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Non-Legislative Rules Need Scrutiny Too: The Curious Case of the Appropriate Care Standard

Ryan Mitchell^{*+}

Introduction

Executive agencies have earned the title of the fourth branch of government in part because of their quasi-legislative powers.¹ When enacting a statute, Congress often includes a provision which prescribes the enforcing agency to create gap-filling rules.² This rulemaking delegation creates the agency’s quasi-legislative powers.³ However, the agency’s quasi-legislative powers are not unbridled. To prevent a chasm of federalism, either the agency’s enabling statute, the Administrative Procedure Act (“APA”), or both, require agencies to follow quasi-democratic procedures when engaging in rulemaking.⁴ The most common

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+ Editor’s Note: On July 29, 2019 the EPA issued Enforcement Discretion Guidance Regarding Statutory Criteria for Those who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners (“Common Elements”) which superseded the Interim Guidance discussed in this article. This article was written and accepted for publication prior to this date.

1. See generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 615 (1984).

2. See generally Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1051 (2015) (highlighting that “Congress routinely delegates to agencies the power to promulgate legislative rules”).

3. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (“The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress . . .”).

4. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE: A CONTEMPORARY APPROACH 126–137 (rev. 6th ed. 2019) [hereinafter ADMINISTRATIVE PROCEDURE AND PRACTICE].

form of quasi-democratic rulemaking is notice and comment rulemaking.⁵ Accordingly, agencies are generally precluded from adopting a legislative rule—a rule with a legal duty or legally binding effect—unless the rule has undergone notice and comment.⁶

Generally, the next step agencies take after filling in the statutory gaps with legislative rules is to publish interpretive rules and guidance.⁷ Sometimes, however, an agency will publish interpretive rules directly interpreting statutory language.⁸ Regardless, these non-legislative rules are not required to go through notice and comment.⁹ They are facially devoid of legally binding effect and exempt from rulemaking procedures under the APA.¹⁰ However, a closer look sometimes reveals that a legislative rule is disguised as a non-legislative rule.¹¹ These disguised legislative rules undermine the agencies' internal checks and balances, undermining the quasi-democratic impacts of notice and comment. Therefore, it is of vast importance that suspicious non-legislative rules receive searching judicial scrutiny. Such scrutiny exists in the form of the circuit majority-applied “legally binding effect” test and the lesser used “substantial impact” test.¹²

Yet, a growing chorus of commentators are renouncing these tests and calling for a new test, the “notice and comment” test.¹³ This bright-line test asks whether the non-legislative rule has undergone notice and comment.¹⁴

5. Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 13 (2009) (noting that notice and comment rulemaking is “the default mode in the federal government for making ‘binding’ legislative rules with the ‘force of law.’”).

6. Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 263 (2018).

7. *Id.* at 270–71.

8. *See, e.g.*, EPA, INTERIM GUIDANCE REGARDING CRITERIA LANDOWNERS MUST MEET IN ORDER TO QUALIFY FOR BONA FIDE PROSPECTIVE PURCHASER, CONTIGUOUS PROPERTY OWNER, OR INNOCENT LANDOWNER LIMITATIONS ON CERCLA LIABILITY (Mar. 6, 2003), <https://perma.cc/4AHF-P44G> [hereinafter COMMON ELEMENTS GUIDANCE]; *see, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001) (evaluating a non-legislative rule directly interpreting a statute); *see, e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 213 (2002) (evaluating a non-legislative rule directly interpreting a statute).

9. Administrative Procedure Act, 5 U.S.C. § 553(b)(A) (2012); *see infra* notes 22–24 and accompanying text.

10. 5 U.S.C. § 553(b)(A) (2012); *see infra* notes 22–24 and accompanying text.

11. *See, e.g.*, *Hector v. U.S. Dep't of Agric.*, 82 F.3d 165 (7th Cir. 1996).

12. William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1326 (2001) [hereinafter *A Primer on Nonlegislative Rules*].

13. William Funk, *When is a “Rule” a Regulation? Marking a Clear Line Between Non-legislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 663 (2002) [hereinafter *When is a Rule a Regulation*]; Robert A. Anthony, *Three Settings in Which Non-legislative Rules Should Not Bind*, 53 ADMIN. L. REV. 1313, 1314 (2001).

14. *When is a Rule a Regulation*, *supra* note 13, at 663.

