

Cleanup in Progress: Agency Deference, CERCLA, and the Inflation Reduction Act

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I. INTRODUCTION.....	421
II. BACKGROUND.....	423
A. Overview of CERCLA.....	423
1. Funding Prior to 1995.....	424
2. Funding After 2022.....	426
B. Interpretation of Orders, Settlements, and Hazards	426
1. Section 106 Orders	427
2. Hazardous Substances.....	429
C. Chevron Deference and History.....	429
D. New Eras of Deference.....	430
1. The (Not So) New Rule of Loper Bright	431
III. ANALYSIS	432
A. CERCLA Without Any Teeth	432
B. The Road from Chevron to Loper Bright	434
C. Behavioral Changes and Last-Ditch Efforts	435
IV. RECOMMENDATION	437
A. EPA Procedures	437
B. Amending CERCLA	438
C. Considerations for At-Risk Corporations.....	439
V. CONCLUSION	440

I. INTRODUCTION

Federal agencies are garnering an increasing amount of controversy, attention, and debate among the public and legal spheres. This controversy became even more clear amid a tumultuous election season.¹ One such agency under fire, the Environmental Protection

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1. Lisa Mascaro, *Conservatives Aim to Restructure U.S. Government and Replace it with Trump's Vision*, PBS NEWS (Aug. 29, 2023), <https://www.pbs.org/newshour/politics/conservatives-aim-to-restructure-u-s-government-and-replace-it-with-trumps-vision> [https://perma.cc/Y2J5-CSDD].

Agency (“EPA”), relies on statutes passed by Congress to shape its role and responsibility.² Of these statutes, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”) will likely emerge from the background in the coming years. With fresh funding, new case law, and the watchful eye of the public, the country has entered a new era of CERCLA and the administrative state.

This Note will begin by laying the groundwork with *Chevron v. Natural Resources Defense Council*, the foundation for what is widely known as the *Chevron* Doctrine.³ Decided in 1984, *Chevron* became the standard for deference to agency interpretation for 40 years.⁴ *Chevron* was cited by agencies to support their interpretation of ambiguous statutory language, including the EPA’s interpretation of language within CERCLA. The *Chevron* court codified the two-question standard used to review agency statutory construction: (1) whether “Congress has directly spoken to the precise question at issue,” and if Congress has not directly addressed the issue, the court must ask (2) “whether the agency’s answer is based on a permissible construction of the statute.”⁵

The next highlight in the administrative state shift is *West Virginia v. EPA*, decided recently in 2022.⁶ This case created, or at least popularized, the major questions doctrine.⁷ *West Virginia* marked a significant shift in the Supreme Court’s attitude towards the administrative state and the Court’s propensity to interpret the law. The court sets a fallback provision that allows courts to deny an agency’s interpretation if the court feels the issue is too politically and economically impactful.⁸ By creating a larger basket to store away decisions of economic and political importance, the Supreme Court continues to restrict agencies’ ability to interpret their designated statutes.

To pinpoint the focus of this Note, *Loper Bright Enterprises v. Raimondo* must be examined.⁹ In the summer of 2024, the Supreme Court decided *Loper Bright*, which explicitly overturned *Chevron*.¹⁰ The two-part *Chevron* test that required deference to agency decisions in ambiguous statutes was removed entirely. Courts are now required to “exercise their independent judgment in deciding whether an agency has acted within its statutory authority,” even in ambiguous cases.¹¹ Courts may still look to the Executive Branch to “help inform that inquiry,” but their independent judgment is ultimately necessary.¹² *Loper*

2. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675; Clean Water Act of 1972, 33 U.S.C. §§ 1251–1389; Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601–97.

3. See generally *Chevron, U.S.A., Inc. v. Nat’l. Res. Def. Council*, 467 U.S. 837 (1984), *overruled by* *Loper Bright Enter. v. Raimondo*, 603 U.S. 369 (2024).

4. See Michael R. Blumenthal et al., *The End of Chevron Deference: What Does It Mean, and What Comes Next?*, ABA (Aug. 16, 2024), https://www.americanbar.org/groups/business_law/resources/business-law-to-day/2024-august/end-chevron-deference-what-does-it-mean-what-comes-next/ [<https://perma.cc/ZFB2-63ZE>].

5. *Chevron*, 467 U.S. at 842–43.

6. *W. Va. v. EPA*, 597 U.S. 697 (2022).

7. *Id.* at 723. The majority and dissent disagree over whether the “major questions doctrine” had historic precedent or whether the majority is “announc[ing] [its] arrival.” *Id.*

8. See *id.* at 779 (noting within Justice Kagan’s dissent, that the major questions doctrine appears as a “get-out-of-text-free card”) when textualist interpretations would “frustrate broader goals”).

9. See generally *Loper Bright Enter. v. Raimondo*, 603 U.S. 369 (2024).

10. *Id.* at 412.

11. *Id.*

12. *Id.* at 413.

Bright has removed the *Chevron* Doctrine from play, and at least for the time being, can be considered the new standard for judicial review of federal agencies' interpretations.

The changing legal landscape around administrative agency statutory interpretation is important because of the agency's ability to issue new rules, adapt its regulations to new circumstances, and direct its finite resources towards its purpose rather than litigation. As courts grapple with this post-*Chevron* era, the EPA's most recent PFAS rule,¹³ among other statutory interpretations, will be challenged. Specifically applied to CERCLA, any inhibitions on the EPA's operation can slow or halt cleanup efforts, resulting in detrimental consequences to public health and the environment.¹⁴

II. BACKGROUND

A. Overview of CERCLA

Toxic waste cleanup sites seem better suited to a 2000s movie than a current pressing concern of this nation. And yet, the United States currently has 1,343 Superfund sites listed under the National Priorities List.¹⁵ The essential function of the Comprehensive Environmental Response, Compensation and Liability Act (referred to either as "CERCLA" or simply "Superfund") is to ensure that the most dangerous contaminated waste sites are cleaned up to prevent disastrous harm to public health. Toxic sites that meet the criteria discussed within this Note are often referred to as Superfund sites. For the public, CERCLA may have faded into the background, but this Act may see a revival with billions of dollars in funding expected to enter the Superfund from tax revenue implemented in the Inflation Reduction Act of 2022.¹⁶

The passage of CERCLA was the culmination of several bipartisan environmental protection laws passed in the 1970s, finally addressing the clean-up of abandoned hazardous waste sites.¹⁷ After accounts of severe contamination reached mainstream news, such as Love Canal and Valley of the Drums,¹⁸ it was apparent that intervention was needed at a federal level.

13. Reza Zarghamee & Steve R. Brenner, *The End of Chevron Deference Could Spell Trouble for EPA's PFAS 'Hazardous Substance' Rule*, PFAS OBSERVER (Sept. 4, 2024), <https://pfas.pillsburylaw.com/chevron-deference-epas-pfas-hazardous-substance-rule/> [https://perma.cc/D42L-FATC].

14. Bryan Nelson, *10 Examples of Why the Superfund Program Matters*, TREEHUGGER (Oct. 12, 2017), <https://www.treehugger.com/superfund-sites-where-are-they-now-4869204> [https://perma.cc/G3NT-W5MU].

15. *National Priorities List (NPL) Sites—by State*, EPA (July 3, 2025), <https://www.epa.gov/superfund/national-priorities-list-npl-sites-state> [https://perma.cc/GDA9-EY6H].

16. Jean Mosites & Amanda L. Brosy, *The Inflation Reduction Act Reinstates Superfund Petroleum Excise Tax*, BABST CALLAND (Aug. 19, 2022), <https://www.babstcalland.com/wp-content/uploads/2022/08/The-Inflation-Reduction-Act-Reinstates-Superfund-Petroleum-Excise-Tax.pdf> [https://perma.cc/F2WS-NTC6]; Inflation Reduction Act of 2022, Pub. L. No. 117-169.

