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Frey v. Environmental Protection Agency: A Small Step Toward Preventing Irreparable Harm in CERCLA Actions

Megan A. Jennings*

When Congress amended the federal Superfund statute in 1986, it closed the door to most litigation regarding the adequacy of cleanup at hazardous waste sites at any point before a cleanup action is complete. While this timing-of-review provision successfully blocked potentially responsible parties from avoiding or delaying cleanup costs, it has also sometimes prevented citizen suits that challenge EPA response actions that would allegedly exacerbate irreparable environmental harm. The courts, with few exceptions, have read the timing-of-review provision as an absolute bar to judicial review despite the circumstances. In Frey v. Environmental Protection Agency, plaintiffs sought judicial review of a long-running cleanup that they claimed would increase releases of toxic chemicals. EPA argued that the timing-of-review provision barred such review until the matter was completed. The Seventh Circuit clarified how "completeness" should be evaluated, agreeing with plaintiffs that the action was effectively—if not officially—complete. This Note argues that although the court did not expressly base its decision on the existence of an irreparable harm claim, it gave citizens a new opportunity to raise these claims in the future. However, the Note concludes that the court should have gone further to explain its reasoning and scope.

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INTRODUCTION

"A Superfund project is major surgery on the environment.... Despite beneficent intentions, skillful execution, and salutary results, the remedy itself is by no means a benign process."

In Frey v. Environmental Protection Agency, the Seventh Circuit held that citizens were entitled to judicial review challenging the adequacy of the agency's remediation of hazardous wastes at three federal Superfund sites in Bloomington, Indiana. The decision clarified an important aspect of the Comprehensive Emergency Response, Compensation, and Liability Act (CERCLA) regarding "timing of review"—the point during a cleanup action at which judicial review becomes available. Specifically, Frey explained when the action has been "completed" and thereby determined the appropriate time for lifting the statutory bar on judicial review. CERCLA generally precludes citizen suits after EPA selects a remedy and before remediation is complete. However, the court held that, to postpone review, the agency must provide some objective standard to demonstrate that it has in fact

2. 403 F.3d 828, 836 (7th Cir. 2005).
selected a remedy. While the decision paves the way for the plaintiffs to pursue relief and will likely influence future timing-of-review cases, its significance may be limited by the court's failure to fully explain its reasoning.

This Note first provides background on CERCLA's timing-of-review provision, its legislative history, judicial interpretations, and academic proposals for its application. Next, it examines Frey's factual backdrop, procedural history, and the decision itself. Finally, the Note analyzes the decision in light of the debate surrounding timing of review, concluding that the court reached a defensible conclusion but missed an opportunity to clarify the scope of its holding.

I. TIMING OF REVIEW UNDER CERCLA

The following section traces CERCLA's enactment, amendment, and judicial interpretations, focusing on the development of the timing-of-review provision.

A. CERCLA's Enactment and Early Litigation

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) provides a mechanism to clean up the nation's most dangerous hazardous waste sites as quickly as practicable, at minimum expense to the public. The legislation was passed hurriedly in the waning days of the Carter Administration in response to growing public concern surrounding toxic wastes spurred by high-profile hazardous waste crises, namely the Love Canal incident in upstate New York. CERCLA is fairly unique among the major environmental laws passed in the last three decades in that it lacks an express statement of legislative intent. However, legal scholars generally agree about the underlying goals of the legislation: to provide timely, effective remedies for hazardous waste sites, paid for largely by the polluters.

Congress gave EPA broad authority to implement CERCLA’s policies. CERCLA directs EPA to establish a National Priority List (NPL) by identifying the hazardous waste sites that pose the most serious threats; to order or initiate response actions; and to recover costs from potentially responsible parties (PRPs) who fall into one of four specified categories of liability.7 Response actions fall into two categories: “removal” and “remedial” actions. While a removal action is intended as a short-term response to reduce environmental danger in an urgent situation, a remedial action is intended to provide for the long-term viability of the site.8 Any remedial action must “attain a degree of cleanup... at a minimum which assures protection of human health and the environment.”9

CERCLA further specifies the process EPA must follow when initiating a cleanup. The process requires a Remedial Investigation to evaluate the nature and extent of contamination, and a Feasibility Study to evaluate costs and benefits associated with potential cleanup methods.10 During this process, EPA often negotiates with one or more PRPs to determine the extent of response actions they will each fund.11 EPA must accept state and public comment on proposed actions and publish a Record of Decision (ROD) that officially establishes the selected remedy.12

Additionally, CERCLA grants citizens the right to enforce any substantive provision against either EPA or a PRP.14 Citizens have

7. See 42 U.S.C. §§ 9604, 9605, 9607(a). While imposing strict, joint, and several liability, the act also allows PRPs to recover costs beyond their share from other PRPs. Id. § 9607(a)(4)(B).
8. Id. § 9601(23), (24), (25).
9. Id. § 9621(d).
10. Id. §§ 9604(b), 9621(b); 40 C.F.R. § 300.430(d)–(e). This process is commonly referred to as “RI/FS.”
12. 42 U.S.C. §§ 9617(a)–(c) (providing for public participation in selection of remedial action plans); 9621(f) (providing for state involvement in “initiation, development, and selection of remedial actions”).

any person may commence a civil action on his own behalf—(1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter...; or (2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency... where there is alleged a failure of the President or of such other officer to perform any act or duty under this Act... which is not discretionary...
repeatedly used this provision to compel cleanups and, less frequently, to challenge allegedly inadequate or dangerous response actions. The scope and significance of CERCLA citizen suits is discussed in more detail below, in conjunction with timing of review.

CERCLA's hasty passage\textsuperscript{15} may have contributed to certain procedural inadequacies, which revealed themselves in the following years. Notably, the original statute was silent on whether parties could seek judicial review of ongoing cleanup actions. A large number of PRPs subsequently filed actions against EPA in federal court, attempting to delay or evade financial responsibility. These suits limited CERCLA's effectiveness as a tool for efficient cleanup.\textsuperscript{16} The courts responded by developing their own "clean up first, litigate later" doctrine—consistently holding that Congress intended to preclude all judicial review before remediation is complete.\textsuperscript{17}

\textbf{B. Superfund Amendments: Adding Section 113(h)}

Congress attempted to address a number of CERCLA's perceived shortcomings in the Superfund Amendments and Reauthorization Act of 1986 (SARA).\textsuperscript{18} One of the most significant changes was to add section 113(h), the timing-of-review provision,\textsuperscript{19} which would later become the primary issue in Frey. After balancing potential harm to the environment from delayed cleanups against PRPs' financial burdens, Congress essentially adopted the courts' "clean up first, litigate later" approach.

