining the statutory language, the Ninth Circuit reasoned that § 9613(h) was an unqualified withdrawal of federal jurisdiction.⁹⁷ Furthermore, the statutory language embodied Congress's determination that the "need for swift execution of CERCLA cleanup plans outweighs" concerns about a lack of judicial review.⁹⁸ Thus, unlike in *Cabot Corp.* and *Princeton Gamma-Tech*, the *McClellan* court found context-specific analysis unnecessary to determine the operation of the timing-of-review provision. The court was aware that its interpretation of § 9613(h) could greatly delay judicial review—perhaps even permanently—but held that rectifying such a potential injustice was Congress's job, not the courts'.⁹⁹ *McClellan* thus represents a categorical interpretation of the timing-of-review provision based solely on the language of the statute.

b. *Clinton County Commissioners v. U.S. EPA*¹⁰⁰

The Third Circuit revisited the timing-of-review provision in *Clinton County*. This case involved a chemical manufacturing facility located in Lock Haven, Pennsylvania, and operated by Drake Chemical from the 1940s until 1982.¹⁰¹ More than forty years of continuous operation left the site contaminated with various toxic substances hazardous to both human health and the environment.¹⁰² The EPA took over the site and initiated "clean-up efforts pursuant to its response authority under CERCLA."¹⁰³ After six years of study, the EPA decided on a final remedy for the site, which involved excavating the contaminated soil, treating it in an on-site mobile incinerator, and returning it to the ground.¹⁰⁴

The plaintiffs sued seeking a preliminary injunction under CERCLA's citizen-suit provision,¹⁰⁵ claiming that the incinerator remedy would release "dangerous amounts of highly toxic chemicals that would

96. *Id.*

97. *Id.*

98. *Id.* at 329.

99. *Id.*

100. 116 F.3d 1018 (3d Cir. 1997) (en banc).

101. *Id.* at 1020.

102. *Id.*

103. *Id.*

104. *Id.*

105. 42 U.S.C. § 9659 (2006).

contaminate the local air, soil, and food chain, creating an unacceptable risk of cancer and other serious illnesses.”¹⁰⁶ The district court dismissed the complaint, citing a lack of subject-matter jurisdiction.¹⁰⁷ Specifically, the court “held that . . . CERCLA’s ‘timing of review’ provision precluded the court from exercising jurisdiction over a citizens’ suit challenging an EPA remedial action prior to the completion of the action.”¹⁰⁸ The plaintiffs appealed the district court’s ruling.¹⁰⁹

On appeal, the plaintiffs argued that CERCLA’s citizen-suit provision conferred jurisdiction despite the limitations of the timing-of-review provision because the complaint made “*bona fide* allegations of irreparable harm to public health or the environment.”¹¹⁰ The Third Circuit, sitting en banc, disagreed and affirmed the district court’s decision, stating that “Congress intended to preclude *all* citizens’ suits against EPA remedial actions under CERCLA until such actions are complete, regardless of the harm that the actions might allegedly cause.”¹¹¹

The court based this conclusion on several factors. The first factor was the statutory language. Because § 9613(h)(4) only allowed judicial review of actions that had been “taken,” this was “a clear indication of [Congress’s] intention that citizen-initiated review of EPA removal or remedial actions take place only *after* such actions are complete.”¹¹² Furthermore, § 9613(h) generally precluded review of “selected” remedial actions while the exception in § 9613(h)(4) allowed for judicial review in citizens’ suits alleging that actions “taken” violated CERCLA.¹¹³ In explaining the difference between the terms “selected” and “taken,” the court stated:

[T]he most reasonable distinction between the two terms is that a remedial action “selected,” which federal courts have no jurisdiction to review, is one chosen but not fully implemented, while a remedial action “taken,” which a federal court may review for compliance with

106. *Clinton Cnty.*, 116 F.3d at 1021.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1022.

112. *Id.* at 1022–23.

113. *Id.* at 1023.

the requirements of CERCLA, is one that was chosen *and* has been completed.¹¹⁴

Additionally, according to the last sentence of § 9613(h)(4), “an action may not be brought with regard to a removal where a remedial action *is to be undertaken* at the site.”¹¹⁵ This language showed that the EPA could undertake both a removal and a remedial action at the same site to deal with the same release of hazardous materials.¹¹⁶ In such a situation, “a citizens’ suit challenging a ‘removal’ action may not be brought even after completion of that removal action, so long as ‘remedial’ action remains ‘to be undertaken.’”¹¹⁷ Both removal and remedial actions had to be complete before judicial review.¹¹⁸

The second factor the court considered was the legislative history of § 9613(h). Specifically, the court examined the Conference Report on the Superfund Amendments of 1986, the Report of the House Committee on Energy and Commerce, and the Report of the House Committee on Public Works and Transportation.¹¹⁹ Language in each report discussed how challenges to EPA response actions could not be brought until such actions were completed.¹²⁰ This reinforced the preclusion of judicial review.

The final factor the court considered was congressional intent. The court reasoned that adopting the plaintiffs’ interpretation of § 9613(h)(4) would go against Congress’s clearly expressed intent.¹²¹ The plaintiffs’ interpretation “would create a situation in which response actions could be seriously delayed while EPA refutes allegations of irreparable harm which, while ‘*bona fide*,’ may simply reflect a legitimate difference of opinion about the preferred remedy for a particular site.”¹²² Congress intended for such differences of opinion to be communicated and resolved during the public notice and comment period that occurred before remediation.¹²³

114. *Id.*

115. *Id.* (emphasis in statutory language was added by the court) (quoting 42 U.S.C. § 9613(h)(4) (2006)).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1023–24.

120. *Id.*

121. *Id.* at 1024.