17. CONG. RSCH. SERV., COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT 1 (2012), <https://crsreports.congress.gov/product/pdf/R/R41039> [https://perma.cc/4TG3-EDCT].

18. ROGER C. HERDMAN ET AL., LOVE CANAL PUBLIC HEALTH TIME BOMB 3 (1978), https://www.health.ny.gov/environmental/investigations/love_canal/docs/ctimbmb.pdf [https://perma.cc/B43P-V3X2]; Kirsten Delamarter, *EEC Looks Back at 'Valley of the Drums' Legacy*, LAND, AIR & WATER (Aug. 4, 2021), <https://landairwater.me/2021/08/04/ee-looks-back-at-valley-of-the-drums-legacy/#> [https://perma.cc/H5U9-KP4Q].

Congress enacted CERCLA in 1980, authorizing the federal government “to clean up contaminated sites in the United States and to make the ‘potentially responsible parties’ connected to those sites financially liable for the cleanup costs.”¹⁹ When a site is designated, CERCLA requires the responsible parties to either complete the cleanup process or pay the government for the cleanup work undertaken by the EPA.²⁰ This is accomplished by the “broad liability scheme that holds both past and current owners and operators” of the contaminated sites responsible for the cost of cleanup.²¹ The EPA is responsible for investigating potential sites, determining potentially responsible parties (“PRP”), and overseeing cleanup efforts, among other responsibilities.²² The EPA also manages the National Priorities List, which identifies the sites most in need of cleanup action.²³

Superfund site designations require consistent and thorough administrative procedures by the EPA. The site designation process can begin with discovery or identification by “citizens, states, tribes or other environmental programs” notifying the EPA of suspected hazardous waste activity.²⁴ The official process begins with adding the site to the Federal Agency Hazardous Waste Compliance Docket (“Docket”).²⁵ Non-federal sites require Pre-CERCLA screening, limited in scope to only collect necessary information.²⁶ Next, both federal and non-federal sites that were placed on the Docket undergo a preliminary assessment and a site inspection if needed.²⁷ The Hazard Ranking System (“HRS”) scoring is applied, and sites with a score below 28.50 are not added to the National Priorities List, while those scored above 28.50 are added, assuming they will not receive a “no action” Record of Decision.²⁸

If no responsible party can be located, the site becomes an “orphan share” or “orphan site” and the EPA completes the cleanup using funds from the Hazardous Substance Superfund Trust Fund (often referred to as simply the “Superfund”).²⁹ There were three sources of funding for the initial 1980 Superfund that eventually expired in 1995.³⁰ These included taxes on petroleum, chemical feedstocks, and corporate income taxes.³¹

1. Funding Prior to 1995

The funding structure of CERCLA is crucial to its efficacy. The Superfund pays for the cleanup of orphan sites, so a well-funded Superfund is necessary, especially when a

19. CONG. RSCH. SERV., *supra* note 17, at 1.

20. *See* Mosites & Brosy, *supra* note 16.

21. *See* CONG. RSCH. SERV., *supra* note 17, at 1.

22. *Id.*

23. *Id.*

24. *Superfund Site Assessment Process*, EPA, (Sept. 22, 2025), <https://www.epa.gov/superfund/superfund-site-assessment-process> [<https://perma.cc/XWM2-GT5C>].

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *See* CONG. RSCH. SERV., *supra* note 17, at 1. The terms “orphan share” and “orphan site” are used colloquially to describe cleanup sites without a known responsible party.

30. CONG. RSCH. SERV., *supra* note 17, at 19.

31. *Id.*; *see also* 26 U.S.C. § 4611, § 4661.

large portion of sites are orphans.³² The three original sources of funding for the Superfund were dedicated taxes on petroleum, chemical feedstocks, and corporate income.³³

The tax on petroleum³⁴ has been controversial since its enactment.³⁵ In 1986, the Superfund Amendments and Reauthorization Act (“SARA”) introduced the special tax on corporate income.³⁶ While Congress has debated multiple reinstatements of the Superfund taxes, arguments of unfairness have consistently halted any decisions.³⁷ Many consider the taxes to be a necessary aspect of Superfund, while others point to the observation that some businesses are subject to the tax who have never contributed to pollution, pulling more than their fair share of the weight.³⁸

After the expiration of the initial taxation system, the Superfund ran out of money by 2004, less than ten years after its prime.³⁹ Once the 1995 expiration passed, the Superfund was solely funded by the General Fund of the United States Treasury, which was the minimal contributor that did not garner much attention prior to 1995.⁴⁰ Despite the accusations of unfairness towards non-polluting corporations, some citizen groups are redefining the Superfund Trust Fund.⁴¹ When the General Fund of the United States Treasury is the sole contributor to federal funding of Superfund cleanups, some corporate income taxes and individual income taxes are still paying their share.⁴²

The Superfund’s contribution structure has changed significantly since Congress enacted CERCLA, but changes that fail to consistently refill the Superfund likely run contrary to Congress’ original intent. Congress effectively incorporated the “clean up first, litigate later” principle into the Act, which requires funds be available to the EPA to begin cleanup rapidly.⁴³ Congress prioritized initiating the site cleanup regardless of payment to protect the health of communities.⁴⁴ These policy considerations are precisely what lend understanding to continued funding for 15 years. But once these three funding sources ended, it was a long road to implement them once again.

32. ENV’T PROT. NETWORK, CLEANING UP SUPERFUND SITES 2 (2020), <https://www.environmentalprotectionnetwork.org/wp-content/uploads/2020/08/Cleaning-Up-Superfund-Sites.pdf> [https://perma.cc/83KQ-EG8R].

33. The General Fund of the U.S. Treasury did contribute to the Superfund trust at this time as well, although it was minimal and nearly disregarded. CONG. RSCH. SERV., *supra* note 17, at 19–20.

34. *Id.* at 20. The tax on petroleum was 9.7 cents per barrel prior to the expiration of the tax in 1995. *Id.*

35. Kevin Bogardus & Ellie Borst, *Superfund Tax Shortfall: Trouble for Cleanups, EPA Budget*, POLITICO (Apr. 15, 2024), <https://www.eenews.net/articles/superfund-tax-shortfall-trouble-for-cleanups-epa-budget/> [https://perma.cc/AE94-26BC].

36. CONG. RSCH. SERV., *supra* note 17, at 20. This tax was set at “0.12% of corporate alternative minimum taxable income in excess of \$2 million.”

37. *Id.*

38. *Id.*

39. *Superfund*, CTR. FOR HEALTH, ENV’T & JUST., <https://chej.org/superfund> [https://perma.cc/CY68-PRCP] (explaining what the Polluters Pay fee is and why it is not being collected).

40. CONG. RSCH. SERV., *supra* note 17, at 19–20

41. *Superfund*, *supra* note 39.

42. *Id.*

43. CONG. RSCH. SERV., *supra* note 17, at 1.

44. Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 BUS. LAW. 923, 924 n.4 (1990) (citing *Chem. Waste Mgmt. v. Armstrong World Indus.*, 669 F. Supp. 1285, 1290 n.6 (E.D. Pa. 1987)).

