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NOTE

KENNECOTT UTAH COPPER CORP. V. UNITED STATES DEPARTMENT OF THE INTERIOR: THE VALIDITY OF INTERIOR'S INTERPRETATION OF "PROMULGATED" WITHIN THE STATUTE OF LIMITATIONS PROVISIONS OF CERCLA

Katrine Benedict MacGregor

INTRODUCTION

The public first became aware of the scope and severity of the nation's hazardous waste problem in 1978 when President Carter declared a state of emergency in Love Canal, New York. In this neighborhood, "long-buried chemicals were seeping into homes and high incidences of health effects, from headaches to birth defects were re-

1 See William Harris Frank & Timothy B. Atkeson, Superfund: Litigation and Cleanup, 16 Env't Rep. (BNA) 9 (pt. II) (June 28, 1985); Current Developments, 16 Env't Rep. (BNA) 7 (May 3, 1985).
ported." The public finally began to realize that burying hazardous wastes was an inadequate means of disposal. Well-publicized discoveries in Cedar River, Iowa, and Valley of the Drums, Kentucky, further demonstrated that hazardous wastes could not be safely stored underground.

The discovery of thousands of other dump sites rendered the hazardous waste problem even more alarming. These discoveries prompted both Congress and the Carter Administration to take action. In December 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, popularly known as CERCLA or Superfund, which created a fund of $1.6 billion to help finance the enormous costs of restoring hazardous waste sites.

CERCLA authorizes the government to hold parties liable for releasing hazardous substances into the environment. This liability includes not only the expense of removing hazardous wastes, but also the expenses of more permanent remedial actions. In addition,
under section 107 of CERCLA, governments can hold parties liable for damages to natural resources, such as land, water, or wildlife, and then use the proceeds to restore or replace those resources. Given the fragile nature of ecosystems, disasters such as Love Canal, Cedar River, or Valley of the Drums can devastate the area's natural resources. As a result, potential liability under section 107 can be tremendous.

For many years, parties largely ignored the natural resource damages provisions of CERCLA when initiating recovery litigation. Although the reasons for this practice are unclear, commentators have posited that it arose from the Department of the Interior's failure to finalize until 1988 the damage assessment regulations that section 301(c)(2) of CERCLA required. After the removal of this barrier, natural resource damages suits became "the next frontier" of CERCLA. Cases such as the Exxon Valdez oil spill, which resulted in a $900 million damage award, the largest single civil monetary settlement in history at that time, suggest that the natural resource damages provisions of CERCLA are tremendously significant. This Note focuses on one aspect of the provisions: their statute of limitations.

When Congress enacted CERCLA in 1980, the statute of limitations for claims against the Superfund was to expire on December 11, 1983, or three years from the date of discovery of the injury to, or loss of, the natural resources, whichever was later. In 1986, Congress amended the statute to provide a general three-year statute of limitations running from the later of either the date the statute was "promulgated" or the discovery of the injury or loss. After much

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13 Id. § 9607(a)(4)(C).
14 Id. § 9607(f)(1).
15 See supra notes 2-5 and accompanying text.
16 See, e.g., More Liabilities Coming Your Way: Tidal Waves and Natural Resources, ENERGY ECONOMIST, July 1, 1992, at 9, 9 [hereinafter More Liabilities Coming Your Way] (discussing an unnamed settlement in New England in which the parties agreed to pay $2 million in clean-up costs for contamination that PCB deposits in a major river and harbor had caused, and an additional $62 million in natural resource damages for the harm to wildlife and other resources).
18 See, e.g., Woodard & Hope, supra note 17, at 192.
19 42 U.S.C. § 9651(c)(2).
22 See 42 U.S.C. § 9613(g)(1).
24 42 U.S.C. § 9613(g)(1) (1994). The statute provides in pertinent part:
[N]o action may be commenced for damages ... under this chapter, unless that action is commenced within 3 years after the later of the following: (A)
litigation and an unusual legislative history, the Department of the Interior ("Interior") issued new regulations in 1994.\textsuperscript{25} For purposes of the statute of limitations, 43 C.F.R. § 11.91(e) specified that the date on which regulations are "promulgated" under section 113(g)(1) of CERCLA is the date on which the revisions earn publication as a final rule in the \textit{Federal Register}.\textsuperscript{26} In effect, under section 11.91(e), the government can bring suits for natural resource damages for three years after the issuance of new regulations. Hence, the government potentially could sue responsible parties, whose sites it identified, assessed, and otherwise handled years ago, to recover for additional liability under the new regulations for as long as three years following their issuance.

In \textit{Kennecott Utah Copper Corp. v. United States Department of the Interior},\textsuperscript{27} the petitioners\textsuperscript{28} raised several procedural and substantive challenges to the 1994 regulations.\textsuperscript{29} Some of the substantive challenges questioned the authority and validity of Interior's interpretation of

\begin{quote}

The date of the discovery of the loss and its connection with the release in question. (B) The date on which regulations are promulgated under section 9651(c) of this title.

\textit{Id. at 1199.}

\textsuperscript{25} \textit{See Kennecott Utah Copper Corp. v. United States Dep't of Interior, 88 F.3d 1191 (D.C. Cir. 1996).} The court explained that

[although the public comment period on those proposed regulations ended in mid-July of 1991, ... Interior had still not approved or issued final rules by the time of the November 1992 Presidential election.]

In mid-January 1993, shortly before President Clinton's inauguration, Interior's Assistant Secretary for Policy, Management and Budget approved a set of Type B regulations, which differed from those proposed in April 1991, and directed a subordinate to send the document to the Office of the Federal Register ("OFR") for publication as final regulations. The OFR received ... these signed regulations ... on January 19, 1993, the final full day of the Bush Administration. On January 21—just two days after the OFR received the ["1993 Document,"] and before the OFR filed the document for public inspection—an Interior employee, at the direction of the new acting Assistant Secretary for Policy, Management and Budget, telephoned the OFR to withdraw the document. ... In accordance with its regulations and internal guidelines, the OFR stopped processing the 1993 Document ... .

\textit{Id. at 1200-01.}

\textsuperscript{26} 43 C.F.R. § 11.91(e) (1997).

\textsuperscript{27} 88 F.3d 1191 (D.C. Cir. 1996).

\textsuperscript{28} The procedural challenges come to us through: Kennecott Utah Copper Corporation's appeal of a summary judgment order issued by the United States District Court for the District of Columbia; a separate petition filed by Kennecott; and petitions filed by fifteen trade associations, seven corporations, and two county sanitation districts, collectively referred to as Industry Petitioners. The substantive challenges include eleven arguments presented in petitions filed by Industry Petitioners and one argument raised in a petition filed by the State of Montana.

\textit{Id. at 1199.}

\textsuperscript{29} \textit{See infra} notes 69-81 and accompanying text.
"promulgated" as applied to the statute of limitations. In particular, the petitioners raised two arguments in this area. First, they argued that section 113(g)(1) of CERCLA did not expressly authorize Interior to define the date on which the period of limitations commenced through its interpretation of "promulgated." Absent this authority, courts should not grant deference to Interior's interpretation of the statute. Second, the petitioners argued in the alternative that even if Interior had the authority to define "promulgated," its interpretation failed to satisfy the two-tiered Chevron test. This test, which derives from the Supreme Court's holding in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., provides the most common framework for judicial review of administrative agencies' interpretation of statutes. The test requires courts to conduct two levels of analysis to determine: (1) whether Congress unambiguously has expressed its intent in the statute itself; and (2) if this intent is not clear, whether the agency has provided a permissible interpretation.

Without deciding the issue of whether Interior had the authority to define "promulgated," the District of Columbia Circuit held for the petitioners, finding that Interior's interpretation of "promulgated" did not satisfy step two of Chevron because it was not a reasonable interpretation. Given the great potential for liability for natural resource damages under CERCLA, the interpretation of the statute of limitations could have significant consequences for both businesses and the environment. As a result, the Kennecott Utah Copper court's decision is an important one, worthy of further review.

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30 See infra text accompanying notes 72-81.
31 See Kennecott Utah Copper, 88 F.3d at 1209.
32 See id. The petitioners raised two objections within this argument. See infra text accompanying notes 77-81.
34 See, e.g., Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 512 ("Chevron has proven a highly important decision—perhaps the most important in the field of administrative law since [Vermont Yankee]."); Laurence H. Silberman, Chevron—The Intersection of Law & Policy, 58 Geo. Wash. L. Rev. 821, 822 (1990) (referring to Chevron as a "landmark administrative opinion"); Kenneth W. Starr, Judicial Review in the Post-Chevron Era, 3 Yale J. on Reg. 283, 284 (1986) ("Chevron has quickly become a decision of great importance, one of a small number of cases that every judge bears in mind when reviewing agency decisions."); Cass R. Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071, 2075 (1990) (calling Chevron "one of the very few defining cases in the last twenty years of American public law"); The Supreme Court, 1994 Term—Leading Cases, 109 Harv. L. Rev. 111, 299 (1995) [hereinafter Endangered Species Act Update] (describing the Chevron decision as "infamous" and the "judicial mantra of deference to administrative agencies").
35 See infra Part III.
36 See Kennecott Utah Copper, 88 F.3d at 1210.
37 Id. at 1211-13.
38 See supra note 16 and accompanying text; supra text accompanying note 21.
Part I of this Note discusses the purpose and relevant history of CERCLA, focusing, in particular, on the development of its statute of limitations provisions. Part II discusses the facts and holding of Kenne-cott Utah Copper with respect to Interior’s interpretation of “promulgated” for purposes of CERCLA’s statute of limitations. Part III addresses the court’s holding—that Interior’s interpretation of “promulgated” fails to satisfy step two of the Chevron standard. Although this Part acknowledges that the court correctly determined that the interpretation satisfied Chevron step one, it argues that the court erred in holding that 43 C.F.R. § 11.91(e) was an unreasonable interpretation of the statute. Part IV analyzes the threshold issue that the court failed to address—whether Interior has the authority to make such an interpretation. The Note concludes by arguing that the deficiencies in the court’s analysis are unfortunate yet foreseeable results of the indefinite and malleable Chevron standard.

I
THE DEVELOPMENT OF THE STATUTE OF LIMITATIONS PROVISIONS OF CERCLA

Section 107 of CERCLA authorizes federal and state officials, acting as public trustees, to assess natural resource damages and to sue responsible parties to recover such damages,39 both under CERCLA and section 311 of the Federal Water Pollution Control Act,41 commonly known as the “Clean Water Act.” The damages may include “injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from [the] release” of hazardous substances.42 Trustees may use the funds they recover “to restore, replace, or acquire the equivalent of such natural resources.”43 CERCLA defines the term “natural resources” to include:

[La]nd, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States[,] ... any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.44

Congress granted the responsibility of promulgating regulations governing the assessment of natural resource damages to the Presi-

39 CERCLA, supra note 7, at 2806.
40 42 U.S.C. § 9607(F)(1)-(2).
43 Id. § 9607(f)(1).
44 Id. § 9601(16).
dent, 45 "who, in turn, delegated this responsibility to Interior." 46 Section 301(c)(2) requires the federal government to issue regulations specifying "standard procedures for simplified assessments requiring minimal field observation." 47 These regulations are known as Type A regulations. Similarly, section 301(c)(2) requires the federal government to issue regulations, known as Type B regulations, specifying "alternative protocols for conducting assessments in individual cases" requiring more detailed evaluations. 48 The statute further provides that "[s]uch regulations shall identify the best available procedures to determine such damages, including both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover." 49

The government must review these regulations every two years and revise them when appropriate. 50 Once a trustee determines the amount of damages in accordance with federal regulations promulgated under section 301(c), the trustee's assessment enjoys a rebuttable presumption of accuracy in a proceeding to recover damages from a responsible party. 51 Under the 1980 law, the statute of limitations for claims against the Superfund expired on December 11, 1983, or three years from the date of discovery of the injury to, or loss of, the natural resources, whichever was later. 52

In August 1986 Interior published a final rule containing the Type B regulations for natural resource damages assessments. 53 Interior also amended the statute of limitations to read that