\textsuperscript{15} One professor describes the proceedings as occurring on a "take it-or-leave it basis," "after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments." Grad, supra note 4, at 1.


\textsuperscript{17} See, e.g., Lone Pine Steering Comm. v. EPA, 777 F.2d 882, 887 (3d Cir. 1985) ("find[ing] in § 9604 an implicit disapproval of pre-enforcement judicial review... [which] is not limited to emergency situations but applies to remedial actions as well."); see also Lucia Ann Silecchia, \textit{Judicial Review of CERCLA Cleanup Procedures: Striking a Balance to Prevent Irreparable Harm}, 20 HARV. ENVTL. L. REV. 339, 352-53 (1996) (listing eleven district and circuit court cases exemplifying this trend); Murphy, supra note 16, at 598-99.


\textsuperscript{19} 42 U.S.C. § 9613(h) (2000). See Murphy, supra note 16, at 599-602 (discussing the significance of this amendment).
Section 113(h) establishes a general rule barring judicial review of response actions, and then lists five exceptions to the rule.20 The text relevant to Frey states that

[n]o Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under section 9604 of this title,21 or to review any order issued under section 9606(a) of this title,22 in any action except one of the following: . . . (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 section 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.23

Although exception (4) may appear to simply reaffirm the availability of citizen suits, in practice it places time limitations on jurisdiction over these suits (along with all other challenges arising under CERCLA). For nearly twenty years after Congress added Section 113(h), reviewing courts consistently applied it as a strict bar to judicial review of any response action at any time before the entire action is complete. This interpretation derives from the inclusion of the terms “selected,” “taken,” and “was in violation”—use of the past tense implies that review is available only after the actions in question are complete—as well as legislative history.24 However, the scope of the citizen suit “exception” has been controversial since Congress first considered it. The controversies surround three often-overlapping issues: first, when has an action been “selected,” deferring judicial review;25 second, when the action has been completed, lifting the ban on review;26 and third, regardless of whether an action has been completed, should there be an exception for citizens who allege that a response action will cause irreparable harm to health or the environment.27

20. One of these exceptions concerns cost recovery and contribution actions assigning liability for costs under section 107. 42 U.S.C. § 9613(h)(1). Another three concern actions brought by the federal government under section 106, § 9613(h)(2), (3), or by parties seeking reimbursement for costs resulting from a section 106 cleanup. Id. § 9613(h)(3). See Healy, supra note 11, at 286.
22. Relating to abatement orders.
24. See infra Part I(B)(1) for a discussion of the provision’s legislative history.
25. See, e.g., Cooper Indus., Inc. v. EPA, 775 F. Supp. 1027, 1039 (W.D. Mich. 1991) (dismissing for lack of subject matter jurisdiction where EPA had not yet issued a ROD but had completed the RI/FS).
26. See, e.g., Frey v. EPA, 270 F.3d 1129 (7th Cir. 2001).
27. See, e.g., Hanford Downwinders Coal., Inc. v. Dowdle, 71 F.3d 1469 (9th Cir. 1995).
The significance of the timing-of-review provision is clearest in the last instance, in the context of citizen suits. Citizen plaintiffs generally bring health-based challenges to cleanup actions in one of two ways. First, plaintiffs may allege that the enforcement action, once completed, will be inadequate to protect public health. In this case, it may be possible to secure an order to achieve an adequate cleanup later; even if the cleanup is inadequate to meet long-term standards, it may still provide some short-term benefit. Alternatively, plaintiffs may claim that the cleanup itself will pose an immediate, irreparable danger by releasing additional contaminants into the environment. If the harm is in fact irreparable, then by definition no adequate equitable relief will exist after the fact, and monetary remedies may be unsatisfactory.

In other words, the timing-of-review provision generally serves environmental and public health interests by promoting rapid remediation of contaminated waste sites. However, in some cases it may frustrate those interests by blocking judicial review even when the administrative cure is worse than the disease. The legislative history indicates that Congress, to some extent, anticipated the conundrum of irreparable harm. The issues crystallized in a series of conflicting judicial opinions and academic commentary on the timing of review, as addressed in the following section.

1. Legislative History

SARA’s legislative record is rife with conflicting views over the scope of section 113(h) when plaintiffs allege irreparable harm to health or the environment. For example, Senator Tom Stafford, Chairman of the Senate committee primarily responsible for the bill, raised legal and practical considerations during hearings:

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

28. See Healy, supra note 11, at 301.
29. To illustrate these two situations, assume that a site presents a risk level of 50 before remediation. An insufficient remediation may reduce the risk to 30—not optimal, but clearly less dangerous than the pre-cleanup level. However, a remediation that exacerbates existing risk may raise the risk level to 80 for the short term.
30. To put this scenario in context, it is not necessarily rare for a cleanup to pose its own risks. One study of cleanups in EPA Region 5—the region covering Indiana, and therefore the contested sites in Frey—found that “remediation risks are routinely marginalized and frequently ignored in the remedy selection process for Superfund sites.” Applegate & Wesloh, supra note 1, at 270. The study considered short-term risks both to the environment and to workers at cleanup sites. Id. at 270–71.
proceed in violation of the law and waste millions of dollars ... before a court has considered the illegality.\textsuperscript{31}

Similarly, Senator Mitchell noted that “[t]he public, however, has no recourse if their health has been impaired. For this reason, courts should carefully weigh the equities and give great weight to the public health risks involved.”\textsuperscript{32} The most-cited statements to the contrary are those of Senator Strom Thurmond, who expressed that “[c]ompletion 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.”\textsuperscript{33} Committee reports indicate that proponents of the latter view were primarily interested in achieving speedy cleanups,\textsuperscript{34} which they viewed as important to promote public health. It is not clear whether drafters generally intended to preclude suits alleging that remedial actions would exacerbate health threats, although at least one member of Congress expressly rejected the idea of allowing this category of citizen suits.\textsuperscript{35} The precise intent with regard to these suits, if it can be said to have existed at all, remains murky, and has allowed for differing judicial interpretations.