122. *Id.*

123. *Id.*

In addition to discussing the several bases for its holding, the court addressed its prior decision in *Princeton Gamma-Tech* and rejected its conclusion.¹²⁴ In the court's view, Congress clearly thought delays in remediation were more dangerous than the risk of errors by the EPA in selecting response actions.¹²⁵ Further, the public still had a chance to make its voice heard in the selection of response actions for contaminated sites via the "elaborate *pre-remediation* public review and comment procedures," which served as a substitute for judicial review.¹²⁶ Finally, with such clear statutory language and congressional intent, it was not a reviewing court's job to second-guess Congress's policy choices.¹²⁷ Thus, the court explicitly overruled "that portion of *Princeton Gamma-Tech* which held that a district court has jurisdiction under § 9613(h)(4) during the pendency of an EPA remedial action when plaintiffs make *bona fide* allegations of irreparable harm."¹²⁸

C. *The Current Circuit Split*

1. *Frey v. EPA*

On January 4, 1983, the United States filed a civil suit against Viacom to force it to clean up two dump sites in Bloomington, Indiana, that were contaminated by polychlorinated biphenyls (PCBs).¹²⁹ Subsequently, the City of Bloomington sued Viacom in connection with two other contaminated sites.¹³⁰ Both of these lawsuits were consolidated and two additional contaminated sites were added, bringing the total number of contaminated sites to six.¹³¹ The parties entered into a consent decree in 1985, which required Viacom to fully excavate and incinerate all PCBs at the six contaminated sites.¹³² The incineration provision made the consent decree controversial.¹³³ Frey sued in 1988,

124. *Id.* at 1024–25. For a discussion of *Princeton Gamma-Tech*, see *supra* Part II.B.1.b.

125. *Clinton Cnty.*, 116 F.3d at 1025.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Frey v. EPA*, 403 F.3d 828, 830 (7th Cir. 2005).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

challenging the incineration remedy mandated by the consent decree.¹³⁴ The court dismissed the suit for lack of subject-matter jurisdiction.¹³⁵

After Frey failed to stop the incinerator remedy in court, the Indiana State Legislature passed a law to block construction of the proposed incinerator.¹³⁶ With the incinerator option legislatively invalidated, an alternative remedy was needed to clean up the contaminated sites.¹³⁷ Negotiations to determine a new cleanup remedy deadlocked over the scope of the remediation effort.¹³⁸ Meanwhile, the district court issued an order requiring remediation of the contaminated sites by 1999.¹³⁹ To meet the deadline, the district court appointed a special master to help the parties resolve their disputes and move forward.¹⁴⁰ While these events were occurring, the EPA moved through the process of selecting its own final remedy to replace the invalidated incinerator option.¹⁴¹ The proposed final remedy called for excavation and removal of material from hot spots and the subsequent creation of a landfill cap.¹⁴²

After the EPA issued its proposed final remedy, Frey sued again—this time contending that the EPA’s selected remedy failed to bring the contaminated sites into compliance with CERCLA and other environmental statutes.¹⁴³ The key issue was whether CERCLA’s timing-of-review provision barred Frey’s suit.¹⁴⁴ The Seventh Circuit had previously interpreted the timing-of-review provision “as requiring a citizen seeking to challenge a remediation action to wait for the selected action to be completed.”¹⁴⁵ Frey argued that CERCLA did not bar her suit because the EPA’s only selected remedy, excavation, had been completed.¹⁴⁶ The EPA moved for summary judgment, arguing that

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 831. A landfill cap “is a containment technology that forms a barrier between the contaminated media and the surface, thereby shielding humans and the environment from the harmful effects of its contents and perhaps limiting the migration of the contents.” *Landfill Caps and Enhancements*, CENTER FOR PUB. ENVTL. OVERSIGHT, <http://www.cpeo.org/techtree/ttdescript/lancap.htm> (last visited Sept. 24, 2010).

143. *Frey*, 403 F.3d at 832.

144. *Id.*

145. *Id.* (citing *Frey v. EPA*, 270 F.3d 1129, 1133–34 (7th Cir. 2001); *Schalk v. Reilly*, 900 F.2d 1091, 1095 (7th Cir. 1990)).

146. *Id.* at 833.

concrete and existing remedial measures were still underway at the contaminated sites.¹⁴⁷ To support this argument, the EPA produced evidence that water and sediment investigations were ongoing.¹⁴⁸ The district court concluded that the EPA had not selected a remedy for water treatment and sediment removal but that active remedial planning was underway.¹⁴⁹ Therefore, the district court held that Frey's lawsuit was premature and barred by the timing-of-review provision.¹⁵⁰

On appeal, Frey argued that the court should interpret the statute to allow a citizen to sue once a selected remedy is complete.¹⁵¹ In the instant case, the only remedy the EPA had selected—the excavation of the PCBs—had been completed.¹⁵² Because the EPA had selected no other remedy, no remedial action remained to be completed.¹⁵³ Therefore, § 9613(h) should not bar Frey's suit.¹⁵⁴ The EPA, on the other hand, based its argument on the court's holding in Frey's first suit that “a citizen suit may *not* go forward when only one stage of a broader remediation plan has been completed.”¹⁵⁵ The EPA said that the excavation of PCBs was only one stage of its overall remediation plan and, therefore, Frey could not sue until all phases of remediation were completed.¹⁵⁶

The Seventh Circuit rejected the EPA's argument. Fundamentally, the EPA's interpretation of § 9613(h) was too broad because it insulated the EPA from judicial review as long as it had “any notion that it might, some day, take further unspecified action with respect to a particular site.”¹⁵⁷ More specifically, the statute did not support such an “open-ended prohibition on a citizen suit.”¹⁵⁸ For § 9613(h) to bar Frey's suit, the EPA had to point to an “objective referent that commits it and other responsible parties to an action or plan.”¹⁵⁹ In the present case, no such objective referent was present because there was “no timetable or other objective criterion by which to assess when EPA's amorphous study and

147. *Id.* at 832–33.