If so, then the rule has legal effect; if not, then the rule has no legal effect.¹⁵ Scholars note that the test would greatly benefit the judicial process by economizing such judicial decisions.¹⁶ Resultingly, courts would cease their thorough and evaluative judicial scrutiny of non-legislative rules.¹⁷

However, this approach likely benefits agencies more than it does the public and creates a slippery slope. Scholars opposed to the “notice and comment test” consider the test a dangerous “short cut.”¹⁸ Further, they argue that agencies will no longer fear that their non-legislative rules will be overturned for failure to utilize notice and comment procedures.¹⁹ Thus, this approach affords agencies the latitude to broadly and aggressively interpret statutory and regulatory terms to include more responsibilities or stricter compliance requirements.²⁰ While these non-legislative rules will be nonbinding, agencies only need a court to defer to such rules to gain the desired effect.²¹ Viewed in conjunction with the deference courts provide agencies, deleterious results could ensue. Therefore, this approach has the potential to undermine the spirit of notice and comment rulemaking and would be a disservice to democracy.

This Note attempts to promote the need for continued judicial scrutiny of non-legislative rules by examining the Environmental Protection Agency’s (“EPA”) Common Elements Guidance to the Comprehensive Environmental Recovery (“Guidance”), and the Compensation, and Liability Act’s (“CERCLA”) Bona Fide Perspective Purchaser (“BFPP”) defense. Part I examines the background on non-legislative rules. Part II establishes the Guidance’s factual background. Part III sets the framework for judicial review of the Guidance. Part IV applies both the “legally binding effect” test and the “substantial impact” test to evaluate whether the guidance is a procedurally deficient non-legislative rule. Finally, this Note concludes by analyzing whether or not a court is likely to find that the Guidance violates the APA, addressing how EPA or Congress can solve this problem, and arguing that courts need to continue scrutinizing non-legislative rules.

15. *Id.*

16. *When is a Rule a Regulation*, *supra* note 13, at 663; Anthony, *supra* note 13, at 1313.

17. *When is a Rule a Regulation*, *supra* note 13, at 663.

18. David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 *YALE L.J.* 276, 279 (2010).

19. *Id.* at 280–81.

20. *Id.* at 306–07.

21. *Id.* at 323.

I. Background on Non-Legislative Rules

For federal agencies, finding a balance between regulating in a fair, impartial, democratically consistent manner, while effectuating their regulatory duties efficiently and uniformly is an ongoing challenge.²² Congress often tasks agencies with promulgating rules to fill statutory gaps.²³ When promulgating legally binding regulations, agencies generally must comply with certain rulemaking procedures.²⁴ Individual statutory provisions, executive orders, and the APA (and combinations of the three) can require rulemaking procedures.²⁵ Such procedures help to ensure continued separation of powers by placing restrictions and oversight on how, and to what extent, the executive can create legislative rules—Congress’s constitutional domain.²⁶

However, the same rulemaking procedures that ensure a balanced governance also stifle agencies’ abilities to promulgate necessary regulations.²⁷ This ossified process has slowed rulemaking to a snail’s pace. On average, the rulemaking process for major federal rules takes approximately four to eight years.²⁸ Yet agencies have a marginal solution to ossification: non-legislative rules.

Non-legislative rules are generally exempt from rulemaking procedures—but the APA poorly defines the category.²⁹ This general exemption from rulemaking procedures is one of the reasons agencies often use non-legislative rules.³⁰ The exemption gives agencies a level of flexibility and expediency, helping agencies avoid some ossification.³¹ Notably, the courts have narrowly construed the

22. See Stuart Shapiro, *Agency Oversight As “Whac-A-Mole”: The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL’Y 523, 549 (2014) (“Legislation inevitably gives agencies discretion to make policy choices. Over the past half-century, informal rulemaking has become the preeminent way that agencies make these choices. As a result, there have been increasing attempts to proceduralize the informal rulemaking process so as to give it a greater sense of democratic accountability.”)

23. Steven J. Lindsay, *Timing Judicial Review of Agency Interpretations in Chevron’s Shadow*, 127 YALE L.J. 2448, 2451 (2018).

24. Franklin, *supra* note 18, at 278.

25. See ADMINISTRATIVE PROCEDURE AND PRACTICE, *supra* note 4, at 126–37 (providing examples of different types of rulemaking, which includes rulemaking procedures from individual statutes, executive orders, or the APA).

26. Franklin, *supra* note 18, at 280.

27. *Id.* at 283–84.

28. ADMINISTRATIVE PROCEDURE AND PRACTICE, *supra* note 4, at 140.

29. 5 U.S.C. § 553(b)(A).