2. From SARA to Princeton-Gamma Tech

Occasionally, courts have stated in dicta or implied that they would be willing to consider irreparable damage as a factor in reading section 113(h) to allow for judicial review of the selected remedy. For example, the district court in \textit{Cabot Corp. v. EPA} indicated in dicta that it would be willing to address citizens’ health and environmental concerns “as promptly as possible.”\textsuperscript{36} However, only the Third Circuit in \textit{United States v. Princeton Gamma-Tech, Inc.}\textsuperscript{37} made a genuine departure from the trend barring all judicial review of uncompleted response actions.

In \textit{Gamma Tech}, the Third Circuit read section 113(h) narrowly to allow a challenge to an uncompleted remediation based on the danger of irreparable environmental harm. \textit{Gamma-Tech} involved a cross-motion
by the defendants in a reimbursement case seeking a preliminary injunction to stop the EPA from implementing its cleanup plan. The defendants argued that the plan would "exacerbate the existing environmental damage and cause further irreparable harm to the environment." The district court dismissed the cross-motion, and the Third Circuit reversed the dismissal for several reasons. First, the court found that barring claims that alleged irreparable harm would violate CERCLA's remedial intent. While recognizing that such claims could further delay cleanup, the court determined that temporary delay was essentially a lesser evil than a persistent environmental threat resulting from inadequate cleanup. Second, the court distinguished the case from conflicting precedent based on its unique procedural posture. EPA had brought the cost-recovery action before completion of the cleanup; because the government was in court of its own accord, the court saw justification for allowing intervention in its cleanup action. Third, the court turned to the citizen suit exception to section 113(h), which it read to allow plaintiffs alleging irreparable harm to seek review of uncompleted actions.

Gamma-Tech was a controversial decision and even those who generally favored allowing pre-enforcement review criticized it. One observer suggested that the decision went too far in allowing such a challenge by a PRP, and others who supported the policy grounds for the decision expressed concern that legislative support for the holding was shaky at best. However, the precedent did not last long enough for any of the predictions about its application to be proven true or false.

38. Id. at 141.
39. See id. at 148-49.
40. See id. at 142.
41. Although Gamma-Tech was a responsible party rather than a third-party citizen, the court found that it "could qualify as a plaintiff in a citizens' suit alleging irreparable harm to the environment." Id. at 148.

    Attention all PRP's! Now all you have to do in the Third Circuit to get pre-enforcement review is allege "irreparable harm" to the environment. If you establish irreparable harm . . . you may be entitled to injunctive relief. Even if you don't, you can tie the EPA up in prolonged litigation. Heck its [sic] worth a shot; and it's all in the name of saving the environment!
43. See id. at 116–17; see Silecchia, supra note 17, at 345.
3. Clinton County: Overturning Gamma-Tech

In 1996, the Clinton County (Pennsylvania) Commission and a citizens group filed suit under CERCLA to enjoin incineration of contaminated soils following their excavation.44 The plaintiffs asserted that incineration would release dangerous amounts of toxic chemicals and increase the risk of cancer and other illnesses.45 The Third Circuit reversed the district court’s dismissal, citing Gamma-Tech as the controlling law, but granted rehearing en banc to reconsider that precedent.46

Looking first at the statutory language, the Third Circuit found that Congress made a “clear indication” of its intent to allow citizen suits only after completion of removal or remedial actions.47 The court concluded that the legislative history also supported reading section 113(h) as a strict bar prior to completion of remediation.48 Furthermore, the court rejected Gamma-Tech’s finding that an absolute bar was contrary to the purposes of CERCLA. First, it determined that Congress had weighed the risks and concluded that litigation delays were more detrimental than possible EPA errors.49 Second, it emphasized that Congress still allowed for public challenges to cleanup actions during the pre-enforcement review process.50 Third, it pointed to the remaining legal remedy of a state nuisance action, which Congress left open to citizens.51

In reaching its decision to overturn Gamma-Tech, the court relied on the weight of authority in other circuits, none of which had read section 113(h) as granting a broad exception for review.52 For example, the Third Circuit cited Hanford Downwinders Coalition, Inc. v. Dowdle, where the Ninth Circuit held that the timing-of-review provision barred review and stated that section 113(h) “does not give way even when human health is at issue” despite the “seemingly harsh results.”53 But while the Hanford

44. See Clinton County Comm’rs v. EPA, 116 F.3d 1018, 1020–21 (3d Cir. 1997) (en banc).
45. Id. at 1021.
46. Id. at 1020. The Third Circuit’s initial opinion was not published.
47. Id. at 1022–23.
48. Id.
49. Id. at 1025.
50. Id.
51. Id. This third point has been criticized as contradicting the first because a state nuisance action would have the same effect of delaying cleanup as a federal claim under CERCLA. See Reiter, supra note 16, at 232 (suggesting that, in any event, state nuisance claims would not provide satisfactory remedies).
52. See Clinton County Comm’rs v. EPA, 116 F.3d 1018, 1024 (3d Cir. 1997) (citing Schalk v. Reilly, 900 F.2d 1091, 1095–96 (7th Cir. 1990); Ark. Peace Ctr. v. Ark. Dep’t of Pollution Control & Ecology, 999 F.2d 1212 (8th Cir. 1993); Hanford Downwinders Coal., Inc. v. Dowdle, 71 F.3d 1469, 1484 (9th Cir. 1995); and Alabama v. EPA, 871 F.2d 1548, 1557 (11th Cir. 1989)).
53. Hanford, 71 F.3d at 1484 (rejecting, inter alia, plaintiffs’ claim that a strict application of section 113 would deny them due process); see also Neighborhood Toxic Cleanup Emergency
plaintiffs sought an injunction requiring the Agency for Toxic Substances and Disease Registry to implement a health monitoring program, they did not claim that ongoing response actions would increase environmental or health risks. Several observers have criticized the Third Circuit for failing to distinguish the cases it relied on because, unlike the plaintiffs in Gamma-Tech and Clinton County, none of the plaintiffs in the cited cases alleged that the cleanups would cause irreparable harm.