2. *Funding After 2022*

In 2022, President Biden signed the Inflation Reduction Act, opening up avenues of funding for CERCLA that had not been available since 1995.⁴⁵ While only two of the three original funding sources were reinstated, this has still created momentum for CERCLA.⁴⁶ The third significant tax from 1995 that remains dead is the corporate income tax.⁴⁷ While it may seem like pocket change, the meager 16.4 cents per barrel reintroduced by the Inflation Reduction Act is estimated to raise \$11.7 billion in tax revenue in the next ten years.⁴⁸ Because of the renewed funding scheduled to flow into the Superfund, orphan sites that are waiting on funding to begin cleanup work could see these funds sooner than expected. However, any new action is pending because of the Trump Administration's attempted funding freezes and reevaluations of the Inflation Reduction Act.⁴⁹

B. Interpretation of Orders, Settlements, and Hazards

CERCLA is multifaceted, but the Act itself does not detail the exact actions required for cleanup, nor the specific chemical pollutants that would trigger Superfund designation.⁵⁰ The nature of contaminated site cleanups is far too expansive and technical to allow this information in the Act itself. Congress left this responsibility largely to the EPA for interpretation and rulemaking.⁵¹

To clean up these sites, CERCLA authorizes enforcement mechanisms to use against responsible parties who can be identified, including “judicial or administrative orders, cost-recovery actions, and voluntary settlement agreements.”⁵² The source of this enforcement authority is delegated from Congress to the President, the EPA, and other administrative agencies.⁵³ CERCLA also authorizes citizens and groups to bring suits to enforce cleanups.⁵⁴ The cleanup action “must be completed before compliance with applicable requirements can be challenged.”⁵⁵

If there is the potential for 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,” the EPA may seek a judicial order or issue an administrative order.⁵⁶ Severe fines may be issued for failure to comply with a cleanup order.⁵⁷ To further encourage compliance, CERCLA allows enforcement of punitive damages “up to

45. Inflation Reduction Act of 2022, Pub. L. No. 117–169, § 13601(a)(2), 136 Stat. 1981 (2022) (stating that adjusted for inflation, the tax on petroleum and oil products now sits at 16.4 cents per barrel).

46. Mosites & Brosy, *supra* note 16.

47. *Id.*

48. *Id.*

49. Olivia Guarna & Amy Turner, *100 Days of Trump 2.0: The Inflation Reduction Act*, COLUM. CLIMATE SCH. SABIN CTR. FOR CLIMATE CHANGE L. (Apr. 29, 2025), <https://blogs.law.columbia.edu/climatechange/2025/04/29/100-days-of-trump-2-0-the-inflation-reduction-act/> [<https://perma.cc/5WWR-ZVBE>].

50. CONG. RSCH. SERV., *supra* note 17, at 2.

51. *Id.*

52. *Id.* at 22.

53. *Id.*

54. *Id.* at 26–27.

55. CONG. RSCH. SERV., *supra* note 17, at 22.

56. 42 U.S.C. § 9606(a).

57. These fines are up to \$25,000 per day for noncompliance. *Id.* § 9606(b)(1).

three times the costs incurred by the United States out of the Superfund Trust Fund to carry out the cleanup action that the party did not perform.”⁵⁸ Because these funds can be deposited into the Superfund Trust,⁵⁹ the EPA has an increased incentive to pursue punitive damages.

Cost-recovery actions embody the “clean up first, litigate later” principle. CERCLA allows, and perhaps encourages, the EPA to begin cleanup without the identified potentially responsible party.⁶⁰ States, tribes, and other persons may recover from PRPs if they choose to initiate the cleanup actions themselves.⁶¹ The only potential downside to cost-recovery actions, aside from the upfront investment, is the time limit on recovery actions.⁶² This limit ranges from three years to six years, depending on the length of the cleanup.⁶³

The third enforcement mechanism is through voluntary settlement agreements and Section 113 settlements.⁶⁴ Perhaps the cheapest option for a responsible party, voluntary settlement saves litigation costs and punitive damages costs. Additionally, the EPA has the option to include a covenant in the agreement with the party, promising the federal government will not sue for further liability.⁶⁵ Yet another incentive includes the “protection from contribution claims by other parties at that site” for parties who voluntarily settle for liability.⁶⁶ CERCLA has certainly afforded potentially responsible parties and the EPA alike with viable options for recovery. Settlement options are appealing both to corporations who take on the cleanup voluntarily and those who believe another party is responsible for the contamination.⁶⁷

Companies with a security interest in another company may not be off the hook for waste cleanup violations.⁶⁸ CERCLA’s Section 101 places liability on these companies if they exercise a requisite level of control and decision-making power over the other company.⁶⁹ Because of CERCLA’s strict liability scheme, companies must be acutely aware of their potential liability for companies in which they have a security interest.

1. Section 106 Orders

CERCLA is one of the most comprehensive and aggressive environmental federal liability statutes to date.⁷⁰ Congress articulated its intent that the Act be wide-reaching to hold potentially responsible parties (“PRPs”) accountable and ensure cleanup.⁷¹ Because

58. CONG. RSCH. SERV., *supra* note 17, at 22.

59. *Id.*

60. *Id.* at 23.

61. *Id.*

62. 42 U.S.C. § 9613(g)(2).

63. *Id.*

64. CONG. RSCH. SERV., *supra* note 17, at 23.

65. 42 U.S.C. § 9622(f)(1).

66. CONG. RSCH. SERV., *supra* note 17, at 24 n.93 (citing 42 U.S.C. § 9613(f)(2)).

67. *Id.* at 13.

68. Evan Anderson, *Turning the Dirty Tide: The Farmer Fairness Act’s Attempt to Create Integrator Liability*, 46 J. CORP. L. 199, 213 (2020).

69. *Id.*

70. See Amanda F. Watson, *Remediation for PFAS Contamination: The Role of CERCLA Enforcement in Environmental Justice*, 58 GA. L. REV. 803, 821–23 (2024) (discussing the firm nature of CERCLA’s liability provisions and enforcement action authority).

71. *Id.*

of this strict accountability and reliance on highly technical science, the Act relies on the delegation of presidential authority and deference to administrative agency interpretation to determine ambiguous statutes.⁷²

CERCLA's Section 106 is an enforcement arm of the legislation, but it also contains "carrots" for PRPs.⁷³ It is primarily an effective tool to be used against "recalcitrant or other non-settling PRPs," as the EPA has found that parties are much more likely to consent to response measures when faced with threats of action for injunctive relief.⁷⁴ To bring a Section 106 action, the EPA must be able to prove there is "imminent and substantial endangerment"⁷⁵ because of a "release or threat of a release of a hazardous substance from a facility."⁷⁶ The EPA has subsequently defined these terms, resulting from case law on Section 106, in its Guidance on CERCLA memorandum. For example, "[e]ndangerment' is imminent if factors giving rise to it are present, even though harm may not be realized for years."⁷⁷ The referenced "factors" in the above definition refer to a culmination of problems or situations that would cause the endangerment.⁷⁸

The EPA decides when a PRP requires a Section 106 order based on the enumerated criteria.⁷⁹ But, the language of Section 106 does not specify who exactly may receive a 106 order.⁸⁰ This is an instance in which the EPA has used its authority to interpret and to carry out an integral part of CERCLA. The EPA's view is that PRPs under Section 107(a) are also able to receive a Section 106 order.⁸¹ The list of designees is broad, including present owners and operators, past owners and operators at the time of hazardous substance release, arrangers of disposal, and transporters who selected the site for disposal.⁸² The EPA also includes other parties as is necessary to protect the public or environment.⁸³ These definitional developments are examples of agency interpretation of an arguably ambiguous statute.

Not all Superfund site cleanups need to be initiated and fully compelled by the EPA; PRPs may do the legwork early on and still recoup their costs later. Section 106(b)(2) is

72. CONG. RSCH. SERV., *supra* note 17, at 4; *see* 42 U.S.C. § 9606(c) (stating the EPA's authority to interpret, establish and publish guidelines for using imminent hazard, enforcement, and emergency response mechanisms).

73. CONG. RSCH. SERV., *supra* note 17, at 22–23.

74. Guidance Memorandum from the Env't Prot. Agency on CERCLA Section 106 Judicial Actions to the Regional Administrators 2 (Feb. 24, 1989), <https://19january2017snapshot.epa.gov/sites/production/files/2013-10/documents/cercla-106ja-rpt.pdf> [<https://perma.cc/R7A2-G7KK>].

75. *Id.* at 1.

76. *Id.* at 4.

77. *Id.*

78. For example, the improper disposal of chemicals underground may later contaminate drinking water, which could endanger the public. The harm may take years or even decades to be realized, but this likely still qualifies as endangerment under CERCLA.