148. *Id.* at 831.

149. *Id.* at 833.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 832.

157. *Id.* at 834.

158. *Id.*

159. *Id.*

investigation phase may end.”¹⁶⁰ The EPA attempted to give the court some sort of timetable by hinting at the possibility of more water and soil treatment remedies in 2005 or 2006, but such a vague assertion—for which there was no support in the record—was insufficient.¹⁶¹ While recognizing that the EPA needed time to compile data and evaluate alternative options before settling on a final remedy, the court would not allow the EPA to do so without some transparency.¹⁶² The court required no formal procedure before § 9613(h) could apply; all that the court required was some form of “objective indicator that allows for an external evaluation, with reasonable target completion dates, of the required work for a site.”¹⁶³ Simply pointing to “ongoing testing and investigation, with no clear end in sight,” was not a sufficient indicator to trigger the protections of § 9613(h).¹⁶⁴

The court thought its approach was particularly appropriate given the facts of the case. The only thing it observed in the record was “a desultory testing and investigation process of indefinite duration,” which did not satisfy the objective-criterion requirement.¹⁶⁵ Furthermore, the court said its holding was appropriate in light of Congress’s intent.¹⁶⁶ While Congress wanted remedial action completed before allowing judicial review, the court did not believe that Congress intended to extinguish judicial review completely.¹⁶⁷

2. *Cannon v. Gates*

James Cannon owned more than 1400 acres of land in Utah’s Yellow Jacket Mines area.¹⁶⁸ His land sat next to the U.S. Army’s Dugway Proving Grounds.¹⁶⁹ In 1945, Cannon granted the United States War Department a six-month lease over his land.¹⁷⁰ As part of the deal, the government agreed to return Cannon’s property to him in the same condition as when the government first started using it.¹⁷¹ Over the

160. *Id.*

161. *Id.*

162. *Id.* at 834–35.

163. *Id.* at 835.

164. *Id.*

165. *Id.*

166. *Id.* at 836.

167. *Id.*

168. *Cannon v. Gates*, 538 F.3d 1328, 1330 & n.1 (10th Cir. 2008).

169. *Id.* at 1330.

170. *Id.*

171. *Id.*

course of the lease, the government dropped at least 3000 rounds of ammunition and twenty-three tons of chemical weapons on Cannon's property.¹⁷² After the lease ended, the government returned the land to Cannon as promised, but it was blanketed with fragments of shells, rockets, and bombs the government had dropped during its weapons tests.¹⁷³

Cannon quickly took legal action. He filed two administrative claims against the government in 1945—one for disrupting mining activities and the other for destruction of mineshaft timbering.¹⁷⁴ The government settled both claims, for \$755.48 and \$2064.00, respectively.¹⁷⁵ In 1950, Cannon filed a third claim against the government but this time based the claim on his inability to lease his mines because they were potentially filled with poisonous gas.¹⁷⁶ This claim was denied.¹⁷⁷ Only in the 1970s did the government even begin to study the contamination of Cannon's property.¹⁷⁸ The study did not amount to action, however, and Cannon's land remained contaminated.¹⁷⁹

Because of the government's inaction, the Cannon family continued to pursue its quest to make the government clean up the land. Cannon's son picked up where his father had left off but was unsuccessful in getting the government to clean up the property.¹⁸⁰ In 1998, Cannon's grandchildren sued the government under the Federal Tort Claims Act.¹⁸¹ They succeeded at trial and were awarded \$160,937 in damages.¹⁸² The appeals court, however, reversed the award, finding that the claim was barred by the applicable statute of limitations.¹⁸³

In 2005, the Cannon family attempted a different tactic and filed claims against the government under several federal environmental protection laws.¹⁸⁴ The district court dismissed all of the Cannons'

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 1330–31.

184. *Id.* at 1331.

claims based on the timing-of-review provision's jurisdictional bar.¹⁸⁵ The court held that the government's preliminary investigations into whether cleanup efforts were needed on the Cannons' property constituted selection of a removal action, thus triggering § 9613(h).¹⁸⁶ The Cannons appealed the district court's decision.¹⁸⁷

The Tenth Circuit began its analysis by looking at the text of § 9613(h), focusing on the words "challenges" and "selected."¹⁸⁸ The court interpreted the statutory language to mean that once the United States has "selected" a remedy, that selection cannot be "challenged" until it is completed.¹⁸⁹ With this background, the court set out to answer two questions: (1) whether the United States had "selected" a removal or remedial action and, (2) if so, whether the Cannons' claims amounted to a "challenge" of the removal or remedial action.¹⁹⁰

In response to the first question, the court concluded that the United States had selected a removal action because it had taken several steps to monitor, assess, and evaluate the release of hazardous substances on the Cannons' property.¹⁹¹ It rejected the Cannons' counter-contention that the government could not select a removal action until it had complied with every applicable regulation.¹⁹² The court reasoned that nothing in § 9613(h) suggested the jurisdictional bar only applied if the government had completed a substantial portion of its removal action.¹⁹³ Moreover, the Cannons' suit constituted a challenge to the government's removal action because it sought injunctive relief, which would interfere with the implementation of the government's ongoing removal efforts.¹⁹⁴ While the court sympathized with the Cannons' frustration at the long delay in the cleanup of their property, it could not intervene because the Cannons' suit fell "within the broad ambit of § 9613(h)."¹⁹⁵ As a result, the court affirmed the district court's decision to dismiss the Cannons' suit.¹⁹⁶

185. *Id.*

186. *Id.* at 1331–32.

187. *Id.* at 1332.

188. *Id.*

189. *Id.*

190. *Id.* at 1332–33.

191. *Id.* at 1333–34.

192. *Id.* at 1335.

193. *Id.*

194. *Id.* at 1335–36.

195. *Id.* at 1336.