Examining the line of cases exemplified by Clinton County, several academic observers have argued that courts have given section 113(h)’s citizen suit exception too little effect, and that CERCLA’s objectives are furthered by allowing some form of carefully crafted exception to allow suits against EPA where the selected remedial measure presents a genuine threat to health or the environment. But these suggestions have largely fallen on deaf judicial ears, until Frey v. EPA signaled that they may have another opportunity to shape the debate.

II. FREY V. EPA

Frey v. EPA was the most recent development in citizens’ long-running efforts to challenge the remediation of three Superfund sites surrounding Bloomington, Indiana. The decision provided a judicial framework to address the controversial matter of what constitutes a “completed” cleanup action and, to some extent, cleanup actions that are perceived to be inadequate or dangerous. This section provides an overview of PCBs and related health threats in Bloomington, the ensuing EPA action, and a summary of the Frey rulings.

v. Reilly, 716 F. Supp. 828, 834 (D.N.J. 1989) (holding that section 113 barred pre-implementation review of a cleanup plan alleged to pose irreparable risks); cf. Boarhead Corp. v. Erickson, 923 F.2d 1011 (3d Cir. 1991) (rejecting judicial review where plaintiffs argued the planned remedial action would cause irreparable harm to a historic Native American cultural site).

54. See Hanford, 71 F.3d at 1473.
56. See, e.g., Hoffman, supra note 55, at 1941–42 (supporting judicial discretion over legislation and allowing for review only where EPA had a conflict of interest in its choice of response action); Murphy, supra note 16, at 623–24 (proposing a two-pronged congressional solution wherein plaintiffs would have to meet a high evidentiary burden and present a viable alternative); Reiter, supra note 16, at 225 (proposing an exception to allow plaintiffs who can overcome a “clear and convincing” burden to proceed to the merits); Silecchia, supra note 17, at 385–88 (proposing, among other things, strict requirements about the nature of harm to be redressed); see also Healy, supra note 11, at 355; Robert G. Ruggieri, Casenote, Broward v. Environmental Protection Agency: CERCLA’s Bar on Pre-Enforcement Review of EPA Cleanups under Section 113(h), 13 VILL. ENVTL. L.J. 375, 395–96 (2002).
A. PCBs in Bloomington

Westinghouse Electric Corporation (hereinafter "Viacom") operated an electrical capacitor manufacturing facility in Bloomington from 1958 until the mid-1970s. During this time, Viacom continuously dumped waste equipment and parts that contained polychlorinated biphenyls (PCBs) at various locations near Bloomington, including the three sites at issue in Frey–Neal's Landfill, Lemon Lane Landfill, and Bennett's Dump. PCBs are hazardous, toxic, and probable human carcinogens. They have been shown to cause several serious non-cancer effects to the nervous, reproductive, immune, and endocrine systems. Humans are most likely to become exposed to these chemicals by eating fish from contaminated waters and through inhalation. The principal


59. Polychlorinated biphenyls (PCBs) are "mixtures of synthetic organic chemicals with the same basic chemical structure and similar physical properties ranging from oily liquids to waxy solids." EPA, PCB Home Page, at http://www.epa.gov/opptintr/pcb/index.html (last visited Dec. 6, 2005). These chemicals have been widely used in industrial processes because of their non-flammability, chemical stability, high boiling point, and electrical insulating properties. Id. The Monsanto Corporation, the sole U.S. producer of PCBs, manufactured approximately 1.5 billion pounds of PCBs before evidence of serious health consequences led the federal government to ban their manufacture in 1977, pursuant to the Toxic Substances Control Act, 15 U.S.C. § 2605(e). Today, the manufacture and use of PCBs may occur only under limited, highly-regulated circumstances. See id.; AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, TOXICOLOGICAL PROFILE FOR POLYCHLORINATED BIPHENYLS (PCBS) 467–75 (2000), available at http://www.atsdr.cdc.gov/toxprofiles/tpl17.html.

60. James Simmons & Nancy Stark, Backyard Protest: Emergence, Expansion, and Persistence of a Local Hazardous Waste Controversy, 21 POL'Y STUD. J. 470 (1993) (providing a detailed account of Westinghouse's PCB disposal, the ensuing political and legal battles, and how these events shaped public opinion among Bloomington residents).

61. Also known as Bennett's Stone Quarry. EPA, NPL Fact Sheets for Neal's Landfill, Bennett's Stone Quarry, and Lemon Lane Landfill, supra note 58. The exact dates of disposal vary at each of the three sites.


63. Pursuant to SARA Title III, § 313 (also known as the Emergency Planning and Community Right to Know Act or EPCRA). See 40 C.F.R. § 372.28 (2006).

64. Analysis is based on studies in animals and human assessments. See EPA, PCB Home Page, at http://www.epa.gov/opptintr/pcb/effects.html (last visited Dec. 6, 2005).

65. Id.

66. AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, supra note 59, Ch. 6, at 480. Once introduced to the environment, PCBs can accumulate in body tissue as well as breast milk, exposing infants whose mothers have consumed contaminated foods. Id.
health threats in Bloomington were—and continue to be—concentrated around each disposal site. Several groundwater wells serving local residents have tested positive for PCBs, as have neighboring surface waters. Direct contact with PCB-contaminated soil and fish likely also pose a risk to residents and wildlife.