79. 42 U.S.C. § 9622(f).

80. *Id.*

81. Guidance Memorandum from the Env't Prot. Agency on CERCLA Section 106(a) Unilateral Orders for Remedial Designs and Remedial Actions 12–13 (Mar. 7, 1990), <https://www.epa.gov/sites/default/files/documents/cerc106-uao-rpt.pdf> [<https://perma.cc/RL98-5UGG>].

82. 42 U.S.C. § 9622(f).

83. Guidance Memorandum from the Env't Prot. Agency on CERCLA Section 106(a) Unilateral Orders for Remedial Designs and Remedial Actions 12–13 (Mar. 7, 1990), <https://www.epa.gov/sites/default/files/documents/cerc106-uao-rpt.pdf> [<https://perma.cc/RL98-5UGG>].

particularly attractive for PRPs who have doubts about their responsibility and may want to bring challenges to the EPA's cleanup order, but wish to avoid the severe penalties of refusing to initiate the cleanup.⁸⁴ While many enforcement avenues are embedded in Section 106, at this point, only the EPA's interpretation has determined to whom these enforcement avenues apply.⁸⁵

2. Hazardous Substances

CERCLA also grants the EPA authority to designate "hazardous substances," as defined under CERCLA, which would require a cleanup action.⁸⁶ A hazardous substance designation under Section 9602(a) can be made in addition to the previously listed substances found in Section 9601(14) if the substance "may present substantial danger to the public health or welfare or the environment."⁸⁷ An exhaustive list was not realistic, nor wise, for Congress to make at the time of passage. Accordingly, the EPA is charged with interpreting "substantial danger" under Section 9602(a).⁸⁸ For example, in 2022, the EPA added 1-Bromopropane, often used in solvents and degreasers, to the list of hazardous substances.⁸⁹ This chemical was added to the list because it has been shown to cause cancer.⁹⁰ Although this designation may not be the most mainstream of substance designations that are at risk for challenge after *Loper Bright*, it is certainly on the radar.

Most recently, the EPA used this authority to designate Perfluorooctanoic Acid ("PFOA") and Perfluorooctanesulfonic Acid ("PFOS") within this category for regulation and initiate cleanup actions.⁹¹ Shortly after this designation, the United States Chamber of Commerce, among many others, challenged its validity.⁹² This challenge includes both an interpretive challenge under *Loper Bright* and an arbitrary and capricious challenge under the Administrative Procedure Act.⁹³ This Note will focus only on the interpretive challenge.

C. Chevron Deference and History

Shortly after CERCLA's enactment, the Supreme Court decided the landmark case, *Chevron v. Natural Resources Defense Council* of 1984.⁹⁴ CERCLA previously operated under *Chevron* for 40 years, providing the framework for deference given to administrative

84. CONG. RSCH. SERV., *supra* note 17, at 22–23.

85. 42 U.S.C. § 9622(f).

86. *Id.* § 9602(a).

87. *Id.*

88. *Id.*

89. Addition of 1-Bromopropane to the List of CERCLA Hazardous Substances; List of Hazardous Substances; Technical Corrections, 87 Fed. Reg. 20721, 20721–75 (Apr. 8, 2022) (to be codified at 40 CFR pt. 302); Leigh Krietsch Boerner, *1-Bromopropane Up Next on EPA's Chopping Block*, CHEM. & ENG'G NEWS (Aug. 6, 2024), <https://cen.acs.org/policy/chemical-regulation/1-Bromopropane-next-EPAs-chopping/102/web/2024/08> [<https://perma.cc/4ZTD-Q7NY>].

90. *See* Boerner, *supra* note 89.

91. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39124, 39124 (May 8, 2024) (to be codified at 40 CFR pt. 302).

92. Brief for Petitioner at 1, Chamber of Com. of the U.S. v. EPA, No. 24-1193 (D.C. Cir. May, 2024).

93. *Id.* at 25.

94. *Chevron, U.S.A., Inc. v. Nat'l. Res. Def. Council*, 467 U.S. 837 (1984).

agency interpretations, a critical factor in the functioning of CERCLA. The *Chevron* Court created a two-part test to handle ambiguous language and direct when courts need to defer to the agency's reasonable interpretation of a statute.⁹⁵ First, courts must look to "whether Congress has directly spoken to the precise question at issue" and if Congress's intent is clear, this intent is the rule on the matter.⁹⁶ However, if Congress has not directly addressed the issue, as determined by the court, the question must be whether the agency's interpretation is "based on a permissible construction of the statute."⁹⁷ If the court finds that there are multiple reasonable interpretations, *Chevron* dictates that the court must defer to the agency's interpretation, even if the court believes it is not the best interpretation.⁹⁸ This holding directly impacts the EPA's work with CERCLA because, as with many scientific areas of law, there are often multiple reasonable interpretations. Such complexity and lack of clarity can bring cases to the Supreme Court—which are rarely resolved unanimously—leaving many people wondering how a court can accurately decide the "best" interpretation.⁹⁹

D. New Eras of Deference

To provide context to the Supreme Court's evolution regarding agency deference, *West Virginia v. EPA* is an important phase in the transformation of the administrative state.¹⁰⁰ Even as the Supreme Court pulls in the direction of textualism, it finds the ability to set aside its duty to interpret the law when faced with major questions of political and economic significance.¹⁰¹

The facts of *Loper Bright* created a golden opportunity for the Supreme Court to reassess *Chevron* deference. Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") to address overfishing in international waters off the United States coast.¹⁰² To achieve its conservation goals, the MSA has mechanisms to regulate the fishing equipment, allow some catch to be used in research, and, as applicable here, may require "one or more observers be carried on board" to collect data.¹⁰³ At issue in *Loper Bright* is a rule promulgated by the National Marine Fisheries Service, who administers the MSA. This rule requires fishermen in the Atlantic herring fishery to pay out of pocket for required researchers on board their vessels if federal funding is unavailable to

95. *Id.* at 842–43.

96. *Id.*

97. *Id.* at 843.

98. See *Chevron*, 467 U.S. at 843 (clarifying the distinction between reasonable interpretations, of which there can be multiple, from the "best" interpretation).

99. Robert Percival, *Refreshing Unanimity in Court's Interpretation of Superfund Law*, SCOTUS BLOG (May 25, 2021), <https://www.scotusblog.com/2021/05/refreshing-unanimity-in-courts-interpretation-of-superfund-law/> [<https://perma.cc/AYY4-D56W>].

100. *W. Va. v. EPA*, 597 U.S. 697 (2022).

101. *Id.* at 766 (Kagan, J., dissenting). The Court in *West Virginia* held that the EPA did not have the authority under the Clean Air Act to use a generation-shifting method to reduce carbon emissions, particularly because the Court believed Congress could not have intended to delegate such broad authority to the EPA. *Id.* at 700–01. However, Congress often passes broad and open-ended statutes, with the intent that agencies will fill in the gaps. *Id.* at 758 (Kagan, J., dissenting). Given the larger scale shift, *West Virginia* was a noteworthy step towards constricting the administrative state, particularly agency interpretation.

102. 16 U.S.C. § 1801 *et. seq.* and 16 U.S.C. § 1852.