45 Id. § 9651(c)(1). The responsibility includes promulgating regulations for the purposes of CERCLA and the Clean Water Act's oil and hazardous substance, natural resource damages provisions, governing the assessment of damages for natural resource injuries that result from releases of hazardous substances or oil. See 33 U.S.C. § 1321(f)(4)-(5).
46 Ohio v. United States Dep't of Interior, 880 F.2d 432, 439 (D.C. Cir. 1989); see also infra notes 56-61 and accompanying text (discussing Ohio).
47 42 U.S.C. § 9651(c)(2).
48 Id.
49 Id.
50 See id. § 9651(c)(3).
51 See id. § 9607(f)(2)(C).
53 See Natural Resource Damage Assessments, 51 Fed. Reg. 27,674, 27,726-27 (1986) (codified at 43 C.F.R. pt. 11) (Aug. 1, 1986). The damage assessment process that the Natural Resource Damage Assessment regulations established has several phases. In the "Preassessment phase," a trustee initially determines whether the release of hazardous substances or oil has affected natural resources. 43 C.F.R. §§ 11.20-25 (1997). If the trustee determines that further action is necessary, he devises an assessment strategy in the "Assessment Plan phase." Id. §§ 11.30-35. Next, he implements the "Type B Procedures," id. § 11.60, and determines whether the natural resources suffered an injury ("Injury Determination phase"), id. §§ 11.61-64, quantifies this injury ("Quantification phase"), id. §§ 11.70-73, and determines the monetary damages ("Damage Assessment phase"), id. § 11.80-84. Finally, in the "Post-assessment phase," the trustee documents the assessment process and demands payment from the responsible party. Id. §§ 11.90-93.
no claim may be presented under this section . . . unless the claim is presented within 3 years after the later of the following: (A) the date of the discovery of the loss and its connection with the release in question; or (B) the date on which final regulations are promulgated under section 9651(c) of this title.54

The Conference Report for the amendment suggests that Interior adopted these changes to the statute of limitations

"because the ability of Federal and state trustees to pursue such claims and actions has been impaired by the failure of the President to promulgate regulations . . . . These amendments are intended to revive causes of action [and claims] for natural resource damages that may have been foreclosed by the running of the statute of limitations . . . ."55

State governments, environmental groups, industrial corporations, and an industry group promptly challenged the August 1986 regulations.56 The District of Columbia Circuit consolidated these and later challenges57 in Ohio v. United States Department of the Interior.58 The Ohio court granted a petition for review with respect to two of the Type B regulations,59 and remanded a third to the agency.60 The

58 880 F.2d 432 (D.C. Cir. 1989).
59 Id. at 439-40, 442 (ruling that the regulation limiting damages recoverable by government trustees for harmed natural resources to the lesser of the cost of restoring or replacing the equivalent of the injured resource, or to the lost use value of the resource, was contrary to clearly expressed intent of Congress); id. at 464 (holding that the regulation prescribing the hierarchy of methodologies used to measure the lost use value of natural resources, that focused exclusively on market values for such resources when market values were available and appropriate, was not a reasonable interpretation of CERCLA).
60 Id. at 461 (remanding the record to Interior for clarification of its interpretation of its own regulations concerning applicability of CERCLA natural resource damages provisions to privately owned land that was under the management or control of federal, state, or local governments).
court instructed Interior to proceed with issuing new regulations in conformity with the opinion "as expeditiously as possible." In response, Interior proposed new regulations in April 1991 that left most of the prior rules in place, but changed specific sections to address the concerns of the Ohio court. Due to the change in administrations following the 1992 presidential election, Interior never formally issued revised rules.

In July 1993, Interior reopened the public comment period for the April 1991 regulations and suggested further revisions. In March 1994, Interior issued final regulations. These regulations provided that

the date on which regulations are promulgated under section 301(c) of CERCLA is the date on which the later of the revisions to the type A rule and the type B rule, pursuant to State of Colorado v. United States Department of the Interior, 880 F.2d 481 (D.C. Cir. 1989), and [Ohio], is published as a final rule in the Federal Register.

The 1994 regulations were the subject of the challenges in Kennecott Utah Copper. This Note focuses on the challenges to the statute of limitations provision.

II

KENNECOTT UTAH COPPER CORP. v. UNITED STATES DEPARTMENT OF THE INTERIOR

In Kennecott Utah Copper Corp. v. United States Department of the Interior, the petitioners challenged the validity of the 1994 regulations on both procedural and substantive grounds. The procedural challenges questioned the methods that Interior had used in issuing the regulations. The substantive challenges claimed that the regulations not only exceeded the agency's authority under CERCLA and the Clean Water Act, but also constituted arbitrary and capricious ac-

61 Id. at 481.
63 See supra note 25.
64 See Kennecott Utah Copper Corp. v. United States Dep't of Interior, 88 F.3d 1191, 1201 (D.C. Cir. 1996).
65 See id.
67 Kennecott Utah Copper, 88 F.3d at 1199.
68 Id. The Kennecott Utah Copper decision did not include the facts of the underlying dispute and these facts apparently had no bearing on the decision. The case derived from eight disputes in the lower court.
69 See id. at 1201-09.
Three of these substantive challenges concerned the statute of limitations provision in 43 C.F.R. § 11.91(e).\textsuperscript{71} In the first of the three challenges to the statute of limitations provision, the petitioners argued that Congress had not authorized Interior to define the term "promulgated" within the meaning of section 113(g)(1)(B).\textsuperscript{72} They claimed "that nothing in [section] 301(c) of the CERCLA expressly authorizes Interior to set the period of limitation."\textsuperscript{73} Rather, they argued that because the statute of limitations "control[led] the business of the courts, the resolution of any ambiguity in the statute [was] implicitly entrusted to the judicial branch."\textsuperscript{74} They maintained that it would be highly unusual for Congress to have granted Interior this authority because Interior was frequently a plaintiff asserting natural resource damages claims.\textsuperscript{75}

In the second and third challenges, the petitioners argued that Interior's interpretation of "promulgated" did not survive either step of the \textit{Chevron} standard for statutory interpretation.\textsuperscript{76} They claimed that the interpretation did not satisfy step one because "Congress [had] directly spoken to the precise question at issue."\textsuperscript{77} The petitioners argued that the meaning of "promulgated" was plain on its face.\textsuperscript{78} Therefore, Interior lacked the authority—assuming that it had interpretive authority concerning the statute of limitations provision in the first instance—to provide its own interpretation of this term.\textsuperscript{79} Alternatively, the petitioners argued that Interior's interpretation was not a permissible one under step two of \textit{Chevron} because it "[was] neither reasonable nor consistent with the purpose of the statute."\textsuperscript{80}

A. Interior's Authority to Define "Promulgated" Within Section 113(g)(1)(B) of CERCLA

Addressing the authority issue first, the court acknowledged that it was a "close call" as to whether Congress had authorized Interior to define "promulgated" as the agency did in 43 C.F.R. § 11.91(e).\textsuperscript{81} Rather than further analyzing this issue, the court "assume[d] without deciding" that Interior had the authority to make such an interpreta-

\textsuperscript{70} See Kennecott Utah Copper, 88 F.3d at 1202 (stating that petitioners raised eleven substantive challenges).
\textsuperscript{71} See id. at 1209.
\textsuperscript{72} See id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} See id.
\textsuperscript{76} See id. at 1209, 1210-13.
\textsuperscript{77} Id. at 1210 (citation and internal quotation marks omitted).
\textsuperscript{78} See id. at 1211.
\textsuperscript{79} See id.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 1210.
The court determined that it was unnecessary to decide the authority issue because 43 C.F.R. § 11.91(e) was invalid under *Chevron* regardless of whether Interior had the authority to define "promulgated." As the court stated, "In light of our conclusion that the Department’s interpretation of ‘promulgate’ cannot survive even with the aid of *Chevron* deference, . . . we need not resolve whether Interior [was] in fact entitled to that deference."

**B. The Validity of Interior’s Interpretation**

Proceeding on the assumption that Interior had the authority to define "promulgated" and therefore was entitled to *Chevron* deference, the court applied the *Chevron* standard to 43 C.F.R. § 11.91(e). Although the court concluded that the interpretation satisfied step one of *Chevron* because Congress had not addressed this issue directly, the court nevertheless struck down the interpretation by holding that it was not "reasonable" under step two.

1. *The Court’s Application of Chevron Step One*

The first step of *Chevron* requires that courts and agencies determine "whether Congress has directly spoken to the precise question at issue." If so, then interpretations "must give effect to the unambiguously expressed intent of Congress." The petitioners argued that 43 C.F.R. § 11.91(e) could not meet this step for three reasons: "(1) [section] 113(g)(1)(B) expressly provides that damage claims are barred if filed more than three years after Interior promulgated its regulations under [section] 301(c); and (2) those regulations were promulgated in 1986 and 1987; and (3) the term ‘promulgated’ is unambiguous." In other words, they argued that Congress had used the term "promulgated" in a clear and unambiguous manner that was inconsistent with Interior’s subsequent interpretation.

To determine whether "promulgated" had an unambiguous meaning, the court examined past uses of the term and "the extent to

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82 Id.
83 Id.
84 Id.
85 Id. at 1212.
86 Id. at 1211.
87 Id. at 1212.
89 Id. at 842-43.
90 *Kennecott Utah Copper*, 88 F.3d at 1209.
91 See id. at 1211 (stating the petitioners’ argument to be “that the statute is plain on its face,” and does not support Interior’s “view that a regulation is not promulgated until it has been judicially challenged, revised by the agency as necessary, and become final in the sense that there is no further possibility of judicially-mandated revision”).
which those who must apply it have encountered interpretive difficul-
ties." The court attempted to determine whether it was "apparent, for example, that a rule is promulgated when it is issued or formally announced by an agency," "filed with the Office of the Federal Regis-
ter," "published in the Federal Register." After reviewing several op-
inions in which courts had interpreted the word "promulgated" in vari-
ous ways, the Kennecott Utah Copper court concluded that the term was "far from unambiguous" and, therefore, that Congress had not addressed the meaning of "promulgated" directly in section 113(g)(1)(B). After determining that the agency's interpretation satisfied step one of Chevron, the court proceeded to test the interpretation's validity under step two.

2. The Court's Application of Chevron Step Two

When a statute is ambiguous, the second step of Chevron requires courts to assume that Congress delegated to the agency the power to make policy choices that "represent[] a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." The petitioners argued that, even if the statute was ambiguous, Interior's interpretation was not permissible under step two of Chevron because it would authorize Interior to postpone indefinitely the limitations period simply by delaying its promulgation of the regulations. Interior argued that its interpretation was permissible despite this potential for delay because the regulations did not provide a method for calculating damages prior to the 1994 revisions. In the absence of these final damage assessment regulations, trustees could not take advantage of CERCLA's rebuttable presumption. Therefore, Interior argued that 43 C.F.R. § 11.91(e)

further[ed] a purpose of the CERCLA by preserving for public trustees the ability to initiate litigation until three years after final

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92 Id.
93 Id.
94 Id. (italics added).
95 Id. (italics added).
97 Id. at 1211.
99 See Kennecott Utah Copper, 88 F.3d at 1211-12.
100 See id. at 1212.
101 See id.
and valid regulations have been promulgated. Only with final regulations in place... can a trustee who elects to follow the regulations be assured that he can prosecute a damage action under § 301(c) armed with the rebuttable presumption that the Congress made available.102

The court rejected Interior’s argument and held that the agency’s interpretation of “‘promulgate[ed]’... l[ay] beyond the bounds of the permissible.”103 Although the court acknowledged that there may be some uncertainty about the precise date upon which an agency promulgates a regulation, it concluded:

[I]t is surely either the date of issuance or other formal announcement by the agency, the date of filing with the Office of the Federal Register, or the date of publication in the Federal Register. For an agency to so stretch the word “promulgate” that a regulation might not be deemed promulgated until several years after the last of these events is simply not a reasonable attribution of intent to the Congress.104

In reaching this conclusion, the court placed emphasis on the purpose of statutes of limitation to “grant repose to potential defendants, protecting them from the prejudice and uncertainty that can occur when a plaintiff files its claims only after an extended time.”105

The court dismissed Interior’s claim that trustees would face undue prejudice unless the court enforced the provisions of 43 C.F.R. § 11.91(e).106 The court reasoned that before the Ohio v. United States Department of the Interior decision, a trustee could have followed the then-existing Type B regulations.107 “Since that decision, a trustee has had three choices, none of which would run afoul of the limitation period.”108 First, a trustee could have followed the 1986 version of the regulations with any changes that would have made them consistent with the requirements of Ohio.109 Second, a trustee could have filed his damage claim, but requested a stay of the action until Interior had issued the revised rules.110 Finally, a trustee could have gone forward with the action, despite the lack of damage assessment guidelines, and have lost the advantage of the rebuttable presumption.111 The court concluded that there was no prejudice “that would justify exposing

102 Id.
103 Id.
104 Id.
105 Id. at 1211.
106 Id. at 1212.
107 Id.
108 Id.
109 See id.
110 See id.
111 See id.
defendants to the endless prospect of litigation for alleged infractions many years or even decades past."\(^{112}\)

Therefore, the court held that even if Interior had the authority to define "promulgated" in section 113(g)(1)(B), the interpretation that the agency provided in 43 C.F.R. § 11.91(e) was unreasonable or "beyond the bounds of the permissible."\(^{113}\) The court concluded that the latest date that the regulations were "promulgated" under section 301(c) was the date that the Type A regulations earned publication in the *Federal Register* in 1987.\(^{114}\)

III

THE COURT'S HOLDING: ANALYSIS AND APPLICATION OF *CHEVRON*

The *Chevron* standard of statutory interpretation is comprised of three distinct questions. The first or threshold question asks whether Congress has delegated authority to the agency to interpret the statutory provision at issue.\(^{115}\) If Congress has not done so, either explicitly or implicitly, then the court must determine the validity of the interpretation using standard tools of statutory interpretation.\(^{116}\) If Congress has granted the agency authority to interpret the statute, the court must apply the two remaining questions, which some commentators and courts have deemed the *Chevron* two-step, to determine whether the interpretation is valid.\(^{117}\) Because the two remaining questions grant a greater degree of deference to the interpretation than would standard methods of statutory interpretation,\(^{118}\) the threshold determination of authority is an important part of the *Chevron* analysis.