B. EPA Action

The events leading to the Frey decision began in 1983 when the EPA brought an action against Viacom to clean up two sites near Bloomington contaminated with PCBs, dioxin, and other toxic chemicals. EPA and the State of Indiana eventually implicated a total of six sites. In 1985, the parties entered a consent decree requiring Viacom to fully excavate and incinerate the toxins from the six sites. Three years later, plaintiff Sarah Frey unsuccessfully challenged the proposed incineration, alleging that it could exacerbate existing health and environmental risks from PCBs. The district court dismissed for lack of subject matter jurisdiction and the

67. Id.
68. EPA, NPL Fact Sheet for Lemon Lane Landfill, supra note 58.
69. EPA, NPL Fact Sheet for Bennett's Stone Quarry, supra note 58. When Bloomington's PCB problem came to light in the late 1970s, EPA tests showed that the city's residents ranked twelfth in the nation for PCB concentrations in their blood and tissue. See Simmons & Stark, supra note 60.
71. See Frey v. EPA, 403 F.3d 828, 830 (7th Cir. 2005) (Frey I). EPA's original action was consolidated with another suit, City of Bloomington v. Westinghouse Electric Corp., which sought damages and equitable relief for contamination at the Winston-Thomas Sewage Treatment Plant and Lemon Lane Landfill. See 824 F.2d 531, 532 (7th Cir. 1987). The additional sites added at the consent decree stage were Bennett's Dump and Anderson Road Landfill. See Consent Decree, United States v. Westinghouse Elec. Corp., No. IP 83-9-C (S.D. Ind. 1985), available at http://www.copa.org/bbs_file/cd.txt. The subsequent Frey litigation only concerned the remedial actions at three of these sites: Neal's Landfill, Lemon Lane Landfill, and Bennett's Dump. The Anderson Road and Winston-Thomas sites were never designated Superfund sites. Apparently, Frey also challenged actions at Neal's Dump at the appellate stage in Frey I, but because the site was not discussed in plaintiffs' complaint, the court did not consider this challenge. See Frey I, 270 F.3d at 1131.
72. Frey II, 403 F.3d at 830. The consent decree included what was at the time the largest hazardous waste settlement ever reached by EPA, with Westinghouse agreeing to spend $75-100 million on the cleanup. See Jim Mellowitz, PCB Solution Creates More Controversy, CHI. TRIB., Oct. 21, 1985, at 12.
73. See Frey v. Thomas, No. IP 88-948-C, 1988 U.S. Dist. LEXIS 16967 at *1 (S.D. Ind. Dec. 6, 1988) (dismissing for lack of subject matter jurisdiction). On appeal, Frey's case was consolidated with a similar citizen challenge. See Schalk v. Reilly, 900 F.2d 1091, 1092 (7th Cir. 1990). The court affirmed dismissal on the ground that the "obvious meaning" of the statute precluded any review prior to completion of a selected remedy. In addition, the court emphasized that the plaintiffs had been given "more opportunities for public comment . . . than were legally necessary," and that the approval of the consent decree was "fair, adequate, reasonable, and appropriate." Id. at 1094-95.
Seventh Circuit affirmed the dismissal in *Schalk v. Reilly.* However, the Indiana Legislature responded to public outcry over the cleanup plan by passing a law blocking the incinerator project in 1991.

After the parties disagreed over the extent of Viacom's responsibility, the district court intervened, appointing a Special Master to oversee the cleanup. Most significantly, the Special Master split the cleanup into two stages with separate deadlines. He recommended moving back the excavation (or "source control") deadline to 2000 and required the parties to reach agreement on water treatment and sediment removal at two of the sites approximately one year after completion of excavation. EPA conducted the required remedial investigation and feasibility studies (RI/FS) for each site. Following public notice and comment, EPA issued amended Records of Decision (RODs) for the sites between 1998 and 2000. The RODs took similar approaches, calling for excavation of highly contaminated material ("hot spots") followed by installation of landfill caps. Each ROD indicated that the parties would later decide on further actions, including additional sediment removal or water treatment.

EPA completed hot spot removal at Neal's Landfill and Bennett's Dump in late 1999 and at Lemon Lane Landfill in late 2000. Viacom and EPA constructed interim water treatment plants at Neal's Landfill and Lemon Lane, respectively, and Viacom began conducting groundwater investigations at Bennett's Dump. However, by the time of the 2005 *Frey* decision, water and sediment treatment had not been planned, much less implemented, at any of the sites. EPA's failure to fully implement contemplated remedial measures became central to its section 113(h) defense in the following rounds of litigation.

C. Frey I

In April 2000, plaintiffs Sarah Frey, Kevin Enright, and Protect Our Woods, Inc. (collectively "Frey") brought the present claim in the

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74. 900 F.2d at 1092.
75. Frey v. EPA, 403 F.3d 828, 830 (7th Cir. 2005); see also Simmons & Stark, supra note 60.
76. Frey, 403 F.3d at 830.
77. Id.
79. Frey, 403 F.3d at 831.
80. Id. At Bennett's Dump, the plan included removal of creek sediment as well. See EPA, NPL Fact Sheet for Bennett's Stone Quarry supra note 58.
81. Frey, 403 F.3d at 831.
82. Id. at 831–32.
83. Id.
District Court for the Southern District of Indiana pursuant to CERCLA's citizen suit provision, as well as several other federal and state laws. Frey asserted that the ongoing and planned excavation measures at three NPL sites would not only fail to stop releases of PCBs in the long term but would also cause additional releases to the air, groundwater, and surface water. Frey soon moved for a temporary restraining order to prevent cleanup activities from beginning at Lemon Lane Landfill, arguing that the planned safeguards were inadequate to prevent heightened risk to human health. The district court denied the motion and, without additional briefing or argument, dismissed plaintiffs' complaint in its entirety for lack of subject matter jurisdiction. The court found that the selected actions were not “complete” and therefore did not satisfy section 113(h).

Frey appealed, and the Seventh Circuit rejected the lower court's rationale for dismissal. Addressing the substance of the claim, the court, in an opinion by Circuit Judge Wood, evaluated three possible interpretations of the term “complete.” First, as EPA suggested, “complete” could mean that not only the planned cleanup activities, but

84. These claims were based in the citizen suit provisions of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a), the Toxic Substances Control Act, 15 U.S.C. § 2619(a), the Clean Water Act, 33 U.S.C. § 1365(a), and the Administrative Procedure Act 5 U.S.C. §§ 701-706, as well as Indiana nuisance and air pollution claims. See Frey v. EPA, 270 F.3d 1129, 1131 (7th Cir. 2001) (Frey I). Here plaintiffs asserted diversity and supplemental jurisdiction under 28 U.S.C. §§ 1332 and 1367, respectively.