103. 16 U.S.C. §§ 1853(b)(4), (8), (11).

cover the cost.¹⁰⁴ While the statute expressly outlines funding protocol for these observers in other fisheries and foreign vessels, the statute is silent on observers in Atlantic herring fisheries, prompting the agency interpretation at issue.¹⁰⁵

1. *The (Not So) New Rule of Loper Bright*

In the recent evolution of administrative law, the Supreme Court overruled its decision in *Chevron* with its decision in *Loper Bright*,¹⁰⁶ overturning more than 40 years of precedent.¹⁰⁷ The two-step test to determine deference, as discussed earlier in this Note, has been set aside. In its place, a rule proclaiming that courts need not defer to an agency's interpretation of a statute "simply because a statute is ambiguous" takes center stage.¹⁰⁸ The Supreme Court relies on the Administrative Procedure Act ("APA") to reach this conclusion.¹⁰⁹ Particularly, the Court illustrates how the APA was intended as a check on administrative agencies and a rethinking of agency power.¹¹⁰ The *Loper Bright* Court looks specifically into the language of the APA, with the Court stating: "[B]y directing courts to 'interpret constitutional and statutory provisions' without differentiating between the two, Section 706 makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference."¹¹¹

The Court boils down the issue into two categories. First, that agencies decide questions of fact, and second, that courts decide questions of law.¹¹² In instances of pure fact determinations, a court is still entitled and encouraged to defer to the agency's decision.¹¹³ For example, in *Gray v. Powell*, a pre-*Chevron* case, the Court relied on the agency's fact-based determination that a coal-burning railroad making arrangements with coal mines did not qualify as a "producer" under the relevant statute.¹¹⁴ The *Gray* Court gave deference to the fact determination, but other questions that were deemed questions of law were left to the Court.¹¹⁵

The Court finds that history does not resemble *Chevron* deference.¹¹⁶ Instead, the Court relies upon Congress' iteration that it is "traditional understanding that *courts* must 'decide all relevant questions of law.'"¹¹⁷ Ultimately, the *Loper Bright* rule limiting deference to administrative agencies solidifies another transfer of power from the executive branch to the judicial branch.

The *Chevron* decision did not stand alone for long before the Supreme Court began the carveout process. A significant step in narrowing the *Chevron* Doctrine is *U.S. v. Mead Corp.* where the court reduced deference given to agencies when the interpretation at issue

104. *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 380 (2024).

105. *Id.* at 380–81.

106. *Id.* at 412.

107. *Id.* at 380.

108. *Id.* at 412.

109. *Loper Bright Enter.*, 603 U.S. at 391 (citing 5 U.S.C. § 706).

110. *Id.* at 391–92.

111. *Id.* at 392.

112. *Id.* at 393.

113. *Id.* at 388.

114. *Gray v. Powell*, 314 U.S. 402, 408 (1941).

115. *Id.*

116. *Loper Bright Enter.*, 603 U.S. at 390.

117. *Id.*

was not from a formal procedure.¹¹⁸ The *Mead* court references *Skidmore v. Swift & Co.*, a 1944 case, as the point of reference to use when *Chevron*-level deference is not applicable.¹¹⁹ The *Loper Bright* Court referenced a possible return to the pre-*Chevron* standards of *Skidmore*, despite the 77 Supreme Court cases that relied on *Chevron*.¹²⁰ While it may be too soon to tell what direction the Supreme Court will continue to take, lower courts will need to grapple with this interpretation soon. The changing legal landscape around deference to administrative agency interpretation of statutes will affect those agencies' actions and efficiency. Although many agencies will be affected by the Supreme Court's new rule, this Note focuses on the EPA and CERCLA.

III. ANALYSIS

A. CERCLA Without Any Teeth

The EPA, with its delegated authority, requires deference to fill in technical and evolving gaps in the language of CERCLA as applied to the ever-changing world of hazardous substances. The *Loper Bright* decision may influence the EPA's delegation authority and discretion in Section 106 orders to ensure cleanup compliance.¹²¹ *Loper Bright* is likely to affect new rules promulgated by the EPA, such as the recent PFAS designation.¹²²

The EPA's ability to issue Section 106 orders and reimbursement for cleanup efforts is critical to the function of CERCLA because without it, cleanup actions would only be a toothless recommendation to PRPs. Section 106 orders can include injunctive relief of up to \$25,000 per day.¹²³ Additionally, PRPs may suffer punitive damages "up to three times the cost of cleaning up the site for failure, 'without sufficient cause, to properly provide removal or remedial action.'"¹²⁴ Clearly, these enforcement mechanisms are the muscle behind CERCLA. Without these mechanisms, or if these mechanisms are caught up in litigation, CERCLA implementation could grind to a glacial pace. If the EPA's interpretation of Section 106 orders is disregarded in a post-*Chevron* court, the muscle of CERCLA is lost, at least temporarily.

The PFAS designation will likely be the first interpretation of CERCLA tested under the new *Loper Bright* standard. Early phases of litigation have already been initiated.¹²⁵ The EPA's promulgation of the PFAS¹²⁶ rule implicates another layer of interpretation: the definition of "substantial danger to public health or welfare."¹²⁷ Parties are likely to argue that the EPA has not sufficiently defined "substantial danger" and that designating PFAS

118. *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001).

119. *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 134 (1944)).

120. *Loper Bright Enter.*, 603 U.S. at 392; *How Will EPA Regulate in Loper Bright's Uncertain Wake?*, BLOOMBERG L. (Apr. 2024), <https://www.cov.com/en/news-and-insights/insights/2024/04/how-will-epa-regulate-in-loper-brights-uncertain-wake#layout=card&numberOfResults=12> [https://perma.cc/F83E-2UUN].

121. CONG. RSCH. SERV., *supra* note 17.

122. Zarghamee & Brenner, *supra* note 13.

123. 42 U.S.C. § 9607(c)(3).

124. *Wagner Seed Co. v. Bush*, 946 F.2d 918 (D.C. Cir. 1991); 42 U.S.C. § 9607(c)(3).

125. Megan Quinn, *NWRA and Others Challenge EPA's PFAS Hazardous Substance Designation in Federal Court*, WASTEDIVE (July 15, 2024), <https://www.wastedive.com/news/pfas-lawsuit-epa-superfund-cercla-hazardous-substance-passive-receiver-nwra/721326/> [https://perma.cc/S88Q-LTYX].

126. Throughout this Note, PFOS and PFOA are combined into the umbrella term PFAS for simplicity.

127. Zarghamee & Brenner, *supra* note 13; 42 U.S.C. § 9602(a).

goes beyond the congressionally intended definition.¹²⁸ These early challenges will give a better idea of how the courts intend to utilize the *Loper Bright* standard.

Thus far, parties have claimed the EPA's interpretation of substantial danger "has no real boundaries and is therefore unreasonably broad."¹²⁹ The EPA provides a list of considerations, although they are not weighted nor are they exhaustive.¹³⁰ With the Supreme Court's recent trend towards curtailing administrative agency authority, it is no surprise that a broad rule such as the PFAS designation would raise red flags. Depending on whether the court views the EPA's authority to designate PFAS as a "hazardous substance" as within its expressly delegated authority or outside of this authority, the standard of review will vary. As *Loper Bright* outlines, expressly delegated authority is subject to a reasoned decision-making standard of judicial review.¹³¹ If the PFAS designation withstands the challenges, many companies will need to prepare for cleanup actions, given how pervasive PFAS remains in the environment.

While the EPA attempts to steadily trudge along with its CERCLA enforcement duties, one corporate name has remained in the spotlight for its attempt to evade CERCLA liability, and that is DuPont.¹³² With a wide array of manufactured products, DuPont has been the subject of CERCLA action for chemical spills, and most recently, the leakage of PFAS into groundwater from their plastics production.¹³³ To distance itself from liability, DuPont has spun off into multiple other companies that carry the liability for the PFAS cleanup, yet DuPont only retains the assets.¹³⁴ These spinoffs make it much harder for parties to recover cleanup costs from the original actor, DuPont.

Recently, DuPont has settled PFAS cases for around \$400 million, and these cases do not appear to be slowing down.¹³⁵ Companies like DuPont may attempt to evade liability with underhanded tricks, but this will likely be detrimental in the long term. Companies can and should be proactive about PFAS liability, but this does not require forming spinoff companies. Ultimately, when companies evade liability for their pollution, taxpayers, some of whom have been harmed by the pollution, fund the cleanup.