196. *Id.*

III. ANALYSIS

Despite statements from some courts that § 9613(h) has clear statutory language and is a clear expression of congressional intent,¹⁹⁷ the lack of uniformity among the courts when dealing with the timing-of-review provision indicates otherwise.¹⁹⁸ The case law shows that courts have struggled to determine what the timing-of-review provision means, what Congress intended by passing it, and how it should apply in various situations.¹⁹⁹ Like many other legal issues, the resolution depends on the facts of the case presented. In many situations, it is relatively clear that Congress meant for the timing-of-review provision to bar judicial review, such as where a potentially responsible party is trying to delay remediation to avoid having to pay for the cleanup. However, there are situations—like those in *Frey v. EPA* and *Cannon v. Gates*—where strictly applying the timing-of-review provision can lead to inequitable results.²⁰⁰ In those cases, strict application of the timing-of-review provision could permanently delay judicial review because it is unclear when the EPA would complete its response actions. Because of this potential for unfairness—and also because the lower federal courts cannot agree on a uniform approach for applying the timing-of-review provision—the Supreme Court needs to clarify the operation and applicability of this troublesome provision.

A. Rationales for Seeking a Judicial Resolution to the Timing-of-Review Problem

This Comment is not the first to discuss the confusion surrounding CERCLA's timing-of-review provision.²⁰¹ It differs from previous scholarship by suggesting that the Supreme Court grant certiorari to interpret the timing-of-review provision and resolve the circuit split on this issue. Others who have examined this problem have addressed their recommendations to Congress and suggested that it should amend CERCLA to deal with the issues raised by the case law interpreting the

197. See, e.g., *Clinton Cnty. Comm'rs v. U.S. EPA*, 116 F.3d 1018, 1025 (3d Cir. 1997) (en banc).

198. See *supra* Part II.B.

199. See *supra* Part II.B.

200. See *supra* Part II.C.

201. See, e.g., Jennings, *supra* note 22, at 679–85; Murphy, *supra* note 4, at 604–09; Sauer, *supra* note 18, at 1220–24.

timing-of-review provision.²⁰² Those are valid recommendations. In fact, Congress *should* be the body that revises unclear statutes such as CERCLA.

Unfortunately, these exhortations to Congress will probably not yield tangible results because Congress is unlikely to resolve the timing-of-review issue any time soon. Congress currently faces a variety of other crises that require immediate attention. In the face of such large-scale and vexing problems, it is unlikely that revising a single subsection in an environmental statute will be at the top of Congress's agenda. As a result, federal courts are the only remaining avenue for relief. While several federal district and appellate courts have attempted to provide such relief,²⁰³ a uniform interpretation remains elusive. Because the Supreme Court is the ultimate arbiter of federal law, it has the power to settle the circuit split discussed in this Comment by interpreting how the timing-of-review provision should operate and apply.

B. Two Bases for Supreme Court Action

The timing-of-review problem presents an issue of statutory interpretation and construction. As such, two arguments justify Supreme Court intervention. First, the language of the timing-of-review provision is ambiguous and requires clarification. Second, even if the language were clear, applying it literally could produce absurd results contrary to Congress's intent, thus necessitating Supreme Court intervention.

1. Clarifying Ambiguous Statutory Language

The key issue in the timing-of-review debate is determining the meaning of the statute. In such a situation, the language of the statute is the starting point.²⁰⁴ A prevailing rule of statutory interpretation is the plain meaning rule, which says that reviewing courts should adhere to the plain meaning of a statute whenever possible.²⁰⁵ Thus, if the statutory

202. See, e.g., Jennings, *supra* note 22, at 697; Murphy, *supra* note 4, at 629; Sauer, *supra* note 18, at 1236–37.

203. See *supra* Part II.B.1.

204. See *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (“The task of resolving the dispute over the meaning of [the statute] begins where all such inquiries must begin: with the language of the statute itself.”); see also 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 45:01, at 1 (6th ed. 2000) (“When an authoritative written text of the law has been adopted, the particular language of the text is always the starting point on any question concerning the application of the law.”).

205. See 2A SINGER, *supra* note 204, § 46:01, at 113.

language is clear and unambiguous, a reviewing court should not go beyond the plain meaning of the statute's words.²⁰⁶ On the other hand, a reviewing court may use extrinsic aids if the statutory language is ambiguous.²⁰⁷ Extrinsic aids are sources outside the text of the statute, including legislative history and evidence of the legislature's intent.²⁰⁸

The timing-of-review provision is an example of an ambiguously written statute. Specifically, the statute is ambiguous in two ways. First, it is "open to two or more constructions."²⁰⁹ The alternative constructions do not have to focus on particular words in the statute; rather, conflicting constructions "may arise in respect to the general scope" of the statute.²¹⁰ This is precisely the case with the timing-of-review provision. The circuit split on the application of the timing-of-review provision demonstrates this fact.²¹¹ Some courts interpret the provision as a categorical bar to judicial review while other courts take a more nuanced view of the provision that allows judicial review in certain instances.

The root of the ambiguity lies in the imprecise statutory language. The key words are "selected" and "taken." Section 9613(h) bars judicial review of response actions that have been "selected."²¹² In *Frey*, the timing-of-review provision did not bar Frey's suit when the EPA's actions were limited to testing and investigation of what remedies to employ.²¹³ In other words, the EPA had not selected a remedy. Conversely, in *Cannon*, the Tenth Circuit held that the EPA "selected" a response action when it was studying and analyzing the contamination, but had not taken any concrete steps to ameliorate it.²¹⁴ Thus, it is unclear whether preliminary steps constitute a "selected" response action.

Section 9613(h)(4) allows judicial review of actions that have been "taken."²¹⁵ An action is "taken" when it is picked out, selected, or chosen.²¹⁶ Section 9613(h)(4) gives no indication that an action must be

206. *See id.* § 46:01, at 123.

207. *See id.* § 48:01, at 411–14.