30. ADMINISTRATIVE PROCEDURE AND PRACTICE, *supra* note 4, at 341–43.

31. *Id.*

exemptions so as to preserve the APA's policy goal of public participation and government transparency.³²

There are several general purposes for non-legislative rules, besides combatting ossification. Non-legislative rules inform the public about how an agency will interpret and enforce vague statutory and regulatory terms.³³ Similarly, non-legislative rules instruct agency staff on enforcement policies, providing agency-wide enforcement uniformity.³⁴

The APA provides several categories of non-legislative rules that are exempt from rulemaking: policy statements, interpretive rules, and other agency organizational rules.³⁵ A policy statement generally informs the public and agency staff how the agency will proceed with enforcing a statute or regulation.³⁶ An interpretive rule more thoroughly interprets statutory and regulatory terms, explaining how the law binds regulated entities.³⁷ Yet, this definition does not diverge significantly from legislative rules, which also "advise the public."³⁸ But unlike legislative rules, interpretive rules should not establish duties separate from the law.³⁹ When an interpretive rule does have a legally binding effect, some consider it a "spurious" or "procedurally-deficient legislative rule," which a court should vacate for improper rulemaking.⁴⁰

From the regulated entity perspective, non-legislative rules help entities comply with the law, thereby avoiding costly compliance or enforcement measures.⁴¹ However, regulated entities sometimes dislike non-legislative rules. Without the APA's notice and comment rulemaking

32. See *United States v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989) ("The APA does provide for exemptions from its notice and comment requirements. But we note at the outset that the APA's notice and comment exemptions must be narrowly construed."); see also *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987) ("In light of the obvious importance of these policy goals of maximum participation and full information, we have consistently declined to allow the exceptions itemized in section 553 to swallow the APA's well-intentioned directive.").

33. *Am. Hosp. Ass'n*, 834 F.2d at 1044-45.

34. *Id.*

35. 5 U.S.C. § 553(b)(A).

36. ADMINISTRATIVE PROCEDURE AND PRACTICE, *supra* note 4, at 347-48.

37. *Id.* at 352-54.

38. Franklin, *supra* note 18, at 286.

39. TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 29-30 n.3 (1947) ("Interpretive Rules - rules or statements issued by an agency to "advise the public of the agency's construction of the statutes and rules which it administers.").

40. Robert A. Anthony, *A Taxonomy of Federal Agency Rules*, 52 ADMIN. L. REV. 1045, 1048 (2000) [hereinafter *A Taxonomy of Federal Agency Rules*]; Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1711 (2007).

41. ADMINISTRATIVE PROCEDURE AND PRACTICE, *supra* note 4, at 352.

requirement, agencies have leeway to burden parties with new legal interpretations, which often work by imposing fear of noncompliance.⁴² These legal interpretations may not have the legal force of legislative rules, but agency staff may treat the non-legislative rules as such.⁴³ Furthermore, regulated entities are not afforded an opportunity to comment during the construction of the rule, leading them to feel unheard and frustrated.⁴⁴

Because agency interpretive rules receive deference in judicial review,⁴⁵ challengers have an uphill climb in court—regardless of whether they are challenging the agency’s first interpretation or its fifth in five years.⁴⁶ Correspondingly, the lax requirements and nonbinding element of non-legislative rulemaking allows agencies to quickly shift their legal position, sometimes leaving parties, who rely on the non-legislative rule, outside the boundary of compliance.⁴⁷ This shifting of the bar of compliance/noncompliance—without notice and comment—highlights one reason why agencies are oft-considered the fourth branch of government.⁴⁸

Accordingly, non-legislative rules suffer from their flaws. While they are undoubtedly necessary for agencies when interpreting the words of a statute or regulation, or for providing policy information to staff and the public, non-legislative rules can quickly cross the line of legal effect. Agencies often teeter on that fine line because there is value in providing a rule, but not enough value in taking the rule through notice and comment. Resultingly, agencies sometimes produce non-legislative rules with

42. *Id.* at 342–43.

43. ADMINISTRATIVE PROCEDURE AND PRACTICE, *supra* note 4, at 352 (highlighting that agency staff may inadvertently or strategically treat non-legislative rules as legally binding, thus leading the public to acquiesce to the non-legislative rule).

44. *See, e.g.*, Chamber of Commerce of U.S. v. U.S. Dep’t of Labor, 174 F.3d 206, 208 (D.C. Cir. 1999) (highlighting that the Chamber of Commerce objected to a guidance document “on the grounds that prior notice and an opportunity to comment were required by the Administrative Procedure Act, and that the envisioned inspections will violate the Fourth Amendment to the Constitution of the United States.”).