The primary purpose of the complex CERCLA is ultimately to clean up toxic waste sites that seriously harm the health of those unfortunate enough to live and work around them. The cleanup efforts that Superfund is responsible for are crucial to maintaining a livable environment and protecting vulnerable populations.¹³⁶ National Priorities List sites

128. See Quinn, *supra* note 125 (discussing arguments that the EPA failed to provide clear standards to designate a substance as hazardous).

129. Brief for Petitioner at 31, Chamber of Com. of the U.S. v. EPA, No. 24-1193 (D.C. Cir. May, 2024).

130. *Id.* at 31-32.

131. *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 371 (2024).

132. Gretchen Morgenson, *How DuPont May Avoid Paying to Clean Up a Toxic 'Forever Chemical'*, NBC NEWS (Mar. 1, 2020), <https://www.nbcnews.com/health/cancer/how-dupont-may-avoid-paying-clean-toxic-forever-chemical-n1138766> [<https://perma.cc/XWF2-4WEV>].

133. *Id.*

134. *Id.*

135. *Id.*

136. Earlier versions of this Note relied on information sourced directly from the EPA. Supporting Environmental Justice at Superfund Sites, EPA (Oct. 30, 2023), <https://www.epa.gov/superfund/supporting-environmental-justice-superfund-sites> (on file with the *Journal of Corporation Law*). However, this site was removed during the Trump Administration's review of all federal websites to remove Diversity, Equity, and Inclusion ("DEI") language. Information regarding the importance of environmental justice at Superfund sites can be found with the American Bar Association. Alma Feldpausch & Scott S. Shock, *How Do We Navigate Environmental Justice*

are disproportionately found in and around low-income and minority neighborhoods.¹³⁷ As the world pays closer attention to the disparate impacts of environmental contamination, effective and efficient cleanup is even more important.

Even in its prime function, CERCLA, through the EPA, has missed significant remediation areas. The Valley of the Drums site was one of the driving forces behind Congress's final push to pass CERCLA.¹³⁸ Yet, a mere 700 feet away from the Valley of the Drums site, discarded, corroded storage drums housing toxic waste are strewn about a nature preserve.¹³⁹ The site is much smaller than its famous counterpart, but with such close proximity, locals are concerned and confused as to why it was left.¹⁴⁰ Clearly the EPA does not always "get it right" under CERCLA, but if courts continue to cast aside agency interpretation, future failures are more likely than successes.

B. *The Road from Chevron to Loper Bright*

Since its decision, *Chevron* has become a landmark case, but it was not considered to be one at the time of its decision.¹⁴¹ Only seven of nine Justices participated in *Chevron*, the ultimate decision was not unanimous, and the case was almost was not heard at all.¹⁴² Amid a potential conflict of interest, Justice O'Connor offered to "join 3"¹⁴³ which provided the necessary four votes to hear the case. Justice O'Connor noted hesitation from other Justices, describing some as "very shaky."¹⁴⁴ Nevertheless, the Court heard *Chevron* and, at that time, believed they were simply affirming and clarifying precedent.¹⁴⁵ Under

Concerns at Superfund Sites? Best Practices Based on Experience Across Multiple Sites and Regions, AM. BAR ASS'N (Oct. 15, 2024), https://www.americanbar.org/groups/environment_energy_resources/resources/newsletters/superfund/how-do-we-navigate-environmental-justice-concerns/ [https://perma.cc/UQ6V-MP8Z]. Those who live near Superfund sites across the country are "more likely to be from disadvantaged communities with a higher social vulnerability." Brittany A. Trotter et al., *Who Is Living Near Different Types of US Superfund Sites*, ENV'T EPIDEMIOLOGY at 6 (Feb. 3, 2025), <https://pmc.ncbi.nlm.nih.gov/articles/PMC11793257/pdf/ee9-9-e363.pdf> [https://perma.cc/GVD2-WK75]. Children, minority populations, and households below the poverty level are disproportionately more likely to live within one mile of a Superfund site. See U.S. EPA, OFF. OF LAND AND EMERGENCY MGMT., POPULATION SURROUNDING 1,857 SUPERFUND REMEDIAL SITES (2020), <https://www.epa.gov/sites/default/files/2015-09/documents/webpopulationrsuperfundsites9.28.15.pdf> [https://perma.cc/HP5F-N46M] (showing that of the population living within one mile of a Superfund site, 6.4 percent are children, 49.8 percent are minorities, and 15.4 percent are households below the poverty level).

137. EPA OFF. OF LAND & EMERGENCY MGMT., POPULATION SURROUNDING 1,877 SUPERFUND SITES 1 (2022), <https://www.epa.gov/system/files/documents/2021-10/superfund.pdf> [https://perma.cc/C6CW-49QS].

138. Delamarter, *supra* note 18.

139. James Bruggers, *EPA Cleaned Up Valley of the Drums 45 Years Ago, but Left Behind Gully of the Drums*, KY. LANTERN (Apr. 3, 2024), <https://kentuckylantern.com/2024/04/03/epa-cleaned-up-valley-of-the-drums-45-years-ago-but-left-behind-gully-of-the-drums/> [https://perma.cc/4HFZ-HBHQ].

140. *Id.*

141. Joan Biskupic, *What Sandra Day O'Connor's Papers Reveal About a Landmark Supreme Court Decision—and Why It Could Be Overturned Soon*, CNN POLITICS (Apr. 9, 2024), <https://www.cnn.com/2024/04/09/politics/sandra-day-oconnor-chevron-case/index.html> [https://perma.cc/3Q6K-NK8W].

142. *Id.* Notes from Justice O'Connor regarding the decision to grant certiorari provide key insights into how the Court initially understood this case.

143. A "join 3" refers to when a Justice will vote to hear a case only if three others wanted to hear the case, thereby providing the requisite fourth vote.

144. Biskupic, *supra* note 141.

145. *Id.*

this lens, *Chevron*'s path through history becomes less surprising. The shift towards *Loper Bright* was not a sudden departure from a consistently deferential-to-agencies court. The carve-outs of *Chevron* were certainly indicators of the Court's eventual end goal; independent interpretations of ambiguous statutes.¹⁴⁶ However, another case may stand out as a turning point, *SEC v. Jarkesy*.¹⁴⁷ By curtailing the use of the administrative law judge's ("ALJ") system for SEC claims of fraud seeking civil penalties, power shifted from agencies to Article III courts.¹⁴⁸ Although notably separate, this trend away from administrative agency power is seen all across the United States government.¹⁴⁹ Because the EPA, a federal agency, is responsible for a large functional part of CERCLA's implementation, deference to federal agency decisions during judicial review will significantly impact the function of CERCLA.

C. Behavioral Changes and Last-Ditch Efforts

Within recent years, the Supreme Court's reluctance to apply *Chevron* deference has indicated the shift articulated in the *Loper Bright* decision. However, the EPA may have anticipated this shift.¹⁵⁰ As the Supreme Court has indicated its migration towards textualism, the EPA has done what agencies do well, which is anticipate pushback.¹⁵¹ In recent years, the EPA's rulemaking and defense in litigation show a strategic shift to account for minimal reliance on *Chevron* deference.¹⁵² Agencies often err on the side of caution and overly formal procedures, lest they be accused of failing to provide proper notice and comment periods.¹⁵³

The EPA seems to already be preparing for more litigation in response to the new standard, which will likely go beyond extra formality. The EPA promulgated a new, highly anticipated rule on PFAS in 2024.¹⁵⁴ Throughout the comment period, opponents argued that the "criteria for evaluating whether a chemical or substance poses a 'substantial danger to public health or welfare' was vague and not adequately defined."¹⁵⁵ However, the EPA's response indicated a reliance on deference in making hazardous substance designations.¹⁵⁶

146. *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 380 (2024).

147. *SEC v. Jarkesy*, 603 U.S. 109, 110 (2024).

148. *SEC v. Jarkesy: Why Curtailing the Use of ALJs Will Help SEC Targets*, BUCHANAN (July 24, 2024), <https://www.bipc.com/sec-v.-jarkesy-why-curtailling-the-use-of-aljs-will-help-sec-targets> [<https://perma.cc/RP9A-EHXR>].