208. *See id.* § 48:01, at 407–10.

209. 73 AM. JUR. 2D *Statutes* § 114 (2001).

210. *Id.*

211. *See supra* Part.II.C.

212. 42 U.S.C. § 9613(h) (2006).

213. *Frey v. EPA*, 403 F.3d 828, 835 (7th Cir. 2005).

214. *Cannon v. Gates*, 538 F.3d 1328, 1333–34 (10th Cir. 2008).

215. 42 U.S.C. § 9613(h)(4).

216. AMERICAN HERITAGE COLLEGE DICTIONARY 1382 (3d ed. 2000).

complete to be “taken.” The fact that courts cannot review actions “brought with regard to a removal where a remedial action is to be undertaken”²¹⁷ does not clarify whether all response actions must be complete before judicial review can occur. This language seems to allow judicial review once a remedial action is started but is not yet complete.²¹⁸ Because the statutory language is susceptible to various—and contradictory—interpretations, the Supreme Court needs to provide guidance as to its meaning.

Second, the timing-of-review provision is ambiguous because “giving a literal interpretation to the words would lead to such . . . unjust . . . consequences as to compel a conviction that they could not have been intended by the legislature.”²¹⁹ Specifically, interpreting the timing-of-review provision literally allows the EPA to perpetually study and investigate—without ever taking any concrete response actions—absent any fear of judicial review. Both the *Frey* and *Cannon* courts recognized this possibility.²²⁰ This risk is more than just theoretical. More than sixty years have passed since James Cannon leased his land to help the war effort, yet his property remains contaminated.²²¹ Under the ruling in *Cannon*, it could be another sixty years before anything happens. This unconscionable result could not possibly have been Congress’s intent when it added the timing-of-review provision to CERCLA. It bears repeating that CERCLA’s goal is the swift cleanup of contaminated sites.²²² Sixty years and counting of contamination is anything but swift.

Importantly, the existence of a prevailing interpretation of the timing-of-review provision does nothing to undermine its ambiguity. Just because many courts—though by no means all—have interpreted the timing-of-review provision similarly does not automatically make it clear and unambiguous.²²³ Ambiguity is not based on how many courts

217. 42 U.S.C. § 9613(h)(4).

218. Despite the lack of clarity, many courts have relied on the fact that the statute “refers to actions in the past tense” as justification for barring preenforcement judicial review, even though the language in question “appears within the citizen’s suit exception to [the general bar on] preenforcement review.” Murphy, *supra* note 4, at 607–08; *see also id.* at 608 n.89 (citing various cases that have employed this past-tense-focused interpretation).

219. 73 AM. JUR. 2D *Statutes* § 114 (2001).

220. *See supra* Part II.C.

221. Cannon v. Gates, 538 F.3d 1328, 1330–31 (10th Cir. 2008).

222. *See supra* Part II.A.

223. *See* 73 AM. JUR. 2D *Statutes* § 114 (2001) (“Statutory language is ambiguous if reasonable minds could differ as to its meaning.”).

interpret a statute one way versus another; it depends on the existence of multiple interpretations of the same language.

2. Going Beyond Plain Meaning to Prevent Unintended Results

Even if one accepts the argument that the language of the timing-of-review provision is unambiguous, the Supreme Court may go beyond the provision's plain meaning. Generally, courts adhere to the plain meaning of a statute when the statutory language is clear and unambiguous.²²⁴ Such a bright-line rule can potentially lead to harsh results, as seen in *Cannon*. As a result, a qualification to the plain meaning rule exists to mitigate its severity. The qualification says that even if the language of a statute is clear and unambiguous, a reviewing court can nevertheless engage in statutory interpretation when applying the statute as written will lead to "a result demonstrably at odds with the intentions of its drafters."²²⁵ Put another way, courts are only constrained by the plain meaning rule as long as the literal interpretation of the statute "is not utterly absurd."²²⁶

In the context of the timing-of-review provision, a literal reading of the statute could produce a result that is both absurd and contrary to Congress's intent. When drafting CERCLA, Congress intended to protect the public and redress injuries caused by contaminated waste sites.²²⁷ As a result, courts have consistently categorized CERCLA as a remedial statute.²²⁸ A remedial statute is one that is "protective in nature."²²⁹ CERCLA is a remedial statute because it protects the public

224. See 2A SINGER, *supra* note 204, § 46:01, at 113–18.

225. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

226. Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 184 (1992); see also *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) ("Where the plain language of the statute would lead to 'patently absurd consequences,' that 'Congress could not possibly have intended,' we need not apply the language in such a fashion." (citations omitted)). Even Justice Scalia, perhaps the strictest adherent to the plain meaning rule, recognizes that an exception exists for absurd results. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) ("[I]f the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity.").

227. See *supra* Part II.A.

228. See, e.g., *Atl. Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 570 (10th Cir. 1996).

229. Cf. Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 236 (1996) (noting that "the remedial purpose canon has most often been invoked when the statute at issue is protective in nature").

from the risks of contaminated waste sites by seeking to clean them up promptly.²³⁰

Employing a literal reading of the timing-of-review provision that is confined to the language of the statute could undermine Congress's intent. To understand why, consider the factual scenario in *Cannon*.²³¹ There, the government was studying and investigating the contaminated property.²³² No action had been taken to actually clean up the contamination.²³³ Furthermore, the government gave no indication that it was remotely close to taking concrete action.²³⁴ Thus, the litigation posed no threat of delay for the response action. To the contrary, the government's lack of action caused the delay in the first place. By applying a literal reading of the timing-of-review provision, the Tenth Circuit allowed the government to continue studying and analyzing—without taking any action—indefinitely. This result is contrary to Congress's goal to use CERCLA to achieve timely cleanups. The point is, in certain situations, a nonliteral reading of the timing-of-review provision—that is, a reading using extrinsic aids going beyond the plain meaning of the statute—better serves Congress's goal of prompt cleanup.