The first of the two remaining questions, popularly termed *Chevron* "step one," asks "whether Congress has directly spoken to the precise question at issue."\(^{119}\) If congressional intent is clear from the

\(^{112}\) *Id.*

\(^{113}\) *Id.*

\(^{114}\) *Id.* at 1213.

\(^{115}\) *See* *Adams Fruit Co.* v. Barrett, 494 U.S. 638, 649 (1990); *Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994).

*Chevron* ... is premised on the notion that Congress implicitly delegated to the agency the authority to reconcile reasonably statutory ambiguities or to fill reasonably statutory interstices. Where Congress does not give an agency authority to determine ... the interpretation of a statute in the first instance ..., deference to the agency's interpretation is inappropriate.

*Id.*

\(^{116}\) *See*, e.g., *Adams Fruit Co.*, 494 U.S. at 649-50.


\(^{119}\) *Id.* at 842.
statutory language, then the agency’s interpretation is invalid to the extent that it conflicts with that intent.\textsuperscript{120} If congressional intent is not clear, then the court must apply the second question—\emph{Chevron} “step two.”\textsuperscript{121}

Step two requires the court to examine the agency’s interpretation to determine its validity.\textsuperscript{122} The level of scrutiny that the court must apply to the agency’s interpretation depends on whether Congress’s delegation of authority had been explicit or implicit.\textsuperscript{123} As the \emph{Chevron} Court stated, “If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”\textsuperscript{124} In this case, the reviewing court must uphold the agency’s interpretation of the statute unless this interpretation is “arbitrary, capricious, or manifestly contrary to the statute.”\textsuperscript{125} In contrast, if the delegation of authority to the agency had been implicit, which is generally the case when the statute is silent or ambiguous with respect to a specific issue, the court must determine whether the agency’s interpretation rests on a “permissible”\textsuperscript{126} or “reasonable”\textsuperscript{127} construction of the statute. If the interpretation satisfies both step one and step two, the court must accept the agency’s construction of the statute.\textsuperscript{128}

Because the \textit{Kennecott Utah Copper} court assumed that Interior had the authority to interpret “promulgated” within the natural resource damages provisions of CERCLA, the court’s holding and analysis focused on whether the interpretation was valid under the highly deferential \emph{Chevron} standard.\textsuperscript{129} It is therefore appropriate to initiate the analysis of \textit{Kennecott Utah Copper} by discussing the requirements of steps one and two of \emph{Chevron} and reviewing the court’s application of these steps to that case. For the purposes of this discussion, this Part will adopt the court’s assumption that Interior had the authority to define “promulgated” within the natural resource damages provisions of CERCLA.\textsuperscript{130}

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\textsuperscript{120} See id. at 842-43.  
\textsuperscript{121} Id. at 843.  
\textsuperscript{122} See id.  
\textsuperscript{123} See id. at 843-44.  
\textsuperscript{124} Id.  
\textsuperscript{125} Id. at 844.  
\textsuperscript{126} Id. at 843.  
\textsuperscript{127} Id. at 844.  
\textsuperscript{128} See id. at 843-45.  
\textsuperscript{129} \textit{Kennecott Utah Copper Corp. v. United States Dep’t of Interior}, 88 F.3d 1191, 1191 (D.C. Cir. 1996).  
\textsuperscript{130} For a discussion of whether Interior had this authority, see \textit{infra} Part IV.
A. **Chevron Step One: Clarity of Congressional Intent**

After an agency has interpreted the meaning of a term or section of a statute, the court, in applying *Chevron* step one, must determine whether Congress already has defined that term or section clearly.\(^{131}\) If the court determines that the words and purpose of the statute do not provide an unambiguous definition of the term or section, the court must follow congressional intent and invalidate any conflicting agency interpretations.\(^{132}\) The rationale behind this step derives from the constitutional theory of separation of powers.\(^{133}\) Ideally because Article III of the Constitution grants the legislative branch the ultimate power to write the laws of the country, interpretations that the executive or judicial branches make must conform to the intent of Congress.\(^{134}\) As the *Chevron* Court stated, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."\(^{135}\)

In determining congressional intent, the reviewing court must employ traditional tools of statutory construction.\(^{136}\) A thorough discussion of the many tools of statutory construction is beyond the scope of this Note. Suffice it to say that in recent Supreme Court cases that have implemented *Chevron*, the Court has utilized numerous tools...
including the plain language of the statute,\textsuperscript{137} legislative history,\textsuperscript{138} the statute's relationship with other laws,\textsuperscript{139} and the structure or context of the statute.\textsuperscript{140} Although certain Justices appear to prefer the plain meaning tool,\textsuperscript{141} there is no consensus among courts or commentators as to which tools courts should use in \textit{Chevron} step one to interpret statutes.\textsuperscript{142} It is similarly unclear what level of scrutiny the courts should accord when employing these tools. The generally accepted, but nevertheless vague, standard is that the court should review the statute with enough vigor to determine whether there is a clear congressional intent regarding the issue.\textsuperscript{143} This vigor, however, should not create intent when it is otherwise ambiguous.\textsuperscript{144}

Furthermore, it is unclear how much ambiguity warrants labeling a term "ambiguous," thus triggering \textit{Chevron} step two.\textsuperscript{145} Justice Scalia proposed that "congressional intent must be regarded as 'ambiguous' . . . when two or more reasonable, though not necessarily equally valid, interpretations exist."\textsuperscript{146} He argued that in requiring courts to

\begin{itemize}
  \item \textsuperscript{138} See, e.g., Holly Farms Corp. v. NLRB, 517 U.S. 392, 399 n.6 (1996); \textit{United Food & Commercial Workers}, 484 U.S. at 129-30; \textit{Cardoza-Fonseca}, 480 U.S. at 422-33; see also Scalia, supra note 34, at 518 (acknowledging the importance of legislative history and stating that the history of agency action is also important because "the existence of a 'long-standing, consistent agency interpretation' that dates to the original enactment of the statute . . . may be part of the evidence showing that the statute is in fact not ambiguous but has a clearly defined meaning").
  \item \textsuperscript{139} See, e.g., \textit{Cardoza-Fonseca}, 480 U.S. at 438-40.
  \item \textsuperscript{140} See, e.g., \textit{United Food & Commercial Workers}, 484 U.S. at 124, 128-30.
  \item \textsuperscript{141} See \textit{Holly Farms}, 517 U.S. at 410-15 (O'Connor, J., concurring in the judgment in part and dissenting in part) (criticizing the majority's failure to consider fully the plain language of the statute); Scalia, supra note 34, at 521 (characterizing himself as one who favors the plain meaning rule).
  \item \textsuperscript{142} This uncertainty is arguably a weakness of \textit{Chevron} step one. See \textit{Endangered Species Act Update}, supra note 34, at 304-05 (arguing that by choosing certain tools of statutory construction that favor the desirable result, courts can use \textit{Chevron} to make policy judgments).
  \item \textsuperscript{143} See \textit{Holly Farms}, 517 U.S. at 410-11 (O'Connor, J., concurring in the judgment in part and dissenting in part); \textit{Anthony}, supra note 136, at 18-19.
  \item \textsuperscript{144} See Richard J. Pierce, Jr., \textit{Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions}, 41 \textit{VAND. L. Rev.} 301, 308 (1988). According to Pierce, a court should refrain from teasing meaning from the statute's ambiguous or conflicting language and legislative history; it should eschew the process of "creative" statutory interpretation that is otherwise essential and appropriate in judicial decision making . . . If the process of "real" statutory interpretation does not produce a determination that Congress resolved the specific issue, the court is dealing with a policy decision made by an agency.
  \item \textsuperscript{145} See Sunstein, supra note 34, at 2091-93.
  \item \textsuperscript{146} Scalia, supra note 34, at 520.
\end{itemize}
determine if the "intent of Congress is clear,"\textsuperscript{147} Chevron suggests that the opposite of 'ambiguity' is not 'resolvability,' but rather 'clarity.'\textsuperscript{148} Justice Kennedy, on the other hand, proposed that congressional intent was unclear if it was "arguably ambiguous."\textsuperscript{149} Finally, Justice Ginsburg indicated that intent was unclear if it was "not an inevitable . . . construction" of the statute.\textsuperscript{150} The difficulty lies in setting the ambiguity threshold high enough to ensure that step one is more than a rubber-stamp procedure, but low enough to ensure that courts do not manufacture congressional intent impermissibly.\textsuperscript{151}

Despite the inherent difficulties in applying Chevron step one, courts usually find that the agency interpretation satisfies this step.\textsuperscript{152} In a non-Chevron case, one in which deference to the agency interpretation is inappropriate, the court interprets the statute itself without deferring to the agency.\textsuperscript{153} Under Chevron, however, the court must proceed to step two to evaluate the agency's interpretation.\textsuperscript{154}

In Kennecott Utah Copper, the petitioners urged the court to apply the plain meaning rule, arguing that the meaning of "promulgated"

\textsuperscript{148} Scalia, supra note 34, at 520. Justice Scalia acknowledged, however, that his tendency to find that the meaning of a statute is clear from its language and its relationship with other laws leads him to invalidate a greater number of suits at step one. Id. at 521.
\textsuperscript{149} K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 293 n.4 (1988). But see Sunstein, supra note 34, at 2091 (observing that "[t]he Court's own decisions . . . suggest that the mere fact of a plausible alternative view is insufficient to trigger the Chevron rule").
\textsuperscript{150} Holly Farms Corp. v. NLRB, 517 U.S. 392, 401-03 (1996) (rejecting the petitioners' argument that Congress had intended catching and loading broiler chickens to qualify as work performed "on a farm as an incident to" the raising of poultry under section 3(f) of the Fair Labor Standards Act of 1938, because such an interpretation is "a plausible, but not an inevitable, construction of [the statute]").
\textsuperscript{151} See Scalia, supra note 34, at 520 (stating that "Chevron becomes virtually meaningless . . . if ambiguity exists only when the arguments for and against the various possible interpretations are in absolute equipoise"); cf. Holly Farms, 517 U.S. at 410 (O'Connor, J., concurring in the judgment in part and dissenting in part) (citing pre-Chevron precedent for the proposition that "blind adherence to [agency interpretations] when [they are] directly contrary to the plain language of the relevant statute" is unacceptable); Sunstein, supra note 34, at 2091 (explaining that "[i]f any ambiguity triggers the deference rule—if the agency wins whenever a reasonable person could be persuaded that more than one interpretation exists—the principle will be extraordinarily broad").
\textsuperscript{152} See Pierce, supra note 144, at 306-07.

In a high proportion of cases, . . . an honest analysis of the language, the congressional goals, and the legislative history of the statute will not support a holding that Congress actually resolved the policy issue presented to the court. This situation often arises because Congress frequently uses ambiguous or conflicting statutory language and invariably promulgates inconsistent congressional goals.