85. See supra note 61 and accompanying text.

86. See Opening Brief of Plaintiffs-Appellants at 11, Frey v. EPA, 403 F.3d 828 (7th Cir. 2005) (No. 03-3877) (Frey II). According to Frey, defendants had “failed to perform the required remedial investigation/feasibility study . . . , failed to select a remedy that adequately protected public health or satisfied CERCLA remedy selection criteria, and violated CERCLA remedy selection public participation requirements . . . .” Id. at 15.

87. See Frey I, 270 F.3d at 1131.

88. See id. at 1131–32.

89. The court determined that the question was “not, strictly speaking, a problem of subject matter jurisdiction.” Id. at 1132. Instead, it treated the matter as a question of whether the plaintiffs were able to state a claim. Id. at 1132–33. In doing so, the Seventh Circuit parted company from virtually every other court that has considered the timing-of-review provision, before or since, which have consistently based dismissal on lack of subject matter jurisdiction. See, e.g., Clinton County Comm'rs v. EPA, 116 F.3d 1018, 1022 (3d Cir. 1997); Hanford Downwinders Coal. v. Dowdle, 71 F.3d 1469, 1471 (9th Cir. 1995); Taylor Farms L.L.C. v. Viacom, Inc., 234 F. Supp. 2d 950, 951 (S.D. Ind. 2002) (relying in part on Frey I for its holding but referring to section 113(h) as a “jurisdiction bar”); Broward Gardens Tenants Ass'n v. EPA, 157 F. Supp. 2d 1329 (S.D. Fla. 2001). The Frey I court based its analysis on the recent holding of the Supreme Court in Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998). The court noted the significance of this distinction: first, dismissal for lack of jurisdiction does not prevent a party from re-filing in a proper court, and second, disputed facts are treated more favorably to the complainant in a 12(b)(6) motion. See 270 F.3d at 1132.

90. See Frey v. EPA, 270 F.3d 1129, 1129 (7th Cir. 2001). Also on the panel for both appellate decisions were Judges Easterbrook and Williams.

91. Id. at 1133.
also all subsequent monitoring, had been carried out.\textsuperscript{92} Second, it could mean that cleanup activities were finished, although authorities would continue to monitor their effectiveness in the future.\textsuperscript{93} Third, as Frey argued, it could mean that particular \textit{stages} of a remedial plan were complete.\textsuperscript{94}

The court found the second interpretation to be the most reasonable. It rejected plaintiffs' position that review should be available upon conclusion of discrete stages of remediation, concluding that the timing-of-review provision "does not say 'a remedial action,' or 'a \textit{stage} of a remedial plan.' Instead, it calls flatly for restraint from suit when 'remedial action' (period) remains to be done."\textsuperscript{95} The court additionally distinguished between active remediation and later monitoring measures; requiring the latter to be completed could convert section 113(h) into a "silent prohibition on judicial review."\textsuperscript{96} Therefore, the middle ground was most appropriate: all remedial \textit{action} must conclude before judicial review becomes available, but anticipated future \textit{monitoring} would not bar review indefinitely.\textsuperscript{97}

Failing to find any "incurable defects" in the federal law claims regarding deficient cleanup plans for Bennett's Dump and Neal's Landfill, the Seventh Circuit reversed the dismissal of those claims and directed the district court to revisit its findings regarding Lemon Lane.\textsuperscript{98} The decision provided plaintiffs with another opportunity to show that all remedial action was actually complete at the three sites in controversy, and, consequently, that they were entitled to judicial review of their claims.

\textsuperscript{92} Id.
\textsuperscript{93} Id. at 1133–34.
\textsuperscript{94} Id. at 1134. Note that by the time the case made its way back to the Seventh Circuit in \textit{Frey II}, the parties changed their positions with regard to the existence of "stages" of remediation. Relying on the decision in \textit{Frey I}, EPA asserted that later stages remained to be completed and therefore review should be unavailable. Plaintiffs, however, claimed that \textit{no} remaining "stages" existed because there was no evidence as to any future actions that might be taken. Opening Brief of Plaintiffs-Appellants, \textit{supra} note 86, at 28.
\textsuperscript{95} 270 F.3d at 1134 (emphasis added). There is a fair amount of legislative history and judicial precedent favoring review following discrete stages of cleanup. \textit{See joint explanatory statement of the comm. of conference, H. Conf. Rep. No. 99-962, at 224, reprinted in 1986 U.S.C.C.A.N. 3276, 3317 ("[A]n action under section [9659] would lie following completion of each distinct and separable phase of the cleanup . . . ."); neighborhood toxic cleanup emergency v. reilly, 716 F. supp. 828, 834 (D.N.J. 1989) ("If the first phase of the cleanup were complete . . . the court would have jurisdiction pursuant to sections 9659(a) and 9613(h)(4).")}.
\textsuperscript{96} \textit{See} Frey v. EPA, 270 F.3d 1129, 1134 (7th Cir. 2001).
\textsuperscript{97} \textit{See} id.
\textsuperscript{98} Id. at 1135, 1137.
D. Frey II

On remand, defendant EPA moved for summary judgment, again arguing that Frey's action was barred by CERCLA section 113(h).\(^9\) EPA asserted that the action was not complete because the agency continued to actively investigate and evaluate its options for further treatment, although it did not dispute that only the “selected” remediation measures had been completed.\(^9\) The agency relied on the Seventh Circuit's analysis in Frey I, asserting that only one stage of the remedial process was complete and therefore section 113(h) barred review.\(^10\) Frey, on the other hand, asserted that once a “selected” remedy is complete a citizen may bring suit; EPA had already completed the only “selected” remedy, and therefore Frey was entitled to challenge the adequacy of the agency's remediation in court.\(^10\) The district court concluded that Frey's case was premature based on ongoing “active remedial planning” at the three sites and granted EPA's motion for summary judgment.\(^10\)

The Seventh Circuit disagreed and ultimately granted plaintiffs judicial review of EPA's remedial action.\(^10\) The court reiterated its position from Schalk and Frey I that section 113(h) requires “a citizen seeking to challenge a remediation action to wait for the selected action to be completed.”\(^10\) Building on its holding in Frey I, the court rejected EPA's position that, because excavation of PCBs merely constituted one phase of its plan, the action was not “completed” for purposes of the statute.\(^10\) The record established that EPA could not offer any timetable or other objective criteria by which to evaluate its “amorphous study and investigation phase.”\(^10\) The court was “unimpressed” by the agency's inability to offer anything more than vague statements about when this phase might conclude, especially given that Viacom and EPA were supposed to reach a negotiated agreement within one year after the court adopted the Special Master's report in 1999.\(^10\) At oral argument, the

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\(^9\) See Frey v. EPA, 403 F.3d 828, 832–33 (7th Cir. 2005).