In addition to going against Congress's intent, a literal application of the timing-of-review provision can produce absurd results. The facts of *Cannon* are once again instructive.²³⁵ In that case, the government had not taken any concrete steps to remedy the contamination; it was merely studying, investigating, and analyzing.²³⁶ By employing a literal interpretation of the timing-of-review provision, the Tenth Circuit ensured that the government could continue taking preliminary steps without any possibility of its actions being reviewed in court. This result is absurd for two reasons. First, it leaves the Cannon family without a mechanism to redress their injuries. They are at the mercy of an indeterminately long planning-and-analysis phase that has no end in sight. Furthermore, the Cannons cannot even force the government to justify its lack of action because of the complete protection the literal reading of the timing-of-review provision provides. Second, a literal

230. Steven Ferrey, *Inverting the Law: Superfund Hazardous Substance Liability and Supreme Court Reversal of All Federal Circuits*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 633, 707–08 (2009).

231. *See supra* Part II.C.2.

232. *Cannon v. Gates*, 538 F.3d 1328, 1330 (10th Cir. 2008).

233. *Id.*

234. *Id.*

235. *See supra* Part II.C.2.

236. *Cannon*, 538 F.3d at 1330.

reading of the timing-of-review provision is absurd because it could not possibly follow Congress's intent when it added the timing-of-review provision to CERCLA. The timing-of-review provision was meant to prevent dilatory tactics by potentially responsible parties who sought to avoid having to pay for the contamination they caused.²³⁷ It was not designed to completely insulate the government from judicial review of its cleanup actions—which is precisely the situation that a literal reading can create.

C. *The Equitable-Factors Analysis*

The previous Section established two bases that justify the Supreme Court going beyond the plain meaning of the statute and employing extrinsic aids to interpret the timing-of-review provision. This Section discusses the equitable-factors analysis. First, it examines why considering the equities of a situation is appropriate when analyzing timing-of-review cases. Second, it proposes several equitable factors that courts should include in the analysis. Third, it discusses the potential policy benefits of adopting the equitable-factors analysis.

1. The Basis for Focusing on Equitable Considerations

The legislative history behind the passage of § 9613(h) supports the use of an equitable-factors analysis. Certain members of Congress clearly did not favor an absolute bar to preenforcement judicial review that ignored the context of a particular situation. For example, Democratic Senator George Mitchell of Maine stated: “In considering whether citizens’ suits should lie for cleanup, it is important to *consider the equities* of the situation . . . [and] courts should *carefully weigh* [those] *equities*”²³⁸ Republican Senator Robert Stafford of Vermont, while not explicitly mentioning the consideration of equitable factors, noted:

It is crucial, if it is at all possible, to maintain citizens’ rights to challenge response actions, or final cleanup plans, *before* such plans are implemented even in part because otherwise the response could

237. See *supra* Part II.A.2.

238. 132 CONG. REC. 28,429 (1986) (emphasis added).

proceed in violation of the law and waste millions of dollars . . . before a court has considered the illegality.²³⁹

Moreover, the language of the Joint Conference Committee Report regarding SARA undermines the argument for an absolute bar. The Report stated:

In new section [9613(h)(4)] of the [statute], the phrase “removal or remedial action taken” is not intended to preclude judicial review until the total response action is finished if the response action proceeds in distinct and separate stages. Rather an action under section [9659] would lie following completion of each distinct and separable phase of the cleanup. . . . Any challenge under this provision to a completed stage of a response action shall not interfere with those stages of the response action which have not been completed.²⁴⁰

It is important to note that the legislative history regarding the timing-of-review provision is not completely one-sided. In particular, a difference of opinion surfaced among the proponents of SARA on the application of the timing-of-review provision.²⁴¹ Exemplifying a more rigid interpretation of the timing-of-review provision, Republican Senator Strom Thurmond of South Carolina said: “Completion of all of the work set out in a particular record of decision marks the first opportunity at which review of that portion of the response action can occur.”²⁴² Thurmond, and others who agreed with him, were “primarily interested in achieving speedy cleanups.”²⁴³ In other words, those who favored an absolute bar to preenforcement review were concerned about cleanups being delayed by endless litigation. Such concerns are not implicated in situations where, as in the *Cannon* case, no cleanup remedy has been undertaken. Judicial review in such a situation does not delay anything because nothing is being done. Thus, the equitable-factors analysis does not contravene the legislative history in favor of a more rigid application of the timing-of-review provision.

This survey of the legislative history behind SARA highlights two important points. First, certain members of Congress did not intend for the courts to apply the timing-of-review provision rigidly and mechanically. Second, even those who favored a more strict application

239. *Id.* at 28,409 (emphasis added).

240. H.R. REP. NO. 99-962, at 224 (1986) (Conf. Rep.), reprinted in 1986 U.S.C.A.N. 3276, 3317.

241. Sauer, *supra* note 18, at 1221.

242. 132 CONG. REC. 28,441.

243. Jennings, *supra* note 22, at 682.

did so based on concerns about delayed cleanups—a situation not implicated in the equitable-factors analysis. Put simply, Congress intended to give courts room to maneuver in applying the timing-of-review provision, except in the narrow factual scenario where a cleanup has already been undertaken. The Supreme Court should use this latitude to create an analytical framework that will enable courts to equitably apply the timing-of-review provision.

2. The Equitable Factors

Before laying out the factors themselves, several preliminary issues must be addressed. First, no one factor listed below is dispositive on the question of whether a court should review a response action before completion. In any particular case, the decision to review a response action before it is completed will depend on the totality of the circumstances. Second, not all factors will apply in any given situation. In fact, factors other than those listed here may have bearing on a particular case. These factors are meant to provide a starting point.