\textit{Id.} (footnote omitted).
was clear on its face.\textsuperscript{155} They argued that the plain meaning of the word—in their view, to publish or announce officially—supported their argument that the statute was "promulgated" in 1986 and 1987, when Interior had published the Type B and Type A regulations in the \textit{Federal Register}.\textsuperscript{156} The court, however, did not adopt the plain meaning rule. Instead, the court "look[ed] to the manner in which [the term ‘promulgated’] ha[d] been used and the extent to which those who must apply it have encountered interpretive difficulties."\textsuperscript{157} First, the court pointed to two instances in which another panel of the D.C. Circuit\textsuperscript{158} and Interior\textsuperscript{159} had stated that the 1986 and 1987 regulations were "promulgated." Acknowledging that these statements evidenced prior consensus between the court and the agency on this issue, the court nevertheless determined that such statements were not dispositive because they did not prove that the word itself was unambiguous.\textsuperscript{160}

Second, at Interior’s urging, the court reviewed two other cases, \textit{United States v. Montrose Chemical Corp.}\textsuperscript{161} and \textit{United States v. Seattle},\textsuperscript{162} in which the respective district courts had struggled to interpret "promulgated" under section 113(g)(1)(B).\textsuperscript{163} Although the court did not discuss these opinions in detail, it appeared to acknowledge that defining "promulgated" was a difficult task.\textsuperscript{164} Finally, the court briefly mentioned a D.C. Circuit case\textsuperscript{165} that had arisen under the Occupational Safety and Health Act of 1970 ("OSHA"),\textsuperscript{166} in which the

\begin{thebibliography}{99}
\bibitem{155} Kennecott Utah Copper Corp. v. United States Dep't of Interior, 88 F.3d 1191, 1211 (D.C. Cir. 1996).
\bibitem{156} \textit{See id.} at 1210-11. The petitioners pointed to the definition of "‘promulgate’" in \textit{Black's Law Dictionary} as support. \textit{Id.} at 1211 (citing \textit{Black's Law Dictionary} 1093 (5th ed. 1979)).
\bibitem{157} \textit{Id.}
\bibitem{158} \textit{Id.} (describing the 1987 Type A regulation as "‘promulgated . . . in compliance with the statutory requirements’" of section 301(c) of CERCLA (quoting Colorado v. United States Dep't of Interior, 880 F.2d 481, 485 (D.C. Cir. 1989) (omission in original))).
\bibitem{159} \textit{Id.} (referring to both the 1987 Type A regulations and the 1986 Type B regulations, and stating that "‘[t]he Department . . . has promulgated various final rules for the assessment of damages for injuries to natural resources’" (quoting Natural Resource Damage Assessments, 56 Fed. Reg. 19,752, 19,754 (1991) (alteration and omission in original))).
\bibitem{160} \textit{Id.}
\bibitem{161} 883 F. Supp. 1396, 1402 (C.D. Cal. 1995), \textit{rev’d sub nom.} California v. Montrose Chem. Corp., 104 F.3d 1507 (9th Cir. 1997) (rejecting the argument that section 9618(g) is clear on its face).
\bibitem{162} 33 Env't Rep. Cas. (BNA) 1549, 1550 (W.D. Wash. 1991) (holding that the statute of limitations for both the Type A and Type B regulations had not begun to run until the Type A regulations earned publication on March 20, 1987).
\bibitem{163} \textit{Kennecott Utah Copper}, 88 F.3d at 1211.
\bibitem{164} \textit{See id.}
\bibitem{165} National Grain & Feed Ass'n, Inc. v. OSHA, 845 F.2d 345 (D.C. Cir. 1988).
\end{thebibliography}
court unenthusiastically had held that the date of promulgation of the relevant regulation had been the date that the OSHA standard had earned publication in the Federal Register—"at least in the absence of a valid OSHA regulation fixing some other date."\textsuperscript{167} The Kennecott Utah Copper court concluded that this "opinion ... [had] suggest[ed] that the term 'promulgated,' as [had been] used in 29 U.S.C. § 655(f), [had been] far from unambiguous."\textsuperscript{168} Based on the above analysis, the court held that the term "promulgated" in section 113(g)(1)(B) of CERCLA was ambiguous.\textsuperscript{169} Because it determined that congressional intent was not clear from the face of the statute, the court held that Interior's interpretation survived step one of Chevron.

The court reviewed four cases to reach the conclusion that 43 C.F.R. § 11.91(e) satisfied Chevron step one.\textsuperscript{170} The court relied on these authorities to overcome evidence that the plain language of the statute and past statements of the court and the agency had defined "promulgated" as the date of publication in the Federal Register.\textsuperscript{171} Although, as discussed below, a more vigorous review of the language, history, and application of the statute supports this conclusion, the court failed to approach this issue with such vigor.

The court also found that the term was ambiguous because several interpretations were possible.\textsuperscript{172} The court raised the questions, "Is it apparent, for example, that a rule is promulgated when it is issued or formally announced by an agency? Or must the rule be filed with the Office of the Federal Register? Or published in the Federal Register?"\textsuperscript{173} The cases on which the court relied to find ambiguity\textsuperscript{174} provide little, if any, support for this conclusion. The court in National Grain & Feed Ass'n, Inc. v. OSHA\textsuperscript{175} held that "an OSHA standard is promulgated on the date that it is published in the Federal Register."\textsuperscript{176} Although dicta in the opinion intimated that "the date of issuance" might be sufficient, the court was unwilling to accept this interpretation in the absence of a valid OSHA regulation.\textsuperscript{177} The Seattle and Montrose cases both addressed whether "promulgation of regulations" referred to the Type B or Type A regulations. The Seattle court held that the regulations were not "promulgated" until both the Type A

\textsuperscript{167} National Grain, 845 F.2d at 346.
\textsuperscript{168} Kennecott Utah Copper, 88 F.3d at 1211.
\textsuperscript{169} Id.
\textsuperscript{170} See supra note 96 and accompanying text.
\textsuperscript{171} See Kennecott Utah Copper, 88 F.3d at 1210-11.
\textsuperscript{172} Id. at 1211.
\textsuperscript{173} Id. (italics added).
\textsuperscript{174} See supra note 96 and accompanying text.
\textsuperscript{175} 845 F.2d 345 (D.C. Cir. 1988).
\textsuperscript{176} Id. at 346 (italics added).
\textsuperscript{177} Id.
and Type B regulations appeared in the Federal Register. The Montrose court disagreed with the Seattle decision, concluding that although the statute was not clear, the better reading was that "promulgation" occurred when the earlier Type B regulations earned publication. Although these two courts clearly disagreed about the meaning of "regulations," they did not question that "promulgated" meant "published." In other words, the weight of evidence before the Kennecott Utah Copper court, including those cases that the court cited to support its position, had pointed toward "publication" as the definition of "promulgation." It appears that the Kennecott Utah Copper court decided that the term was ambiguous on the ground that the term "promulgated" could have several possible meanings. Although this impression might satisfy Justice Kennedy's "arguably ambiguous" standard or Justice Ginsburg's "not an inevitable... construction" standard, it likely would fail to satisfy Justice Scalia's "reasonable interpretation" standard.

The question then is whether the Kennecott Utah Copper court, despite the deficiencies in its analysis, reached the correct conclusion in holding that Interior's interpretation of "promulgated" satisfied Chevron step one. In determining Congress's intent in using the term "promulgated" in section 113(g)(1)(B), two issues arise. First, what agency actions constitute promulgation under the Act? The court proposed several alternatives, including publication of the regulation in the Federal Register, the agency's issuance or formal announcement of the regulation, or the act of filing the regulation with the Office of the Federal Register. The court based its holding that Interior's regulation satisfied step one of Chevron on the conclusion that congressional intent regarding this first issue was ambiguous. The second issue is whether the promulgation of an amendment or revision, accepting one of the previous definitions of "promulgated," represents promulgation of the regulation itself under section 113(g)(1)(B). Perhaps because the court found ambiguity in the first issue, it concluded that it did not need to address this second issue in its Chevron step one analysis.

180 See Montrose, 883 F. Supp. at 1398-1402; Seattle, 33 Env't Rep. Cas. (BNA) at 1549.
181 See supra note 149 and accompanying text.
182 See supra note 150 and accompanying text.
183 See supra notes 146-48 and accompanying text.
184 Kennecott Utah Copper Corp. v. United States Dep't of Interior, 88 F.3d 1191, 1211 (D.C. Cir. 1996).
185 Id.
186 Id. at 1210-11.
Although traditional tools of statutory interpretation point to the date of initial publication in the Federal Register as the most common definition of “promulgated,” the court was correct in determining that congressional intent regarding the first issue was unclear. The plain meaning of “promulgation” connotes the act of making a rule generally known. Black’s Law Dictionary defines “promulgate” as “[t]o publish; to announce officially; to make public as important or obligatory. The formal act of announcing a statute or rule of court.” 187 Webster’s New Collegiate Dictionary defines “promulgate” as “to make known by open declaration: proclaim; to make known or public the terms of (a proposed law); to put (a law) into action or force.” 188 Although one could argue that an agency makes a rule generally known by publishing it in the Federal Register, announcing the rule to the general public through the media likely would have the same effect.

Congressional intent also seems ambiguous in light of prior judicial interpretations of the term. Although courts generally have found that promulgation meant publication in the Federal Register, few opinions have held so without qualification. 189 For example, in American Mining Congress v. Thomas, 190 the Tenth Circuit stated that the date that an agency has promulgated a regulation was generally the date of publication in the Federal Register. 191 The court, however, acknowledged that the term “does not have a single accepted meaning in all contexts. . . . At least one meaning of promulgate is to make public.” 192 Based on this reasoning, the American Mining Congress court held that the Environmental Protection Agency (“EPA”) had promulgated a regulation under the Atomic Energy Act on the date that the EPA Administrator had signed the final regulations and had made them available to the public. 193

Unfortunately, the legislative history of CERCLA provides no further guidance regarding Congress’s intended meaning of “promulgated.” The legislative history does not discuss the meaning of this word or, in particular, its meaning with respect to the statute of limita-

189 See supra notes 174-77 and accompanying text; see also Northwest Envtl. Defense Ctr. v. Brennen, 958 F.2d 930, 934 (9th Cir. 1992) (holding that “promulgation” means “publication” because that is the point at which the public generally would learn of regulation); United Techs. Corp. v. OSHA, 836 F.2d 52, 53-54 (2d Cir. 1987) (finding that “promulgation” is “publication” in the Federal Register because this term is juxtaposed with “issued,” which must have a different meaning); Sea Watch Int’l v. Mosbacher, 762 F. Supp. 370, 374-75 (D.D.C. 1991) (holding that “promulgation” is “publication,” rather than “filing,” in the Federal Register under the Magnuson Fishery Conservation and Management Act).
190 772 F.2d 640 (10th Cir. 1985).
191 Id. at 645.
192 Id.
193 Id.
This omission is unfortunate, although not unexpected, given that courts generally have regarded the legislative history of CERCLA as inadequate. Studying the term in the context of the nearby language in the statute is similarly unhelpful because "promulgated" is not surrounded by any words that clarify its meaning.

As for the second issue, it is also unclear whether Congress intended the date of promulgation of amendments or revisions under CERCLA to serve as the date of promulgation of the regulations themselves for purposes of the statute of limitations. The legislative history does not indicate that Congress considered this issue when drafting the statute. In addition, no court—including the Kennecott Utah Copper court—has addressed this issue directly. Some courts have questioned whether the date of promulgation of the initial Type A regulations had tolled the statute of limitations for the earlier Type B regulations. Other courts have questioned the level of finality that is necessary for the promulgation of a regulation. Although these opinions shed some light on this issue, they clearly are not dispositive as to whether the date of promulgation of amendments serves as the date of promulgation of the regulations under section 113(g)(1)(B).

In this instance, the only tool of statutory interpretation that provides some guidance regarding congressional intent is the method of interpreting the term within the context of the broader statute. This method, however, also poses problems because different sections of the statute provide different meanings for "promulgated." For example, in section 301(c)(1), the statute states that the President "shall promulgate regulations for the assessment" of natural resource damages and that these regulations should be promulgated "not later than 6 months after October 17, 1986." "Promulgate," within this con-

194 See 1-3 A LEGISLATIVE HISTORY, supra note 3.
196 See 1-3 A LEGISLATIVE HISTORY, supra note 3.
197 See, e.g., cases cited supra notes 178-79 and accompanying text.
198 See, e.g., Municipal Auth. v. EPA, 945 F.2d 67, 71-75 (3d Cir. 1991) (holding that the EPA's conditional approval of individual control strategies does not constitute promulgation).
199 CERCLA, supra note 7, at 2805 (codified at 42 U.S.C. § 9651(c)(1) (1994)).
text, appears to refer to a one-time event that occurs when the agency initially releases the regulations. Other sections, such as section 102(a),200 separate “promulgate” from terms such as “revise.” The separation and juxtaposition of these terms indicate that Congress did not intend for courts to treat an amendment or revision as a “promulgation.” Other sections, however, fail to make this distinction. For example, section 105(c)(1) states that the President may “promulgate amendments to the hazard ranking system.”201 In that provision, the statute directly states that an amendment can be “promulgated.” Furthermore, section 155(a) discusses both “promulgation” and “repromulgation.”202 Hence, the context of the statute provides strong support for arguments on both sides of the issue.

In conclusion, the Kennecott Utah Copper court correctly found that the term “promulgated,” for the purposes of section 113(g)(1)(B) of CERCLA, was ambiguous. Regardless of whether a court applies Justice Scalia’s “reasonable interpretation” standard, or Justice Kennedy’s or Justice Ginsburg’s less rigorous standards,203 vigorous application of the traditional tools of statutory construction indicates that the intent of Congress is unclear on this issue. Therefore, the court was correct in holding that 43 C.F.R. § 11.91(e) satisfied step one of Chevron.

B. Chevron Step Two: Reasonableness of the Agency Interpretation

Once the reviewing court determines that congressional intent regarding the issue in question is ambiguous under Chevron step one, it must evaluate the agency interpretation under Chevron step two.204 According to Chevron, the level of scrutiny that the court must accord the agency’s interpretation depends on whether Congress’s delegation of authority to the agency was explicit or implicit.205 If the delegation was explicit, the reviewing court must uphold the interpretation unless it is “arbitrary, capricious, or manifestly contrary

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200 42 U.S.C. § 9602(a) (“The Administrator shall promulgate and revise as may be appropriate . . .”).
201 Id. § 9605(c)(1) (“Not later than 18 months after October 17, 1986, and after publication of notice and opportunity for submission of comments . . . , the President shall by rule promulgate amendments to the hazard ranking system in effect on September 1, 1984.”).
202 Id. § 9655(a) (“Notwithstanding any other provision of law, simultaneously with promulgation or repromulgation of any rule or regulation . . . , the head of the department, agency, or instrumentality promulgating such rule or regulation shall transmit a copy thereof . . . ”).
203 See supra text accompanying notes 146-50.
205 Id.
to the statute." In contrast, if the delegation of authority was implicit, the court must determine whether the agency's interpretation rests on a "permissible" or a "reasonable" statutory construction.