149. Mascaro, *supra* note 1.

150. Kevin Ploncarz, *How Will EPA Regulate in Loper Bright's Uncertain Wake?*, BLOOMBERG L. (Apr. 2024), <https://www.cov.com/en/news-and-insights/insights/2024/04/how-will-epa-regulate-in-loper-brights-uncertain-wake#layout=card&numberOfResults=12> [<https://perma.cc/F83E-2UUN>].

151. See generally Aaron-Andrew P. Bruhl, *Supreme Court Litigators in the Age of Textualism*, 76 FLA. L. REV. 59 (2024) (finding that in over 8,000 examined briefs submitted to the Supreme Court, "[t]he magnitude of the textualist shift is smaller in the briefs than in the opinions . . . despite decades of criticism from judicial textualists and steep declines in the Court's use of that tool").

152. Bruggers, *supra* note 139.

153. Donald J. Kochan, *The Commenting Power: Agency Accountability Through Public Participation*, 70 OKLA. L. REV. 601, 602 (2018).

154. Zarghamee & Brenner, *supra* note 13.

155. *Id.* citing § 102(a).

156. *Id.*

Such reliance may now rest on unstable grounds after *Loper Bright*, indicating a high likelihood for future litigation of the bright and shiny PFAS Final Rule.

While it is encouraging to see the EPA gear up for reduced or removed deference, the best hope for security in CERCLA is slipping away in the form of a conservative House, Senate, and Presidency, in addition to the increasingly conservative Supreme Court. A Congressional amendment to CERCLA would best clarify the intentions of Congress regarding the authority of the EPA, but a conservative Congress is less likely to address CERCLA, at least in a positive way.¹⁵⁷ However, some individuals involved in American politics have a concerningly misguided understanding of the *Loper Bright* standard.¹⁵⁸ Mischaracterization of the *Loper Bright* holding illustrates a broader thematic shift in the United States government moving away from deference to agency expertise and towards granting Article III courts more power.

The new presidential term has brought a flurry of Executive Orders, rescinded memorandums, and walked-back statements. Immediately upon beginning his second term, President Trump issued Executive Order 14,154, entitled *Unleashing American Energy*.¹⁵⁹ The executive order directed all agencies to stop dispersing Inflation Reduction Act funding, pending a review of the various uses of the funding.¹⁶⁰ While the Executive Branch may temporarily pause dispersal of funds for assessment, this pause must be temporary because the funding has been approved by Congress. Multiple lawsuits have been filed to challenge this funding freeze.¹⁶¹ A prolonged freeze will be detrimental to the progress of the Inflation Reduction Act, particularly for the clean energy projects.

The EPA's recent PFAS rule under CERCLA has begun to experience some turbulence within the new presidential administration. While the EPA has not yet announced official plans for a new proposed rulemaking, there is uncertainty about how to proceed.¹⁶² Because the EPA published the PFAS rule as a final rule, abiding by the necessary notice and comment procedures, the rule will not be quickly undone. The EPA must follow the same notice and comment procedures to create a new rule, a time-consuming process that provides the public with an opportunity to comment and requires the EPA to respond to concerns.

As the legal landscape around deference shifts, so too does the future of CERCLA, the 1,343 priority contaminated sites, and the many corporations responsible for funding the cleanup.¹⁶³ If *Loper Bright*'s demolition of agency deference allows courts to reinterpret CERCLA, the Act's efficacy and potency could be reduced for years. Without the EPA's full authority to designate hazardous substances and enforce Section 106 orders,

157. Mascaro, *supra* note 1.

158. Vivek Ramaswamy (@VivekGRamaswamy), TWITTER (Nov. 13, 2024), <https://x.com/VivekGRamaswamy/status/1856725762130260383?lang=en> [https://perma.cc/QS33-2NV8]. Vivek Ramaswamy posted about what he believes to be a "mandate" from the Supreme Court, in which he claims *Loper Bright* is one of several Supreme Court decisions that require "eliminating bureaucratic regulations" from the U.S. government. *Id.* It is unclear from where Ramaswamy derives this claim, but it is incorrect.

159. Guarna & Turner, *supra* note 49.

160. *Id.*

161. *Id.*

162. Pat Rizzuto, *EPA Seeks More Time to Craft Ideas for PFAS Superfund Case (1)*, BLOOMBERG L. (May 30, 2025), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X2QPOPO000000> (on file with the *Journal of Corporation Law*).

163. *National Priorities List (NPL) Sites—by State*, *supra* note 15.

CERCLA would have its hands tied. Yet the Superfund continues gathering taxpayer money under the Bipartisan Infrastructure Act, with minimal power to help the communities facing toxic pollution in their backyard.

IV. RECOMMENDATION

To address the potential uncertainties in the EPA's interpretation of CERCLA, this Note proposes both congressional and agency action. Specifically, this Note proposes (1) increased clarity and formality in the EPA's response to comments and settlements, and (2) an amendment to CERCLA that clarifies EPA's authority in the ambiguous areas, such as Section 106 orders, interpretation of "substantial danger" and "hazardous substance" within the statute. Additionally, this Note provides suggestions for affected corporations to prepare for PFAS rule changes and potential liability.

A. EPA Procedures

Already, *Loper Bright* has opened the door to challenges to the EPA's thoroughness in consideration of comments made during the "notice and comment" period of rulemaking.¹⁶⁴ Section 102(a) of CERCLA authorizes the EPA to designate chemicals as "hazardous substances," adding them to the expansive list through informal procedure.¹⁶⁵ The EPA's most recent designation of PFAS was passed through a rigorous notice and comment period.¹⁶⁶ These procedures are likely to be subject to heightened scrutiny and without any deference from the court.¹⁶⁷ Assuming the court affords the EPA no deference in determining whether the agency sufficiently addressed all comments, the standard now turns on whether the court finds the EPA's answers sufficient based on records alone to fulfill Congress's direction.

Perhaps in anticipation of the pending *Loper Bright* litigation, the EPA's PFAS designation of April 2024 came with an intense comment period and over 120 pages of explanation.¹⁶⁸ Yet, pending litigation still challenges the EPA's consideration of comments prior to its promulgation of the PFAS designation.¹⁶⁹ Looking forward, the EPA must continue to clarify its decisions in a way that facilitates the court's understanding. The abundance of caution is warranted if litigation over previously secure agency interpretations continues to increase.

164. Suzanne Yohannan, *Industry Urges Court to Vacate PFAS CERCLA Rule, Citing Multiple Flaws*, EPA WKLY. REP. (Nov. 8, 2024), <https://plus.lexis.com/search/index/?crd=4702a684-c621-4ea0-a576-508d248abc2&pdpermalink=ef2983ff-187a-4a64-805d-8cc828ad8840&pdmfid=1530671&pdissur-lapi=true&cbc=0> (on file with the *Journal of Corporation Law*)

165. 42 U.S.C. § 9601; Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39124, 39124 (May 8, 2024) (to be codified at 40 CFR pt. 302).

166. 89 Fed. Reg. 39124, 39124 (May 8, 2024) (to be codified at 40 CFR pt. 302).

167. *Id.*

168. Yohannan, *supra* note 164.

169. *Id.*

B. Amending CERCLA

Congressional action in the form of an amendment offers the best opportunity to clarify the ambiguities of the EPA's authority under CERCLA. However, an amendment is the most difficult to achieve. The past year has resulted in Congress being extraordinarily unproductive, even by the standards of a divided government.¹⁷⁰ The House voted 749 times, with only 27 of those bills becoming law, most being uncontroversial.¹⁷¹ Because *Loper Bright* is one of the most anticipated decisions of the last few years,¹⁷² the chances of an across-the-aisle bill to clarify CERCLA seem next to impossible.