Finally, there are two threshold requirements. First, consideration of these factors should only apply to a citizen suit by a party that is not a potentially responsible party. Potentially responsible parties have too much incentive to delay cleanup in an effort to avoid incurring the expense of the process. Furthermore, deciding whether a potentially responsible party's intentions are in good faith is a difficult task that would unnecessarily complicate the application of the equitable-factors analysis. Therefore, only citizen suits brought by parties that are not potentially responsible for the contamination should merit consideration of the following equitable factors. Second, the equitable-factors analysis is only appropriate if the plaintiff has exhausted all other available means of attaining judicial review. This requirement is beneficial because it ensures that plaintiffs explore more direct means of attaining judicial review before turning to the timing-of-review provision.

a. Nature of the EPA's Response Action

The first equitable factor is the nature of the EPA's response action. Specifically, the question is what exactly the EPA has done to remediate the contaminated waste site. In both *Frey* and *Cannon*, the response actions involved studying, investigating, and analyzing the

contamination.²⁴⁴ Neither case involved much concrete action to remedy the contamination. When the only response is study and analysis, the EPA should have more difficulty arguing that it has selected a response action that triggers the judicial-review bar. Thus, a court should be more likely to grant precompletion judicial review if the nature of the response action is study and analysis rather than concrete steps to clean up the contamination. Moreover, if the EPA is taking concrete steps to remediate a contaminated site, a court can more easily find that it is actively working to resolve the contamination. When the only response is study and analysis, such a determination is harder to make. This factor is useful because it clarifies what it means to select a response action. Generally, courts should require something more than study and analysis to meet the “selected” response action requirement for precluding judicial review.

b. Duration of the EPA’s Response Action

The second factor is the duration of the EPA’s response action. The longer the duration of the response action without completion, the more likely a court should be to allow judicial review of the response action before it is complete. In both *Frey* and *Cannon*, the EPA’s response action had been going on for decades.²⁴⁵ In such a circumstance—when decades have passed and no end appears in sight—a court should consider reviewing the EPA’s response action. Otherwise, insulation from judicial review could result in agency complacency in moving forward with cleanup remedies. Such a result goes against the purpose of CERCLA—the prompt cleanup of contaminated sites.²⁴⁶ Citizens need some way to spur agency action, and precompletion judicial review is an appropriate mechanism.

Nonetheless, the EPA should still have the time it needs to effectively analyze contaminated sites and determine appropriate remedies. This process is complex and undoubtedly takes time to accomplish. However, deference to the EPA in undertaking an analysis of a contaminated site should not be without limits. In evaluating whether it should hear a challenge to a response action before the action is completed, a court should consider whether it can find any objective measure by which to evaluate the EPA’s actions. The court in *Frey*

244. See *supra* Part II.C.

245. See *supra* Part II.C.

246. Murphy, *supra* note 4, at 591.

discussed this issue, but did not elaborate on what would suffice as an adequate indicator.²⁴⁷ One option would be a documented timetable. For instance, the EPA could spell out in its record of decision a timeline for the completion of the remediation process. If the EPA is unable to meet its timetable, it could adjust the record of decision, or whatever document contains the timeline, to include a revised schedule. This way, a court could see that the EPA is actively working to remediate a contaminated site, meaning the court should not grant judicial review of its response action until completion.

At the most fundamental level, the basis for this factor is fairness. A plaintiff should not have to wait decades for a site to be remediated without having some concrete reason for the delay. Nor should the EPA be able to study a contaminated site indefinitely. Plaintiffs deserve some recourse to compel remediation, or at the least, to compel some reasonable justification for why remediation will take so long to complete.

c. Nature of the Harm Alleged

The third factor that courts should consider is the nature of the harm alleged. Generally, timing-of-review cases allege two types of harms: monetary harms²⁴⁸ and harms to human health and the environment.²⁴⁹ These allegations present different risks. Monetary harms do not present the same imminent and irreparable threat as harms to health and the environment. Plaintiffs alleging monetary harms can be made whole after a response action is completed by recouping their money if their suit is meritorious.²⁵⁰ Therefore, it is not vital that a court redress a monetary harm before a response action is completed. Accordingly, a court should not grant precompletion judicial review if the only alleged harm is monetary in nature.

Allegations of potential harm to human health or the environment present more immediate dangers. As long as hazardous chemicals remain in the ground, they pose risks to individuals and the surrounding environment. Unlike monetary harms, if these risks eventuate, they

247. See *supra* Part II.C.1.

248. See, e.g., *Cabot Corp. v. U.S. EPA*, 677 F. Supp. 823, 825 (E.D. Pa. 1988) (alleging that the EPA did not select the most cost effective cleanup remedy).

249. See, e.g., *Clinton Cnty. Comm'rs v. U.S. EPA*, 116 F.3d 1018, 1021 (3d Cir. 1997) (en banc) (seeking to stop emission of dangerous chemicals).

250. See *Cabot Corp.*, 677 F. Supp. at 828–29 (stating that potentially responsible parties have the “eventual opportunity to contest unnecessary costs that the EPA attempts to recover from them”).

cannot be undone after the fact. Therefore, a court should grant judicial review for allegations of harm to human health or the environment. The likelihood of allowing precompletion judicial review should depend on the intensity of the risk. The risk intensity will vary based on factors such as the amount of waste involved and the degree of toxicity of the chemicals. The more danger an unremediated site poses, the more likely a court should be to grant judicial review of the response action before it is completed. When asserting dangers to human health and the environment, plaintiffs should have to make more than conclusory allegations of potential harm. They should have to produce evidence with specific information about the potential for and intensity of the harm. If the risk of harm is great and the potential harm is particularly dangerous, a court should inquire into the remediation plan for a contaminated site. Put simply, this factor helps determine the dangers in delaying judicial review. If delaying judicial review presents serious dangers, courts should allow review sooner rather than later.

d. Potential Economic Impact of Precluding Judicial Review

The fourth factor that courts should consider is the potential economic impact on a plaintiff if precompletion judicial review is not allowed. In *Cannon*, the plaintiffs alleged that they suffered economic harm from their inability to lease their mines, which were contaminated with hazardous chemicals.²⁵¹ If a plaintiff is suffering economic harm because of the delay in remediating a contaminated site, a court should be more likely to review the response action. This factor helps ensure that a plaintiff does not file a suit simply for dilatory purposes. A plaintiff that is suffering economic harm has no motivation to delay the cleanup of his contaminated property because that will only result in more economic loss. This factor thus helps courts weed out plaintiffs who might be attempting to game the system for improper purposes. Because allegations of economic harm are monetary in nature, plaintiffs must couple them with allegations of harm to human health or the environment to be eligible for precompletion judicial review.