Although some courts have followed this line of reasoning and have discerned an operational difference between the two methods of delegation, the majority of courts has disregarded this distinction, focusing only on whether the interpretation had been "reasonable." Because the potential delegation of authority in *Kennecott Utah Copper* is implicit, a discussion of the distinction between the two methods of delegation is beyond the scope of this Note. Therefore, this Section discusses only the "reasonable" standard and its application to the case.

In applying *Chevron* step two, the reviewing court must defer to an agency interpretation if the interpretation is a reasonable construction of the statute. The Supreme Court has recognized two general rationales for this deference. First, as the Court suggested in *Smiley v. Citibank (South Dakota), N.A.*, if Congress has delegated authority to the agency to administer a statute, it necessarily also has delegated discretion to resolve any ambiguities:

We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but

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206 *Id.* at 843-44.

207 *Id.* at 843.

208 *Id.* at 844.

209 *See*, e.g., *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984) ("[L]anguage in *Chevron* might be read to indicate that the appropriate standard of review in such a situation varies to some degree dependent on whether the statute's delegation of gap filling authority is explicit or implicit."); *Panzarino v. Heckler*, 624 F. Supp. 350, 353 (S.D.N.Y. 1985) (noting that when "rulemaking authority... is only implicit, the scope of our review is somewhat more searching than the 'arbitrary, capricious, or manifestly contrary to the statute' standard").

210 *See* Anthony, *supra* note 136, at 30-31. Professor Anthony asserted that it is important to keep this distinction clear to ensure that courts continue to ask whether Congress has delegated authority to the agency to interpret the statute. *Id.*

211 *See infra* Part IV.

212 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *see also* *Smiley v. Citibank* (S.D.), N.A., 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering."); *Nationsbank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995) ("It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute."") (quoting Clarke v. Securities Indus. Ass’n, 479 U.S. 388, 403-04 (1987) (citation omitted))); *Continental Air Lines, Inc. v. Department of Transp.,* 843 F.2d 1444, 1449 (D.C. Cir. 1988) ("The question... is whether the agency's interpretation is reasonable or permissible. If it is, the judiciary is obliged to defer... ").


214 *See*, e.g., *id.* at 739-41.
rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.\textsuperscript{215}

The second rationale for deference under \textit{Chevron} step two is that administrative agencies possess the unique ability and expertise to reconcile conflicting policy concerns when interpreting a statute.\textsuperscript{216} An agency possesses unique knowledge of the content of the statute that it administers and how differing interpretations would impact the constituency to which the agency is accountable. As the Court stated in \textit{Chevron}, "[T]he principle of deference to administrative interpretations 'has been consistently followed ... whenever [a] decision ... has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy ... has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.'"\textsuperscript{217} Later in its analysis, the \textit{Chevron} Court directly addressed the role of the judiciary, stating that "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones."\textsuperscript{218}

\textit{Chevron} does not define directly when a statutory interpretation satisfies the "reasonable" standard. Rather, the Court, and subsequent authorities that have interpreted the decision, have not focused on what "reasonable" means, but on what it does \textit{not} mean. For example, for an interpretation to be reasonable, it need not be the only inter-

\textsuperscript{215} \textit{Id.} at 740-41 (citing \textit{Chevron}, 467 U.S. at 843-44); see also \textit{Continental}, 843 F.2d at 1454 ("Judicial deference is, after all, but a short-hand way of saying that the judiciary is duty bound to respect the original choice of the political branches in vesting authority in an agency to interpret and enforce a statute."). The \textit{Continental} court continued, "To depart from the culture of deference ... is to do violence to basic structural principles relied upon by Congress and the President in creating the agency in the first instance and endowing it with powers to interpret, administer and enforce that portion of the law of the land.") \textit{Id.}


\textsuperscript{217} \textit{Id.} at 866. In his dissent in \textit{Sweet Home}, Justice Scalia explained: We defer to reasonable agency interpretations of ambiguous statutes precisely in order that agencies, rather than courts, may exercise policymaking discretion in the interstices of statutes. Just as courts may not exercise an agency's power to adjudicate, and so may not affirm an agency order on discretionary grounds the agency has not advanced, so also this Court may not exercise the Secretary's power to regulate, and so may not uphold a regulation by adding to it even the most reasonable of elements it does not contain. \textit{Sweet Home}, 515 U.S. at 733 (Scalia, J., dissenting) (citations omitted); see also \textit{ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW} § 13.7.2, at 469-70 (1993) ("Buttressing the \textit{Chevron} court's deferential approach . . . was the fact that certain agencies are connected to an electorally accountable branch of government—the executive.").
pretation that the agency could have adopted, \(^{219}\) or even the best one. \(^{220}\) The interpretation, however, may not be wholly unsupportable \(^{221}\) or frustrate the policies that Congress intended to effectuate through the statute. \(^{222}\) By contrast, some courts and commentators have defined “reasonable” in relation to the alternative “arbitrary and capricious” standard proposed in *Chevron*, \(^{223}\) providing that an interpretation is reasonable if it is neither arbitrary nor capricious. \(^{224}\)

Although these definitions provide some guidance, they inadequately define what a “reasonable” interpretation is. *Black's Law Dictionary* provides a clear, but lengthy, definition of “reasonable,” stating in pertinent part: “[f]air, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view . . . governed by

\(^{219}\) See *Chevron*, 467 U.S. at 843 n.11; see also Anthony, *supra* note 136, at 27 (“To be sustained as reasonable, the agency interpretation need not be the only permissible one; . . . there need be no single true and enduring interpretation.”).

\(^{220}\) See *Chevron*, 467 U.S. at 843 n.11; see also Smiley, 517 U.S. at 744-45 (“Since we have concluded that the Comptroller's regulation deserves deference, the question before us is not whether it represents the best interpretation of the statute, but whether it represents a reasonable one.”); Holly Farms Corp. v. NLRB, 517 U.S. 392, 409 (1996) (“[T]he [agency] . . . need not show that its construction is the best way to read the statute; rather, courts must respect the [agency's] judgment so long as its reading is a reasonable one.”); Bayside Enters., Inc. v. NLRB, 429 U.S. 298, 304 (1977) (stating that the Court must accept the agency's reasonable interpretation of the statute "regardless of how we might have resolved the question as an initial matter"); Anthony, *supra* note 136, at 57 (asserting that "if reasonable [the agency interpretation] will be upheld even though the court might have construed the statute differently"); Abner J. Mikva, *How Should the Courts Treat Administrative Agencies?*, 36 AM. U. L. REV. 1, 6 (1986) (“As long as an agency articulated a reasonable construction, the courts may not say that some other construction would have been more reasonable.” (citing *Chevron*, 467 U.S. at 844-45)).

\(^{221}\) See *Chevron*, 467 U.S. at 845 (“[W]e should not disturb [the interpretation] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.” (quoting United States v. Shimer, 367 U.S. 374, 385 (1961))); see also Smiley, 517 U.S. at 741 (stating that courts “deny deference to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice” (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988))); Continental Air Lines, Inc. v. Department of Transp., 843 F.2d 1444, 1453 (D.C. Cir. 1988) (“[Courts] must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.” (alteration in original) (quoting Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981))); Mikva, *supra* note 220, at 8 (“[T]he Court directs judges to reject administrative constructions of a statute that are "inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." (quoting Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys., 468 U.S. 137, 143 (1984))).

\(^{222}\) See *Chevron*, 467 U.S. at 845; see also Smiley, 517 U.S. at 742 (asserting that *Chevron* excludes from deference interpretations that are “manifestly contrary to the statute”); Continental, 843 F.2d at 1453 (discussing *Federal Election Commission*, and explaining that “an agency interpretation did not merit judicial approbation if it actually frustrated the policies that Congress was seeking to effectuate”).

\(^{223}\) *Chevron*, 467 U.S. at 845.

\(^{224}\) See, e.g., Pierce, *supra* note 144, at 308.
reason.”

For the sake of clarity, this Note proposes the following definition, which attempts to incorporate aspects of each of the above definitions: An agency interpretation is “reasonable,” under Chevron step two, if it is a feasible construction that has some basis in the statute itself.

It is equally unclear what method the reviewing court should use to determine if an interpretation is reasonable. The Supreme Court’s clearest statement on this issue came from Justice White in United States v. Riverside Bayview Homes, Inc.

In reviewing an interpretation, the Court stated, “[O]ur review is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act.”

Despite this statement, most of the decisions and commentary on this issue have focused on one question—whether the interpretation was reasonable in light of the statute’s purpose.

The Kennecott Utah Copper court followed this approach.

Evaluating the interpretation in light of the purpose of the statute is a difficult task. Decisions and commentary are rife with warnings against confining the inquiry to either the “broad purpose” of the statute or the “narrow purpose” of the term or phrase that the agency has interpreted. Courts that warn against looking only at the “broad purpose” of the statute stress that such an inquiry neglects variations in the statute that inevitably exist due to the political process.

As the Court stated in Board of Governors of the Federal Reserve System v. Dimension Financial Corp.,


226 The author recognizes that there are numerous definitions of “reasonable,” with each definition setting a slightly different standard for the interpretation. For example, although each of the terms “possible,” “probable,” and “suitable” are adequate synonyms for “reasonable,” each places a different burden on the agency. In using “feasible,” the author attempts to select a term that falls in the middle of these disparate standards. Although the author uses this term to evaluate the court’s analysis in Kennecott Utah Copper, see infra text accompanying notes 256-77, the author does not mean to use the selection of this term to resolve the debate surrounding the definition of “reasonable” or the application of Chevron step two.

227 See Sunstein, supra note 34, at 2104.


229 Id. at 131; see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 696-704 (1995) (evaluating the interpretation of the term “harm” using the text, structure, and legislative history of the Endangered Species Act).

230 See, e.g., infra notes 231-39 and accompanying text.


232 See, e.g., Rodriguez, 480 U.S. at 526; Dimension Fin. Corp., 474 U.S. at 373; Continental, 843 F.2d at 1449.

Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.\textsuperscript{234}

Courts that caution against looking only at the "narrow purpose" of the specific term note that the meaning of a term is highly contextual.\textsuperscript{235} They argue that courts can only interpret the purpose of a term adequately in the context of the larger purpose of the statute itself.\textsuperscript{236} In other words, in determining whether an agency's interpretation is reasonable in light of the purpose of the statute, the court often must weigh a host of competing purposes.\textsuperscript{237}

In addition to determining the reasonableness of the interpretation in light of the language, policies, legislative history, and purpose of the statute, courts generally consider several other factors in their reasonableness analysis. For instance, courts frequently consider whether the agency has provided a reasoned explanation for the interpretation.\textsuperscript{238} Justice Stevens's emphasis in \textit{Chevron} on whether "the

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\item \textsuperscript{234} Id. at 373-74; see also Sweet Home, 515 U.S. at 726 (Scalia, J., dissenting) ("Deduction from the 'broad purpose' of a statute begs the question if it is used to decide by what means (and hence to what length) Congress pursued that purpose; to get the right answer . . . there is no substitute for the hard job . . . of reading the whole text."); sources cited supra note 232.
\item \textsuperscript{235} See Nationsbank, 513 U.S. at 262.
\item \textsuperscript{236} See id. (stating that "a characterization fitting in certain contexts may be unsuitable in others"). Writing for the majority, Justice Ginsburg quoted \textit{Atlantic Cleaners & Dyers, Inc. v. United States}, 286 U.S. 427, 433 (1932), stating that while the "meaning [of words] will vary to meet the purposes of the law," courts properly give words "the meaning which the legislature intended [they] should have in each instance." \textit{Id.} (alterations in Nationsbank).
\item \textsuperscript{237} See Continental, 843 F.2d at 1451.
\item \textsuperscript{238} See Sunstein, supra note 34, at 2104. Professor Sunstein drew parallels between this inquiry and the inquiry into whether the agency's decision is "arbitrary" or "capricious" within the meaning of the Administrative Procedure Act. According to Professor Sunstein, "That inquiry requires the agency to give a detailed explanation of its decision by reference to factors that are relevant under the governing statute." \textit{Id.} at 2105; see also Continental, 843 F.2d at 1451 (explaining that the nature of reasonableness-checking requires the courts to evaluate whether the agency "consider[ed] . . . meaningful alternatives" and pro-
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EPA had advanced a reasonable explanation for its conclusion” that the interpretation had served the statutory purpose appears to have introduced this factor.239 Requiring a reasoned explanation for the interpretation is quite often a proxy for the court’s underlying concern that the agency “[had] acted with sufficient care and based its decision on a consideration of relevant factors.”240 Professor Anthony provided an excellent summary of some of the other factors that have led courts to conclude that an interpretation had been reasonable:

[F]actors ... that enhance reasonableness include the importance of agency expertise in a technical or complex area, ... the need to reconcile conflicting policies, congressional grant to the agency of explicit rulemaking authority, interpretation contemporaneous with the agency’s setting the statutory machinery into motion, congressional awareness of the agency view and rejection of changes, and the consistency with which the agency interpretation has been applied.241

Other factors that might support a finding of reasonableness are whether the interpretation would produce absurd results,242 whether the interpretation would “raise constitutional questions,”243 whether the agency employed “flawed ... reasoning,”244 whether the agency provided “a reasoned explication of the choice made” that “demonstrat[ed] a reasonable connection between the facts found and the option selected” (internal quotation marks omitted)); cf. Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 155 (D.C. Cir. 1984) (“Although we do not necessarily require the agency to support its policy decision with detailed cost calculations, neither is its decision made reasonable by the mere invocation of a factor that might legitimately have been influential in a reasoned decisionmaking process.”).