The results of the 2024 election did not create the most favorable situation for amending CERCLA, particularly because a Republican majority is less likely to improve an environmental cleanup statute such as CERCLA.¹⁷³ Even though a CERCLA amendment feels like a Hail Mary, Congress could surprise us all and complete the pass. The crux of *Loper Bright* rests on the lack of clear Congressional direction on ambiguous language in CERCLA and other administrative agency interpretation.¹⁷⁴ Simply put, if Congress adds clarity to the interpretation, all courts must follow their specification. Although a CERCLA amendment in theory is simple and solves most potential interpretation problems, an amendment in practice is cumbersome and complicated.¹⁷⁵

A statutory amendment can clarify ambiguities within CERCLA that are likely to be litigated in a few ways. First, the EPA's ability to designate "hazardous substances" within Section 102(a) must be clarified and strengthened. While it may be too late to bolster the EPA's PFAS designation,¹⁷⁶ a retroactive clarification can help in future litigation. Although, as with any amendment, Congress risks doing more harm than good. Scientific specificity should not be expected from Congress because the negotiation and compromise between varied interests naturally smooths the technical language out of legislation. Even though the use of broad and general language is a typical part of the legislative process, Congress should be using greater clarity and specificity in its delegation of interpretive authority.

The EPA's Section 106 orders, which have been a source of debate for years,¹⁷⁷ stand on shaky ground without deference to agency experts. Because Section 106 orders are a crucial part of CERCLA enforcement, Congress must clarify the boundaries of the EPA's

170. Gurjit Kaur & Patrick Jarenwattanon, *118th Congress to Be the Most Unproductive in Decades*, NPR at 00:52–56 (Dec. 21, 2023), <https://www.npr.org/2023/12/21/1221040449/118th-congress-to-be-the-most-unproductive-in-decades> [<https://perma.cc/U4A5-AVND>].

171. *Id.* at 00:45–53.

172. Considering other major court decisions such as those on abortion, gun control, and other politically divisive issues, *Loper Bright* has made headlines with surprising frequency.

173. Harry Enten, *The House and Senate Could Make History This Election*, CNN POLITICS (Oct. 22, 2024), <https://www.cnn.com/2024/10/22/politics/senate-house-election-history/index.html> [<https://perma.cc/42BF-CBXQ>].

174. *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 379 (2024).

175. *Learning the Game*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/legislative-staff/civics-education/learning-the-game> [<https://perma.cc/63JG-7UFF>].

176. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39124, 39124 (May 8, 2024) (to be codified at 40 CFR pt. 302).

177. 99 CONG. REC. 29604, 29734–29779 (daily ed. Oct. 8, 1986) (statements of Rep. Eckart). The congressional record provides an insight into the debate of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), discussing the proposed amendments to Section 106.

enforcement capability. The interpretation of Section 106(b)(2) is likely of particular interest for PRPs, who are often corporations, because of the reimbursement for action taken by the PRP in cleanup efforts that were wrongfully assigned or improperly allocated.

Congress should also address the EPA's ability to negotiate and settle claims with parties, particularly because this issue is currently being litigated with OxyChem.¹⁷⁸ Under Section 113, the EPA and PRPs agree on limiting the party's financial liability and promising to avoid suing them for more money. The ambiguity may be interpreted to prevent agreements from becoming binding.¹⁷⁹ This may be beneficial to parties, namely corporate PRPs, seeking to negotiate better terms over prolonged periods, but will also cost more in resources by dragging out the settlement process.

The potential for a successful CERCLA amendment ultimately hinges on the makeup of Congress and their willingness to work across the aisle. But let us not get caught up in the overarching theory of it all and forget the "on the ground" implications. When *Loper Bright* opens the door to more litigation, both in quantity and length, costs will rise for those involved in litigation. On one side, the EPA is using finite resources in litigation that are better spent elsewhere. On the other side is likely to be corporate entities, who will eventually pass litigation costs onto consumers.

C. Considerations for At-Risk Corporations

During the next few years, it is possible the EPA will bring fewer enforcement actions for PFAS contamination cleanup. This is due to both the new nature of the rule and the Trump Administration's hesitance to push strict environmental standards onto industry. However, the pendulum may swing the opposite way, where the EPA could bring even more enforcement actions. An increase could be caused by relaxing regulations elsewhere, creating more possibilities for spills and contamination. Even if the PFAS rule remains intact, the EPA can choose to take a hands-off approach to the implementation. Corporations should take this opportunity to evaluate their practices, investigate their partnerships, and insure themselves against potential liability. In uncertain times, corporations should be prepared for how this legal landscape may change.

The first step in assessing a corporation's potential liability is to look internally. If there is suspected widespread use or disposal of PFAS, internal compliance audits should be completed. Similarly, if acquiring or partnering with another business that is suspected to have PFAS usage, companywide audits should be used to assess risk. Some states offer audits through programs that "provide immunity from penalties that might otherwise be assessed."¹⁸⁰ CERCLA does not limit liability to current handlers of the hazardous substance because current owners can be liable for the actions of previous owners. Because of this strict liability, current owners should investigate property records, checking if their property was previously zoned for industrial activity and what companies owned the

178. 89 Fed. Reg. 39124, 39124 (May 8, 2024) (to be codified at 40 CFR pt. 302).

179. *Id.*

180. Meaghan Colligan Hembree et. al, *EPA Designates 2 PFAS Compounds as Hazardous Substances*, HOLLAND & KNIGHT ALERT (Apr. 26, 2024), <https://www.hklaw.com/en/insights/publications/2024/04/epa-designates-2-pfas-compounds-as-hazardous-substances> [<https://perma.cc/5ZQ8-R3FJ>].

property.¹⁸¹ Lastly, corporations should certainly work with their insurance provider. If the corporation has owned and insured the property since before 1985, there is more risk because absolute pollution exclusion was not present in insurance policies.¹⁸² Overall, taking this time to evaluate and prepare is the best way for a potentially liable corporation to mitigate damages in the long term.

V. CONCLUSION

CERCLA's remobilization in the new era of *Loper Bright* creates significant uncertainties for the future of the Act. While CERCLA has remained relatively dormant for the past 20 years without funding, the recent revival of the Superfund by the Inflation Reduction Act of 2022 creates an opportunity for a fresh look. CERCLA was enacted to address a serious problem of environmental contamination that harmed the health of American citizens. While many of the original sites such as Love Canal and Valley of the Drums have been cleaned up, over 1,000 sites remain on the National Priorities List in 2026.

The Inflation Reduction Act has kick-started action on current sites, and *Loper Bright* has opened the door to even more litigation. This convergence of activity is likely to surge through lower courts, creating inconsistencies as courts attempt to sort out the new standard of deference. To prevent making an absolute mess of this litigation and wasting taxpayer and corporate dollars funneling into the Superfund, two sets of actions should be taken. First, the EPA must be strategically clear in its formulation of new rules and orders. Second, Congress should pass an amendment to clarify the anticipated ambiguities of CERCLA. By addressing the new legal landscape from both sides, congressional and administrative, the EPA can secure its requisite ability through CERCLA to effectuate the cleanup of local communities.

181. Matt S. Kirsch, Stacey Halliday & John B. Thomas, Jr., *Purchaser's Participation in Environmental Diligence—Securing BFPP Defenses Against CERCLA Liability*, ARNOLD & PORTER (Feb. 15, 2024), <https://www.arnoldporter.com/en/perspectives/advisories/2024/02/purchasers-participation-in-environmental-diligence> [https://perma.cc/4D7M-6E7S].

182. Brittany Barrientos et. al, *EPA Finalizes Groundbreaking Rule to Regulate Two PFAS Under CERCLA*, STINSON (Apr. 19, 2024), <https://www.stinson.com/newsroom-publications-epa-finalizes-groundbreaking-rule-to-regulate-two-pfas-under-cercla> [https://perma.cc/6XJ2-78K6]. However, commercial general liability and pollution-specific insurance may provide coverage. *Id.*