251. *Cannon v. Gates*, 538 F.3d 1328, 1330 (10th Cir. 2008).

e. Whether the Federal Government is Responsible for the Contamination

The fifth and final factor for courts to consider is whether the federal government is responsible for the contamination. In *Cannon*, ordinance tests by the U.S. military contaminated the Cannons' property.²⁵² Where the government is the source of contamination, courts should be more likely to review response actions before they are complete. There are two reasons for this. First, when the government is involved, the EPA might proceed more slowly, knowing that the government will ultimately incur the cost of remediation. In essence, this situation creates a potential conflict of interest because the EPA is a government agency and the government is the responsible party. Second, the government has more resources to pursue a cleanup than some private responsible parties do. Therefore, it has the ability to proceed more quickly to remediate a site. Based on these reasons, a court should question why the government is not more promptly remediating a site that it has contaminated.

3. Policy Benefits of the Equitable-Factors Approach

Adopting the equitable-factors analysis proposed by this Comment has several potential policy benefits. First, the approach reduces litigation after the remediation is complete. With a categorical bar to judicial review, the EPA does not have to justify its actions until after they are completed. If the EPA missed something in designing its response action, its oversight will not be revealed until after the deficient plan has already been implemented. If certain challenges to response actions could be heard before those actions are completed, EPA plans could be modified proactively to address any revealed deficiencies. As a result, plaintiffs would have no need to litigate whether the response actions were adequate or appropriate. Although the notice-and-comment period before the EPA selects a final remedy serves the same function, it is not always possible for all parties to express all comments and concerns about proposed remedies during this period. Precompletion judicial review can serve as a backup method to ensure that all voices are heard as early in the process as possible.

Second, the approach potentially saves money. Imagine the following situation. The EPA undertakes a response action that cannot

252. *Id.*

be challenged before completion. The EPA spends money to complete this action. After completion, a plaintiff sues, challenging the response action. The suit is successful, and a court finds the EPA's response action in violation of federal environmental law. Either the plaintiffs are awarded monetary damages or the EPA is required to implement a new remediation strategy in accordance with federal environmental statutes. Either way, the EPA has spent money to implement a cleanup and then has to spend more money to pay damages, to plan and implement a revised cleanup strategy, or both. This results in an inefficient allocation of scarce resources the EPA could use to fund other needed cleanups. While precompletion litigation could be costly, it is cheaper than spending money to implement a remediation plan and then spending more money to defend it in court.

Third, the approach potentially offers flexibility. Categorical laws tend to be rigid and reflect a one-size-fits-all mentality. This is dangerous because a potential for extraordinary cases, not envisioned when the law was being drafted, always exists. In the context of the timing-of-review provision, *Frey* and *Cannon* demonstrate such extraordinary situations. Thus, the Tenth Circuit's strict interpretation of the timing-of-review provision harmed the Cannons when in fact Congress designed the provision to help people like the Cannons who suffered as a result of owning contaminated land. The equitable-factors approach proposed in this Comment would alleviate the rigidity of the timing-of-review provision and make it flexible enough to deal with unusual situations like those in *Frey* and *Cannon*.

Of course, these factors are applicable beyond just the situations in *Frey* and *Cannon*. The equitable-factors analysis would be useful in two general contexts. First, it is useful in any situation where the EPA has initiated a response action that drags on without any apparent end in sight. Second, the approach helps in any situation where no concrete action has been undertaken even though an extended period of time has elapsed since the contamination was uncovered. Thus, employing the equitable-factors analysis gives the timing-of-review provision the flexibility it needs to deal with the divergent situations to which it will be applied.

IV. CONCLUSION

The problem of remediating sites contaminated with hazardous substances is a vexing issue in the United States today. While cleaning up these dangerous sites is a prudent course of action, figuring out how to do so poses many challenges. Congress acted wisely when enacting

CERCLA, putting into effect a regulatory and legal framework to oversee the process of cleaning up contaminated waste sites. Despite Congress's efforts, CERCLA remains flawed. In particular, the timing-of-review provision added under SARA is poorly worded, which has resulted in divergent—and sometimes inequitable—results when applied by various district and circuit courts. Ideally, Congress should revise the timing-of-review provision to explicitly provide the flexibility needed to apply it in an equitable way in all situations. Congress has given no indication, however, that it will act in this regard any time soon, given the many other important issues it currently faces.

Because Congress appears unlikely to revise the timing-of-review provision in the foreseeable future, the courts should fashion some relief. Certain courts, such as the one in *Frey*, have tried to do so, while others, such as the one in *Cannon*, have hewed closer to the plain language of the statute and have stated that it is not their place to resolve this issue. Given that the interpretation of the timing-of-review provision has generated a circuit split, it is time for the Supreme Court to provide clarification about the operation and application of this provision. By applying the equitable-factors analysis laid out in this Comment, the Court could create a more evenhanded interpretation of the timing-of-review provision. Such an analysis will give plaintiffs with no other avenues a chance to have justice. As its title implies, the timing-of-review provision is designed to affect the timing of judicial review; it should not be used to extinguish it altogether.