240 Rettig, 744 F.2d at 152; see also Chevron, 467 U.S. at 865 (noting in support of the determination of reasonableness that the agency, among other things, “considered the matter in a detailed and reasoned fashion”); Silberman, supra note 34, at 828 (stating that courts often ask themselves in Chevron step two analysis “whether the agency considered and weighed the factors Congress wished the agency to bring to bear on its decision”).
241 Anthony, supra note 136, at 29 (footnote omitted).
242 See Sunstein, supra note 34, at 2116-17 (noting that the determination of absurdity is “made by reference to traditional legal understandings”).
243 Anthony, supra note 136, at 29 (citing DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr., 485 U.S. 568 (1988)).
244 Anthony, supra note 136, at 29-30 (citing Homemakers N. Shore, Inc. v. Bowen, 832 F.2d 408 (7th Cir. 1987); Brock ex rel. Williams v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987); Brock v. Louvers & Dampers, Inc., 817 F.2d 1255 (6th Cir. 1987); Phillips Petroleum Co. v. FERC, 792 F.2d 1165 (D.C. Cir. 1986)).
positions are "inconsisten[t]," and whether the interpretation would result in "agency self-aggrandizement."

Of course, for a court's inquiry to be truly deferential, it must not be a full-fledged interpretation of the ambiguous term. If the court were to interpret the term de novo to determine the best interpretation, it effectively would assume the agency's role, which would conflict with the rationale behind granting deference to an administrative agency's interpretation of a statute. The court instead must evaluate the interpretation in light of the factors discussed above to determine whether the interpretation is reasonable.

Commentators have criticized the uncertainty of Chevron step two, particularly the courts' disparate definitions of reasonableness, the quantity and diversity of factors that courts have used to determine reasonableness, and the levels of scrutiny that they have applied to the determination. These criticisms generally fall into three categories. First, commentators have criticized the malleability of the step, arguing that it has led to "unpredictable results." Former Judge Abner J. Mikva of the D.C. Circuit stated that "[a]s a rule of the road, this doctrine is inadequate because the drivers have no real assurance

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Anthony, supra note 136, at 30 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987)). But see Chevron, 467 U.S. at 863-64

The fact that the agency has from time to time changed its interpretation of the term 'source' does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informal rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.


See id. at 28-29.


See Chevron, 467 U.S. at 843-45. In Sweet Home, Justice Scalia explained:

We defer to reasonable agency interpretations of ambiguous statutes precisely in order that agencies, rather than courts, may exercise policymaking discretion in the interstices of statutes. Just as courts may not exercise an agency's power to adjudicate, and so may not affirm an agency order on discretionary grounds the agency has not advanced, so also this Court may not exercise the Secretary's power to regulate, and so may not uphold a regulation by adding to it even the most reasonable of elements it does not contain.


See, e.g., Mikva, supra note 220, at 9; Silberman, supra note 34, at 827-28; Endangered Species Act Update, supra note 34, at 306.

Mikva, supra note 220, at 9.
when or how it will be applied in any given case." Second, commentators have criticized the level of discretion that has been available to courts under *Chevron* step two, arguing that the wide range of factors and definitions has placed courts in the agency role of policymaker. The third criticism builds on the second one, contending that this wide discretion grants judges the opportunity either to accept or to reject the agency's interpretations based largely on the judges' personal or political beliefs about appropriate governmental policy.

In *Kennecott Utah Copper*, the D.C. Circuit rejected Interior's interpretation of section 113(g)(1)(B), holding that the interpretation did not satisfy *Chevron* step two because it was neither reasonable nor consistent with the purpose of the statute. Although the court briefly discussed the legislative history of the statute of limitations provision and the explanation that Interior had given for its interpretation, the court devoted the bulk of its discussion to its belief that the interpretation was contrary to the purpose of statutes of limitations in general. The court's holding is improper under step two of *Chevron* for two reasons: First, by failing to consider other factors, such as the overall purpose of CERCLA and the meaning of "promulgated" within the text and structure of section 113(g)(1)(B), the court conducted an incomplete review of the interpretation. Second, in holding that the agency's interpretation was not reasonable, the court rejected a feasible construction that had some basis in the statute itself.

In drafting the CERCLA legislation, Congress had three primary concerns: First, Congress intended the legislation to "provide incentive[s] for maximum care in handling hazardous substances and for minimizing the effects of any releases by establishing strict liability for responsible parties for cleanup costs, mitigation, and third-party damages." Second, Congress intended to "provide a mechanism for rapid response, including an immediately available source of funding for cleanup and mitigation, when hazardous substances are re-

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253 *Id.*
254 See, e.g., *Endangered Species Act Update, supra* note 34, at 306 (stating that "[Chevron step two] gives courts another opportunity to make policy decisions by interpolating their own set of factors into the reasonableness test").
255 See, e.g., Silberman, *supra* note 34, at 827.
256 *Kennecott Utah Copper Corp. v. United States Dep't of Interior, 88 F.3d 1191, 1211 (D.C. Cir. 1996).*
257 *Id.* at 1212.
258 *Id.*
259 *Id.* at 1211-12.
260 *See supra* note 226 and accompanying text.
262 *Id.* at 12, *reprinted in A LEGISLATIVE HISTORY, supra* note 3, at 319.
leased into the environment."263 Finally, Congress intended the legislation to "provide prompt and adequate compensation for injured parties."264 Because it drafted the legislation in response to the discovery of hazardous waste dump sites such as Love Canal, Cedar River, and Valley of the Drums, Congress primarily intended for CERCLA to serve as a remedial statute to remedy the wrongs of offending parties and to provide redress to victims.265 Congress intended the costs of these remedies to fall on the offending parties regardless of the intent behind their actions.266

As discussed above, courts must consider the purpose of a statute when determining whether an agency's interpretation of a term is reasonable.267 This consideration is particularly important when the statute is remedial in nature. As the D.C. Circuit explained in a 1984 case involving ERISA, "One principle of statutory construction teaches . . . that remedial statutes are to be liberally construed to effectuate their purposes."268 Courts have applied this principle to CERCLA in the past, as the following statement from a district court evidences: "To give effect to . . . congressional concerns, CERCLA should be given a broad and liberal construction. The statute should not be narrowly interpreted to frustrate the government's ability to respond promptly, or to limit the liability of those responsible for cleanup costs beyond the limits expressly provided."269 In practice, arguably the natural resource damages provisions themselves are not entirely remedial, given the obvious impossibility of restoring natural resources to their pristine state following a release of hazardous substances. Nevertheless, the provisions' focus on restoration and replacement indicates that

263 Id.
264 Id.
265 See supra notes 1-14 and accompanying text.
266 See S. Rep. No. 96-848, at 13, reprinted in A LEGISLATIVE HISTORY, supra note 3, at 320 ("To establish provisions of liability any less than strict, joint, and several liability would be to condone a system in which innocent victims bear the actual burden of releases, while those who conduct commerce in hazardous substances which cause such damage benefit with relative impunity."); id. at 34 ("In some . . . cases the choice is not between an innocent victim and a careless defendant, but between two blameless parties. In such cases the costs should be borne by the one of the two innocent parties whose acts instigated or made the harm possible."); see also United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) ("In enacting CERCLA in 1980, Congress sought to . . . impose the costs and responsibility for remedial action upon the persons responsible for the creation of the hazardous waste disposal threat."); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.").

267 See supra notes 231-37 and accompanying text.
269 Reilly Tar & Chem., 546 F. Supp. at 1112; see also Mottolo, 605 F. Supp. at 902 ("[T]he remedial intent of CERCLA requires a liberal statutory construction designed to avoid frustration of the Act's purpose.").
Congress intended that they be consistent with the remedial nature of the greater statute.\textsuperscript{270}

By interpreting "promulgated" to include dates on which agencies had filed amendments or revisions to initial regulations, Interior has expanded the statute of limitations period. This expansion enables the government to impose liability on offending parties under revised legislation. Although this interpretation adds to offending parties’ uncertainty by tolling the statute of limitations, it nonetheless consistent with CERCLA's purpose—to restore dangerous sites and impose liability on responsible parties.\textsuperscript{271} By failing to consider the purpose of CERCLA in making its \textit{Chevron} step two determination, the \textit{Kennecott Utah Copper} court overlooked an important factor that favored a determination of reasonableness.

In addition, the \textit{Kennecott Utah Copper} court failed to consider the ambiguity of the term "promulgated." As discussed above, Interior's interpretation had been one of many possible interpretations of section 113(g)(I)(B).\textsuperscript{272} In fact, a recent Course of Study that the American Law Institute, the American Bar Association, and the Environmental Law Institute co-sponsored specifically recognized that the date that Interior had issued revised regulations in response to the decision in \textit{Ohio v. United States Department of the Interior} was only one of several possible dates on which the natural resource damage assessment regulations could have been promulgated for purposes of the statute of limitations.\textsuperscript{273} By failing to consider the ambiguity of the language in section 113(g)(1)(B), the \textit{Kennecott Utah Copper} court neglected to consider another factor in favor of reasonableness.

Even if one were to focus on only the factors that the court had considered in making its determination, one would not conclude inevitably that Interior's interpretation had been unreasonable. The court was correct in asserting that Interior's interpretation would toll the statute of limitations significantly and extend the liability and uncertainty of offending parties that already have responded to the statute.\textsuperscript{274} This interpretation certainly would conflict with the purpose of statutes of limitations to provide finality and grant repose to the parties. The Supreme Court, however, has held consistently that when parties seek to interpret statutes of limitations provisions to defeat government rights, courts should construe the provisions strictly

\textsuperscript{270} See supra note 43 and accompanying text.
\textsuperscript{271} See supra text accompanying notes 7-14.
\textsuperscript{272} See supra text accompanying notes 172-73.
\textsuperscript{274} Kennecott Utah Copper Corp. v. United States Dep't of Interior, 88 F.3d 1191, 1211-12 (D.C. Cir. 1996).
in the government’s favor.\textsuperscript{275} As the United States District Court for the District of New Hampshire stated in a case involving CERCLA, “Where, as here, defendants’ proposed construction would operate to bar actions for cost reimbursement under CERCLA by the United States and state governments more than three years after cost incurrence, [the statute] must be strictly construed in favor of the federal and state governments.”\textsuperscript{276} Interior’s interpretation of section 113(g)(1)(B) was consistent with this approach. By failing to consider this well-established principle of statutory construction, the *Kennecott Utah Copper* court conducted an incomplete assessment of the reasonableness of Interior’s interpretation.

Furthermore, it is clear that Interior provided a reasoned explanation of its interpretation, even if the court did not conclude that it was the best interpretation.\textsuperscript{277} Although this Note recognizes that Interior’s interpretation of “promulgated” may not be the best interpretation under section 113(g)(1)(B), such a determination is beyond the bounds of *Chevron* step two analysis. Rather, the question is whether Interior presented a reasonable interpretation—one that was feasible and had some basis in the statute. For the reasons discussed above, Interior presented a reasonable interpretation of the statute. Therefore, the *Kennecott Utah Copper* court erred in holding that 43 C.F.R. § 11.91(e) was invalid under *Chevron* step two.

IV

THE COURT’S ASSUMPTION: INTERIOR’S AUTHORITY TO DEFINE “PROMULGATED”

The previous two parts of this Note determined that Interior’s interpretation of “promulgated” within the statute of limitations provisions of CERCLA was acceptable under both steps of *Chevron*. As a result, the *Kennecott Utah Copper* court erred in holding that 43 C.F.R. § 11.91(e) was invalid under *Chevron*. This determination, however, does not end the inquiry into the overall validity of Interior’s interpretation. In order for the interpretation’s validity under *Chevron* to be dispositive, the interpretation must be entitled to *Chevron* deference.