\(^10\) See id. at 833–34; Answering Brief of the Federal Appellees at 12, 30, Frey v. EPA, 403 F.3d 828 (7th Cir. 2005) (No. 03-3877).

\(^10\) See id.; see also supra note 94 (discussing the parties' reversal of positions regarding stages of remediation).

\(^10\) Id.

\(^10\) Id. at 833.

\(^10\) Id. at 832.

\(^10\) Id. at 834.

\(^10\) Id.
court had asked EPA whether CERCLA would preclude review if EPA asserted it would take action "at some point before the sun becomes a red giant and melts the earth;" EPA reportedly had no response. The court also asked whether it could invoke section 706 of the Administrative Procedure Act to compel agency action unlawfully withheld or unreasonably delayed, if inaction continued for decades. EPA responded that CERCLA's rules regarding judicial review overrode the APA. The judges read these statements to mean that EPA believed itself shielded from review provided it claimed that it might take some unspecified action at some unspecified future point. While EPA is entitled to gather information and examine alternatives before selecting one, this process must proceed with some amount of transparency, which the court found lacking.

Frey went on to argue that the court should read CERCLA to prohibit review only where EPA has specifically identified a remedial plan through its Record of Decision process. The court agreed that there must be "some objective indicator" with reasonable target dates allowing an outside evaluation of timely progress but declined to go so far as to require the agency to formally adopt a plan before it could obtain "breathing room." Without giving an opinion of what would be reasonable in this case, the court noted that an attempt to submit a 100-year plan would "obviously" be unreasonable. Because EPA failed to offer any reasonable indicator, it could not evade review of its remediation. The court concluded by recognizing that "Congress intended for remedial action to be complete before permitting judicial review. Congress did not, however, intend to extinguish judicial review altogether. After a very long wait, the citizens of Bloomington are finally entitled to their day in court."

109. Id.
110. See id. (discussing 5 U.S.C. § 706(1) (2006)).
111. Frey v. EPA, 403 F.3d 828, 834 (7th Cir. 2005) (citing 5 U.S.C. § 702 and Schalk v. Reilly, 900 F.2d 1091, 1097 (7th Cir. 1990)).
112. Id.
113. See id. at 834–35.
114. Id. at 835.
115. Id.
116. Id.
117. Id. Viacom provided an alternative basis for rejecting the suit. Section 113(h) precludes review of a "removal where a remedial action is to be undertaken at the site." Viacom claimed that EPA had only completed removal and that "remedial" action remained to be taken. The court rejected this argument based on a full reading of the definitions and because EPA's project manager for the sites explicitly characterized the ongoing evaluation as "remedial" action. Id. (emphasis added).
118. Id. at 836 (internal citations omitted).
III. ANALYSIS

The Seventh Circuit's second Frey opinion is sound from perspectives of public policy and law. Indeed, it advances the debate over challenges to Superfund cleanups. However, the court missed two key opportunities to clarify its holding. First, the court should have articulated what factors did and did not influence its decision. Second, it should have defined the scope of its holding in a way that will be helpful to later reviewing courts or parties. This section concludes that the ambiguities in Frey v. EPA once again highlight the need for Congress to reconsider exceptions to timing of review under CERCLA.

A. Policy and Legal Rationales

First, assuming the plaintiffs' allegations of irreparable harm or inadequate cleanup to be well-founded, allowing them to pursue equitable relief is sound from a public policy perspective. The court implicitly reasoned that, regardless of judicial intervention, EPA could still engage in years of inaction before completing all contemplated remediation measures. This outcome would likely be undesirable even if the challenge were based on the remediation being simply inadequate, rather than causing irreparable harm. Furthermore, if Bloomington residents did in fact suffer irreparable health effects during and after the remediation process, then preventing loss of well-being and life is highly preferable to attempting to compensate for the damage later. Hardship, of course, cannot always be prevented. But when the harm is physical rather than monetary, after-the-fact remedies will rarely be more than a rough way of making the victim whole—even assuming plaintiffs can establish the necessary elements of their claims. Here, reasonable scientific certainty exists that allowing the action to continue would result in harm. Perhaps there is a de minimis level of risk for which we should not be willing to disrupt ongoing remediation. Nevertheless, it is enough to say, for now, that where there is a reasonable belief that judicial review will prevent serious, irreparable harm to health or the environment, that door open should be kept open.

Frey v. EPA is also legally sound. The holding consistently builds upon the Seventh Circuit's related decisions in Schalk v. Reilly and Frey I. In considering whether EPA could delay review indefinitely while conducting investigations, the Seventh Circuit faced conflicting precedent. While the Ninth Circuit was confident that applying section 113(h) was "appropriate even if there is a possibility that plaintiffs' claims will never be heard in federal court,"119 the Seventh Circuit had

119. Hanford Downwinders Coal., Inc. v. Dowdle, 71 F.3d 1469, 1484 (9th Cir. 1995).
previously expressed disapproval over "extinguishing judicial review."120 Facing these mixed messages, the court reached a defensible conclusion and stayed closest to its own precedent. Moreover, the court was silent regarding "irreparable harm," and thereby avoided the difficult task of re-opening the door the Third Circuit closed in Clinton County. The decision is even consistent with the legislative history most often cited for the proposition that the bar on pre-enforcement review is sweeping—Senator Thurmond's statements that section 113(h) precluded review until all the measures in a ROD were concluded.121 Here, the only measures identified in the RODs were completed long before the court's decision.