As the Supreme Court stated in *Adams Fruit Co. v. Barrett*,\textsuperscript{278} “A precondition to deference under *Chevron* is a congressional delega-


\textsuperscript{277} See *Kennecott Utah Copper Corp. v. United States Dep’t of Interior*, 88 F.3d 1191, 1212 (D.C. Cir. 1996).

\textsuperscript{278} 494 U.S. 638 (1990).
tion of administrative authority." Therefore, in determining the validity of an agency interpretation, courts can only grant deference if Congress has delegated authority to the agency to render such an interpretation. The remainder of this Note addresses the question that the *Kennecott Utah Copper* court left unresolved—whether Interior's interpretation is entitled to *Chevron* deference.

Although agency interpretations are commonplace in modern administrative law, courts and commentators have debated their validity for centuries. When an agency interprets a statute, it necessarily defines the law at issue. When a court defers to an agency's interpretation, rather than conducting an independent review of the statute, it implicitly acknowledges that the agency has the authority to define the law. This acknowledgment is problematic for two reasons. First, one could read the United States Constitution to prohibit courts from granting this deference. Article III of the Constitution states that the "judicial power of the United States" is vested in the courts. A strict reading of this provision indicates that courts alone have the power to interpret the law. Chief Justice Marshall adopted this reading in *Marbury v. Madison* when he stated that it was "emphatically the province and duty of the judicial department to say what the law is." Second, if the Framers did grant the courts the power to interpret the law, the maxim *delegata potestas non potest delegari* prevents the delegation of this power to administrative agencies. This maxim, which also is known as the nondelegation doctrine, asserts that "[a] delegated power cannot be delegated." The combination of these two principles—the strict reading of Article III and the nondelegation

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279 Id. at 649 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)). Similarly, in *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), the D.C. Circuit explained that *Chevron*... is premised on the notion that Congress implicitly delegated to the agency the authority to reconcile reasonably statutory ambiguities or to fill reasonably statutory interstices. Where Congress does not give an agency authority to determine... the interpretation of a statute in the first instance..., deference to the agency's interpretation is inappropriate. *Kelley*, 15 F.3d at 1108 (citing United States v. Western Elec. Co., 900 F.2d 283, 297 (D.C. Cir. 1990)).


281 See *supra* text accompanying notes 81-84.


283 U.S. CONST. art. III, § 1.


285 5 U.S. (1 Cranch) 137 (1803).

286 Id. at 177.


288 Id. at 569 n.140; see also Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 478-80 (1989) (discussing the constitutional basis for, and the decline of, the nondelegation doctrine).
doctrine—dictates that courts must conduct an independent review of all statutes.289

Over the last two centuries, however, the development of administrative law has departed from these two principles.290 As Professor Cynthia Farina stated, "The size and power of the contemporary administrative state became doctrinally possible because the Supreme Court’s view of the scope and purpose of constitutional restraints on delegation evolved considerably during the nineteenth and early twentieth centuries."291 Accompanying this development has come the acknowledgment that "courts do not necessarily abdicate a Marshallian duty to 'say what the law is' by deferring to agencies" because courts retain the authority to invalidate unreasonable interpretations.292 Nevertheless, concerns about the concepts of separation of powers and nondelegation endure.293 As a result, the scope and application of the deference doctrine reflect these ongoing tensions.294

Prior to Chevron, courts had grappled with the deference doctrine on a case-by-case basis.295 In each individual case, the court struggled to determine whether deference was appropriate, often producing inconsistent results.296 A primary component of this determination has involved a consideration of the appropriate allocation of interpretive authority between agencies and courts.297 As Professor Farina explained:

For those who study the interaction of courts and agencies, one of the most persistently intriguing puzzles has been to define the appropriate judicial and administrative roles in the interpretation of regulatory statutes...
Judicial attempts, over the years, to cut through this conceptual complexity have produced a large number of statutory interpretation opinions that defy easy reconciliation. Nevertheless, despite these inconsistencies, the pre-Chevron cases generally reflect two distinct and competing responses by the courts.

Courts that adopted the first response, which Professor Thomas Merrill appropriately termed the "'deference' mode," concluded that the agency had the primary responsibility for interpreting the statute. Under this first response, courts focused merely on whether the agency's interpretation was reasonable, and thus did not contradict the text or language of the statute. The Supreme Court's decision in NLRB v. Hearst Publications, Inc. is a commonly cited example of the "deference mode." In this case, the Court upheld, pursuant to the National Labor Relations Act, the NLRB's decision that certain newspaper distributors were "employees." The Court concluded that the agency should resolve more specific interpretations. The Court wrote, "[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." In these cases, courts should accept agency interpretations if they are "warrant[ed] in the record" and have "a reasonable basis in law."

In stark contrast, courts that adopted the second response, which Professor Merrill termed the "independent judgment mode,"
granted no deference to agency interpretations and interpreted the statutes de novo.\textsuperscript{312} In making an interpretation, a reviewing court employed traditional tools of statutory construction—such as legislative history, textual analysis, and the like—to reach what it concluded was the best interpretation of the statute.\textsuperscript{313} \textit{Packard Motor Car Co. v. NLRB},\textsuperscript{314} in which the Court upheld the NLRB’s decision that shop foremen were “employees” under the National Labor Relations Act,\textsuperscript{315} is a commonly cited example of the “independent judgment mode.”\textsuperscript{316} Rather than determine whether the agency’s decision had “a reasonable basis in law,” as the \textit{Hearst} Court had done when faced with similar facts three years earlier,\textsuperscript{317} the Court interpreted the term “employees” de novo.\textsuperscript{318} In other words, “the majority and the dissenters each made their own legal analysis; neither suggested the agency’s decision should receive any special weight or deference; and neither referred either to \textit{Hearst} or to any of the cases on which \textit{Hearst} relied.”\textsuperscript{319}

The rationales supporting “independent judgment mode” decisions such as \textit{Packard} are sensible given the approach’s historical basis in Article III and the nondelegation doctrine.\textsuperscript{320} The more interesting question is why a court should ever adopt the “deference mode” and grant weight to an agency’s interpretation of the law.\textsuperscript{321} The key element of this inquiry is a determination of whether Congress has granted the agency authority to interpret the statute.

Courts and commentators have offered three rationales for granting deference to agency interpretations. Two of the rationales assert, for different reasons, that courts should exercise deference because agencies are better suited to interpret the laws that they promulgate. In other words, the agency has implied authority to make the interpretations because it has more expertise in the specific area. The third

\textsuperscript{312} See Breyer, \textit{supra} note 296, at 366-67; Callahan, \textit{supra} note 295, at 1279-80; Diver, \textit{supra} note 282, at 551; Farina, \textit{supra} note 288, at 453-54; Merrill, \textit{supra} note 299, at 971; Starr, \textit{supra} note 34, at 293.

\textsuperscript{313} See Farina, \textit{supra} note 288, at 453-54; Merrill, \textit{supra} note 299, at 971-72.

\textsuperscript{314} 330 U.S. 485 (1947).

\textsuperscript{315} Id. at 489-90.

\textsuperscript{316} See, e.g., Breyer, \textit{supra} note 296, at 366-67; Callahan, \textit{supra} note 295, at 1279-80. Scholars often use \textit{Hearst} and \textit{Packard} to contrast the two approaches because of their obvious similarities in facts, governing statute, and parties.

\textsuperscript{317} See \textit{supra} text accompanying note 310.

\textsuperscript{318} \textit{Packard Motor Car}, 330 U.S. at 488-90; \textit{see also} Barlow v. Collins, 397 U.S. 159, 166 (1970) (“[S]ince the only or principal dispute relates to the meaning of [a] statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the [agency], but by judicial application of canons of statutory construction.”).

\textsuperscript{319} Breyer, \textit{supra} note 296, at 366-67.

\textsuperscript{320} See \textit{supra} text accompanying notes 282-89.

\textsuperscript{321} See Breyer, \textit{supra} note 296, at 368.
rationale points to the intent of Congress, asserting that courts should defer to agency interpretations simply because Congress intended that the agency interpret the statute. The following discussion addresses each of these points.

The first rationale asserts that courts should defer to agency interpretations because the agency possesses unique "expertise" in interpreting the statute.\textsuperscript{322} Because an agency’s operations revolve around the statute that it administers, the agency is presumably more familiar with the history and purpose of the statute.\textsuperscript{323} The agency also has a thorough understanding of the language of the statute, including how the statute’s provisions interrelate and how different interpretations would affect relevant parties.\textsuperscript{324} Because the generalist judiciary does not share this expertise, courts should defer to the agency because it is more likely to reach the correct result.\textsuperscript{325} In the context of a particular case, several factors can strengthen this first rationale. If, for example, a statute at issue is especially complex or imprecise, deferring to the agency’s expertise is particularly warranted.\textsuperscript{326} Conversely, if the agency has wavered in its past interpretation of the relevant provision, then its expertise is more dubious and judicial deference is less likely.\textsuperscript{327}

The second rationale asserts that agencies are better suited to interpret statutes because they are, indirectly at least, accountable to the electorate.\textsuperscript{328} This rationale stems from the following three arguments. First, when interpreting a statute, the interpreting entity inevitably must consider policy in reaching its decision.\textsuperscript{329} As Professor Colin Diver observed, statutory interpretation is a "component in the larger process by which social policy, as embodied in the statute as a whole, is implemented."\textsuperscript{330} Second, under a democratic system, enti-

\textsuperscript{322} See id.; Farina, supra note 288, at 466; Richard J. Pierce, Jr., The Role of the Judiciary in Implementing an Agency Theory of Government, 64 NYU L. Rev. 1239, 1251 (1989); Scalia, supra note 34, at 514; Starr, supra note 34, at 309-10.

\textsuperscript{323} See Scalia, supra note 34, at 514.

\textsuperscript{324} See Starr, supra note 34, at 309-10.

\textsuperscript{325} See Scalia, supra note 34, at 514; Starr, supra note 34, at 309-10.

\textsuperscript{326} See Breyer, supra note 296, at 370-71; Scalia, supra note 34, at 513; see also Starr, supra note 34, at 309-10 ("Many regulatory statutes, particularly those enacted in the 1960’s and since, are highly complex.").

\textsuperscript{327} See Breyer, supra note 296, at 368 (stating that "courts have said they find an agency’s views more persuasive when they reflect a longstanding, consistent interpretation of the statute").

\textsuperscript{328} See Diver, supra note 282, at 593; Farina, supra note 288, at 466; Pierce, supra note 322, at 1240, 1251; Scalia, supra note 34, at 515.

\textsuperscript{329} See Diver, supra note 282, at 593 (asserting that "interpretation is inherently a form of policymaking"); Farina, supra note 288, at 467 (asserting that policy choices are "unavoidable in construing contemporary regulatory statutes").

\textsuperscript{330} Diver, supra note 282, at 585.
ties that are politically accountable should make policy judgments. Finally, due to the underlying functions of agencies and courts, agencies are significantly more accountable to the electorate than are courts. The judiciary’s function as enforcer of the law necessitates its independence from the President, Congress, and the people. Once federal judges are confirmed, they cannot face removal from office merely because their policy decisions fail to reflect the consensus of the electorate. By contrast, agency personnel serve at the pleasure of the President, who can remove them from office if their decisions are politically unpopular. Accordingly, the enhancement of this “political accountability” rationale will occur in a particular case if consideration of policy is a critical component of the interpretation at issue.

The third and final rationale for granting deference to an agency interpretation is congressional intent. When it drafts a statute, Congress either explicitly or implicitly delegates to the agency the power to decide the relevant question of law. Therefore, to satisfy congressional intent, the court must consider the agency’s interpretation. When this delegation is explicit, the question of deference generally is not at issue. When Congress implicitly delegates authority to interpret the statute, however, the court must consider a variety of factors to determine congressional intent.

Justice (then Judge) Breyer provided a helpful summation of these factors:

[Courts] look[ ] to practical features of the particular circumstance to decide whether it “makes sense . . . .” . . . to imply a congressional intent that courts defer to the agency’s interpretation. . . . [C]ourts will defer more when the agency has special expertise that it can bring to bear on the legal question. Is the particular question one that the agency or the court is more likely to answer correctly? . . . A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration. A court may also look to see whether the language is “inherently imprecise,” i.e., whether the words of the statute are phrased so broadly as to invite agency interpretation. It might also consider the extent to which

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331 See Pierce, supra note 322, at 1240; Scalia, supra note 34, at 515; see also Farina, supra note 288, at 467 (indicating despite her subsequent criticism, that the political accountability rationale "echoes the Lockean view that the exercise of power in a democratic government can be defended only through accountability to its source, the electorate").