While Frey puts a finer point on one aspect of section 113(h), how far it actually advances the broader debate surrounding timing of review is uncertain. Frey provides clarity to the extent that it forecloses one possible interpretation of "completed"—that is, vaguely contemplated future measures are not enough to show that a response action is incomplete. But what the term means in an affirmative sense remains unclear. For plaintiffs who claim that the remediation is simply inadequate to protect environmental health in the long term, this decision may be a useful tool in bringing claims earlier than they otherwise could. On the other hand, Frey does little for plaintiffs who claim that the remediation actually exacerbates existing threats, as they may have to endure worsened environmental conditions before EPA reaches a stopping point.

B. Clarifying the Criteria for “Selected” Action

The court missed an opportunity to articulate specific criteria for future courts to apply in determining when judicial review is proper. While the court did not need to establish a precise test, it neglected to even identify the factors relevant to its rationale. In particular, the court should have been clear about any role that EPA's delayed cleanup played in its decision, and should have gone further to require defendants to provide some specific, objective measure for the purpose of future evaluation.

First, the court should have been explicit about whether EPA's delay in selecting the remedy influenced the decision to allow judicial review. The opinion's language regarding unreasonable agency delay under the APA, and "finally" giving the plaintiffs their "day in court"122 indicates it was a factor, but the delay in selecting further remediation measures itself

120. N. Shore Gas Co. v. EPA, 930 F.2d 1239, 1245 (7th Cir. 1991).
121. See supra note 33.
122. See Frey v. EPA, 403 F.3d 828, 829, 836 (7th Cir. 2005).
was not directly related to the plaintiffs' claims. In other words, if EPA had selected water treatment measures as soon as excavation was finished, that would not have changed Frey's underlying claims regarding increased PCB exposure from the excavation. Furthermore, the present suit was initially brought shortly after completion of the selected remedy of "hot spot" excavation. In the future, can a citizen bring suit as soon as the planned work is completed, or is some amount of delay required? The primary reason for adding section 113(h) was to avoid litigation that delayed the agency's response. Perhaps EPA's long inactive period led the court to believe that litigation on the merits would not be the primary cause of additional delay. Since EPA was "foot dragging" anyway, it appeared disingenuous for the agency to protest litigative delays. Nevertheless, there may still be reason for concern about the effect of additional delay on top of the delay attributable to EPA.

Second, the court should have gone further to hold that EPA has to actually select additional remedial measures to gain protection from suit, or at a minimum, require EPA to specifically show that it will select them. Noting that a 100-year plan is unreasonable123 is not very helpful; how are future courts to evaluate a fifty, twenty, or ten-year plan? Failure to require a specific measure of progress seems to give EPA an easy out. Requiring an objective indicator may give EPA an additional incentive to expedite its process; on the other hand, any proffered indicators will likely demand further adjudication to establish their adequacy. How is EPA to balance its need to design effective remedies—undeniably an involved, time-consuming process—with the desire to satisfy the court and avoid intermediate review? Unfortunately, the court did not give the agency many "objective indicators" of its own.124

C. Clarifying Frey's Scope

Beyond providing guidance to future courts about the relevant factors in evaluating timing-of-review claims, the court's holding should have clarified what types of parties and what claims it covers. For example, the court could have expressly stated that the new exception applies to citizen suits alleging bona fide risks to health and environment but not to PRPs bringing suit under one of the other exceptions to section 113(h).125 Some of the opinion's language suggests that the exception

123. See id. at 835.
124. See id.
125. Princeton Gamma-Tech suggests an additional category: PRPs raising bona fide public health issues. See 31 F.3d 138, 148 (3d Cir. 1995). Presumably, this kind of case would be rare. If the situation did arise, it could be addressed through other mechanisms such as judicial sanctions for dilatory tactics.
applies only to citizen suits, such as when the court stated that "[t]here is no support in the statute for such an open-ended prohibition on a citizen suit." However, other statements are more ambiguous, such as when the court discusses Congress' intent not to "extinguish judicial review altogether," without any context regarding potential parties to litigation.

While it can certainly be argued that the public interest at stake in Frey is not present in suits initiated by PRPs, the opinion does not focus on that interest so much as it expresses concern about precluding review in general. Notably, the parties and the court avoided legal arguments directly addressing the issue of irreparable harm. The plaintiffs (and perhaps the court) likely thought it would be a losing game given the weight of precedent against creating a public health exception to the statute. Still, the plaintiffs relied on the alleged risk as a central part of their factual argument, and the court likely implicitly considered this factor. It is not clear from the opinion whether the holding will apply to other types of parties. Still, nothing in the court's language is specific to private citizens alleging harm to health and the environment, so it could reasonably be read more broadly.

IV. LOOKING AHEAD

Frey v. EPA does not resolve all issues relating to timing of review in CERCLA citizens suits, nor could it reasonably be expected to. The Seventh Circuit could have further clarified its reasoning, but the court's conclusion nevertheless creates new options for parties in future suits and for the courts and Congress to reconsider.

In light of CERCLA's remedial purpose, future courts should read Frey's holding to apply broadly in citizen suits alleging bona fide harm to health or the environment and should read it narrowly with regard to all other parties. While concerned citizens have opportunities to comment on proposals, PRPs typically have much greater bargaining power to influence the remedy selection, which suggests that they do not need the same opportunities for judicial review. Moreover, PRP challenges generally concern cleanup costs. The courts can fully remedy these injuries to PRPs who later prevail on their claims, but the same is not true for public health injuries. In short, the courts should continue to maintain a strong presumption against PRP suits at any point before all remedial action at a site is complete, but should not apply such a presumption in citizen suits.

126. Frey II, 403 F.3d at 834 (emphasis added).
127. Id. at 836.
128. See supra note 11 and accompanying text.
Ultimately, *Frey v. EPA* highlights the need for Congress to revisit timing of review under CERCLA, this time focusing less on what constitutes "completion" and more on the interests served by allowing certain suits to proceed during cleanup. Equity urges allowing citizens to protect themselves through the federal courts where remedial action may endanger their well-being. The timing-of-review provision makes a sound general rule, but like all rules, it needs exceptions for extraordinary situations—and in this case, the existing exception for citizen suits needs to be given full effect.