332 See Pierce, supra note 322, at 1240, 1251.

333 See id. at 1241.

334 See id. at 1251.

335 See id.

336 See Breyer, supra note 296, at 370-71; Scalia, supra note 34, at 516.

337 See Breyer, supra note 296, at 370-71; Scalia, supra note 34, at 516.
the answer to the legal question will clarify, illuminate or stabilize a broad area of the law.\(^{338}\)

Of course, statutory language, legislative history, or other evidence indicating that Congress intended for courts to resolve the statutory question at issue can outweigh these factors easily.\(^{339}\)

Chevron had appeared to end courts’ case-by-case struggles with the deference doctrine.\(^{340}\) On its face, Chevron had seemed to advocate a blanket presumption that deference to agency interpretations was required when a statute was ambiguous.\(^{341}\) In the fourteen years since the Chevron decision, however, it has become apparent that the Court does not consider Chevron analysis to be the universal test for granting deference.\(^{342}\) As Professor Thomas Merrill noted in 1992, “[T]he Chevron framework is used in only about half the cases that the Court perceives as presenting a deference question.”\(^{343}\)

Furthermore, the aforementioned rationales and related factors that support deference have not disappeared in the post-Chevron period.\(^{344}\) On the contrary, the Chevron decision itself incorporates aspects of all three rationales.\(^{345}\) In particular, Justice Stevens relied on the “political accountability” rationale when he wrote for the majority:

\(^{338}\) Breyer, supra note 296, at 370-71 (citations omitted). Although Justice Scalia acknowledged the agency expertise and political accountability rationales, he argued that the only acceptable justification for the deference mode was congressional intent. Scalia, supra note 34, at 514-15. In discussing implied intent, he argued that “the relevance of such frequently mentioned factors as the degree of the agency’s expertise, the complexity of the question at issue, and the existence of rulemaking authority within the agency . . . make an intent to confer discretion upon the agency more likely.” Id. at 516.

\(^{339}\) See Breyer, supra note 296, at 371.

\(^{340}\) See Callahan, supra note 295, at 1281; Farina, supra note 288, at 455; Scalia, supra note 34, at 512.

\(^{341}\) See Callahan, supra note 295, at 1281; Merrill, supra note 299, at 969; Scalia, supra note 34, at 516. But see Breyer, supra note 296, at 373 (“To read Chevron as laying down a blanket rule, applicable to all agency interpretations of law, such as ‘always defer to the agency when the statute is silent,’ would be seriously overbroad, counterproductive and sometimes senseless.”).

\(^{342}\) See Merrill, supra note 299, at 970. Professor Merrill points to several factors indicating that the Chevron Court “did not regard [its decision] as a departure from prior law.” Id. at 976. For example, only six Justices participated, the opinion did not include any concurring or dissenting statements, “[a]nd in the year following Chevron, the Court decided nineteen cases involving deference issues, but applied the Chevron framework only once.” Id. at 975-76.

\(^{343}\) Id. at 970.

\(^{344}\) See id.; see also Scalia, supra note 34, at 521 (“The opinions we federal judges read, and the cases we cite, are full of references to the old criteria of ‘agency expertise,’ ‘the technical and complex nature of the question presented,’ [and] ‘the consistent and long-standing agency position’ . . .”).

\(^{345}\) Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (invoking the “agency expertise” rationale and stating that “the principle of deference to administrative interpretations ‘has been consistently followed by this Court whenever . . . a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency
When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.\textsuperscript{346}

Following \textit{Chevron}, cases and commentary that address the deference issue indicate that courts have continued to make case-by-case determinations of deference. In \textit{INS v. Cardoza-Fonseca},\textsuperscript{347} the Court invoked aspects of the expertise rationale to conclude that the Board of Immigration Appeals' construction of the Refugee Act of 1980\textsuperscript{348} was not entitled to \textit{Chevron} deference.\textsuperscript{349} The Court reasoned that the interpretation was "a pure question of statutory construction."\textsuperscript{350} It differentiated between two kinds of interpretive problems, stating that "[t]he narrow legal question whether the two standards are the same is, of course, quite different from the question of interpretation that arises in each case in which the agency is required to apply either or both standards to a particular set of facts."\textsuperscript{351} In other words, rather than granting \textit{Chevron} deference to the agency's interpretation, the Court reasoned that the judiciary was better suited than the agency to make the interpretation at issue. The Court added, in a footnote, that the interpretation also was not entitled to deference because the agency's past interpretations of the provision had been inconsistent.\textsuperscript{352} As previously discussed, courts are likely to decline deference in these situations on the ground that the agency's expertise in the area is questionable.\textsuperscript{353}

The Court's more recent decision in \textit{Babbitt v. Sweet Home Chapter of Communities for a Great Oregon}\textsuperscript{354} also reflects this case-by-case approach. As part of this highly controversial decision, the Court held that, under \textit{Chevron}, it should defer to the Secretary of the Interior's regulations'" (quoting United States v. Shimer, 367 U.S. 374, 382 (1961))); \textit{id.} at 843-44 (reviewing the differences between explicit and implicit delegations of agency authority); \textit{see also} Callahan, \textit{supra} note 295, at 1281-82 (discussing the various rationales apparent in \textit{Chevron}).

\textsuperscript{346} \textit{Chevron}, 467 U.S. at 866.
\textsuperscript{347} 480 U.S. 421 (1987).
\textsuperscript{349} \textit{Cardoza-Fonseca}, 480 U.S. at 446-48; \textit{see also} K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 322 (1988) (Scalia, J., concurring in part and dissenting in part) ("[O]ne of the most important reasons we defer to an agency's construction of a statute [is] ... its expert knowledge of the interpretation's practical consequences.").
\textsuperscript{350} \textit{Cardoza-Fonseca}, 480 U.S. at 446.
\textsuperscript{351} \textit{Id.} at 448.
\textsuperscript{352} \textit{Id.} at 446-47 n.30.
\textsuperscript{353} \textit{See supra} note 327 and accompanying text.
\textsuperscript{354} 515 U.S. 687 (1995).
interpretation under the Endangered Species Act of 1973 ("ESA") of when an endangered or threatened species has been "take[n]." Writing for the majority, Justice Stevens reasoned that "[t]he latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation." The Court's reliance on the agency expertise rationale is clearly apparent in this passage. Furthermore, in pointing to the latitude that the statute granted the agency in enforcing the ESA, the Court also appeared to invoke the congressional intent rationale by inferring that Congress had intended the agency to resolve these questions.

Thus, it appears that there is no clear standard for determining when courts should defer to agency interpretations. Rather, at a minimum, Chevron stands for the proposition that when the aforementioned rationales and factors suggest that deference "makes sense" in a particular case, then deference is appropriate. Justice Breyer provided an insightful prediction of the current predicament eleven years ago when he forecast the following:

Inevitably, one suspects, we will find the courts actually following more varied approaches, sometimes deferring to agency interpretations, sometimes not, depending upon the statute, the question, the context, and what "makes sense" in the particular litigation, in light of the basic statute and its purposes. No particular, or single simple judicial formula can capture or take into account the varying responses, called for by different circumstances, and the need to promote a "proper," harmonious, effective or workable agency-court relationship.

Returning to the Kennecott Utah Copper decision, the appropriate question is whether Interior's interpretation of the statute of limitations provision in section 113(g)(1)(B) is entitled to Chevron deference. As discussed previously, the D.C. Circuit "assume[d] without deciding" that the interpretation was entitled to this deference. The necessary inquiry, therefore, is whether, in light of the above rationales and factors, Interior has the authority to make such an interpretation. Although there are valid arguments on each side of the

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356 Sweet Home, 515 U.S. at 703.
357 Id.
358 Id. Breyer, supra note 296, at 381 (internal quotation marks omitted).
359 Id.
360 Kennecott Utah Copper Corp. v. United States Dep't of Interior, 88 F.3d 1191, 1210 (D.C. Cir. 1996); see supra notes 81-84 and accompanying text.
inquiry, the balance of factors indicates that the interpretation is not entitled to *Chevron* deference.

With respect to the agency expertise rationale, a determination of the meaning of "promulgated" in the statute of limitations provision does not require any technical expertise or special knowledge. As the Third Circuit stated in *Bamidele v. INS*, \(^{361}\) which this circuit decided shortly after the *Kennecott Utah Copper* decision, "A statute of limitations is not a matter within the particular expertise of the [agency]." \(^{362}\) Although the *Bamidele* court acknowledged that the agency's interpretations of the statute generally were entitled to considerable deference, the court declined to extend this deference to a statute of limitations provision. \(^{363}\) The court reasoned that such an interpretation was "'a clearly legal issue that courts are better equipped to handle.'" \(^{364}\) This reasoning is applicable to *Kennecott Utah Copper*. As administrator of the natural resource damages provisions of CERCLA, Interior certainly has considerable expertise in the language, purpose, and history of CERCLA. If the interpretation at issue had involved a discrete technical provision of this complicated statute, deference certainly would have been more appropriate. \(^{365}\) The interpretation, however, focuses solely on the meaning of a legal term that commonly appears in many statutes of limitations. In this context, the agency is not better situated than the court to make the interpretation. Therefore, *Chevron* deference is not appropriate in this instance.

Under the political accountability rationale, the balance shifts slightly in favor of granting deference. Although the interpretation primarily involves a consideration of statutory language and history, the purpose of CERCLA plays a considerable part in the interpretation. \(^{366}\) To determine the meaning of "promulgated," the interpreting entity must consider the policies underlying the statute and how each interpretation would affect these policies. For example, the entity must consider the impact that its interpretation would have on the environment and on the liability of polluters, as well as other relevant policy considerations. \(^{367}\) As a result, the political accountability ra-

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361 99 F.3d 557 (3d Cir. 1996).
362 *Id.* at 561.
363 *Id.*
364 *Id.* (quoting Dion v. Secretary of Health & Human Servs., 823 F.2d 669, 673 (1st Cir. 1987)) (citing Lynch v. Lyng, 872 F.2d 718, 724 (6th Cir. 1989); In re Oliver M. Elam, Jr., Co., 771 F.2d 174, 181 (6th Cir. 1985)).
365 See *id.* at 562.
366 See *supra* text accompanying notes 267-70. Although this Section addresses the "reasonableness" of the agency's interpretation, a similar consideration would take place when interpreting the provision de novo.
tionale supports a granting of *Chevron* deference to the agency interpretation.

Finally, concerning congressional intent, the balance shifts back in favor of independent judicial review of the statute. There is little evidence in the statute or elsewhere that Congress intended the agency to interpret the statute of limitations provision: First, although the clarity of "promulgated" does not satisfy *Chevron* step one inquiry, the ambiguity is not extreme enough to support an implication that Congress invited agency interpretation. Second, because the agency does not have special expertise in interpreting statutes of limitations, one cannot assume, on expertise grounds, that Congress intended the agency to address this issue. Finally, the date on which the statute of limitations begins to run is a significant matter within a remedial statute such as CERCLA. It is unlikely, therefore, that Congress intentionally left a gap in this area for the agency to resolve in its daily administration.

In conclusion, the *Kennecott Utah Copper* court erred in assuming that Interior's interpretation of "promulgated" within CERCLA's statute of limitations provisions was entitled to *Chevron* deference. The aforementioned rationales and factors indicate that, despite Interior's authority to interpret other technical provisions of the statute, the agency did not have the authority to define CERCLA's statute of limitations provisions. As a result, the court's application of *Chevron* to the instant case, however flawed, was moot. The court should have conducted an independent review of the statute to determine the meaning of "promulgated" within section 113(g)(1)(B).

**Conclusion**

In invalidating 43 C.F.R. §11.91(e), the *Kennecott Utah Copper* court reached the correct result. At the same time, however, the court erred in its analysis. As a threshold matter, the court failed to address the most important issue in the case—whether Interior had the authority to interpret section 113(g)(1)(B) of CERCLA. In applying *Chevron* step one, the court conducted a cursory and, arguably, inadequate review of the statute. The court extended this level of review into its *Chevron* step two analysis. In applying this step, the court focused exclusively on a handful of factors that supported a conclusion of unreasonableness and neglected several factors that supported a contrary conclusion.

The *Kennecott Utah Copper* decision is an excellent example of the deficiencies of the *Chevron* test for statutory interpretation. As dis-

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368 See supra Part II.
369 See supra text accompanying notes 361-63.
cussed earlier in Parts III and IV, the test contains numerous ambiguities that courts have interpreted in various ways. These ambiguities enable courts to craft the application of the *Chevron* test to reach a pre-determined conclusion. In some cases, this malleability suggests that a decision may reflect a court’s biases and tendencies instead of the merits of the particular controversy. When the controversy at issue involves a statute that, like CERCLA, has been a source of public and political attention since its inception, the risk that courts will exploit such malleability is severe. This action has the potential to impact environmental policy greatly in this nation, affecting both the liability of polluters and the extent to which natural resource damages are recoverable.

Because *Interior’s* interpretation was not entitled to *Chevron* deference, the *Kennecott Utah Copper* court nevertheless reached the correct result in invalidating 43 C.F.R. § 11.91(e). Whether the decision resulted from judicial bias or flawed application, however, the District of Columbia Circuit conducted a deficient analysis of *Interior’s* interpretation of “promulgated” within CERCLA’s statute of limitations provisions.