45. *See* ADMINISTRATIVE PROCEDURE AND PRACTICE, *supra* note 4, at 352 (highlighting that “reviewing courts give deference to agency’s characterization of its action as an interpretative rule.”); *see also* Stinson v. United States, 508 U.S. 36, 45 (1993) (“[P]rovided an agency’s interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’”).

46. ADMINISTRATIVE PROCEDURE AND PRACTICE, *supra* note 4, at 352.

47. *Id.* at 342–43.

48. *See* Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 376 (2008) (highlighting the separation of powers issue resulting from agency regulatory powers).

impermissible legislative characteristics.⁴⁹ As we will see, the Common Elements Guidance teeters on the fine line of legal effect.

II. Factual Background of the BFPP Defense and the Common Elements Guidance

Across the United States, from the Industrial Revolution to the 1970s, private and public entities lackadaisically, and with limited oversight, disposed hazardous substances into the environment.⁵⁰ In the 1970s, public recognition of extensive pollution hit a boiling point.⁵¹ Congress reacted by enacting a number of environmental laws.⁵² In 1980, Congress took a step to retroactively redress released hazardous substances and prevent future releases by enacting CERCLA.⁵³

On paper, CERCLA has produced fantastic results. Polluters have paid enormous sums for their violations—detering others from degrading the environment.⁵⁴ The federal government and third-parties have undertaken extensive environmental remediations, restoring lands to a reasonable standard.⁵⁵ These environmental remediations have helped many communities recover from the plight of hazardous substance contamination.⁵⁶ However, the same mechanisms that led to CERCLA's success have also prevented many parcels from being remediated.

49. *A Taxonomy of Federal Agency Rules*, *supra* note 40, at 1048; Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1711 (2007).

50. See Spencer M. Wiegard, *The Brownfields Act: Providing Relief for the Innocent or New Hurdles to Avoid CERCLA Liability?*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 127, 132–36 (2003) (highlighting that oversight was generally limited to the judiciary, with challenges in the form of tort and property theories, such as negligence and nuisance, respectively).

51. Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1174–82 (2010).

52. National Environmental Policy Act, 42 U.S.C. § 4321 (1970); Federal Waters Pollution Control Act, 33 U.S.C. § 1251 (1970); Toxic Substances Control Act, 15 U.S.C. § 2601 (1976); Resource Conservation and Recovery Act, 42 U.S.C. § 6901 (1976).

53. Comprehensive Environmental Recovery, Compensation, and Liability Act, 42 U.S.C. § 9601 (1980).

54. See John G. Aicher Jr., *Developing CGL Coverage Defenses for CERCLA Remediation Costs: When Insureds Claim Coverage for Clean-Up Costs, a Vast Area of Discovery Is Opened, and Coverage Counsel Must Probe Carefully but Completely*, 60 DEF. COUNS. J. 559, 559 (1993) (estimating in 1993 that the average site cleanup costs roughly “\$30 million”).

55. LeRoy C. Paddock, *Green Governance: Building the Competencies Necessary for Effective Environmental Management*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10609, 10626–27 (2008) (highlighting Brownfield remediation successes in Atlanta, Georgia; Clearwater, Florida; and Minneapolis, Minnesota).

56. *Id.*

For example, CERCLA greatly restricted developers' capacity to purchase, remediate, and utilize contaminated land—otherwise known as Brownfields.⁵⁷ Before the Small Business Liability Relief and Brownfields Revitalization Act (“Brownfield Amendments”), if an owner had knowledge of hazardous-substance contamination on a property, prior to taking title, the owner could not raise any of the statutory defenses.⁵⁸ Thus, a purchaser generally could not acquire a Brownfield without accompanying CERCLA liability because Brownfields are inherently contaminated.⁵⁹ Fearing CERCLA liability, developers avoided Brownfields, leaving them contaminated and underdeveloped.⁶⁰ As a result, the economic productivity of most Brownfields remained locked away.⁶¹ These underdeveloped lands generally have a depressing effect on the surrounding community.⁶² Furthermore, socially and ecologically valuable green spaces suffered as developers used these uncontaminated lands to avoid CERCLA liability.⁶³

Congress took the initiative to statutorily resolve the Brownfield issue by including the BFPP defense in the Brownfield Amendments.⁶⁴ The BFPP defense attempts to provide safe harbor to developers who are willing to voluntarily purchase and responsibly remediate a Brownfield.⁶⁵ According to the amendment, developers, upon establishing that they took “appropriate care,” would be able to raise the

57. Fenton D. Strickland, *Brownfields Remediated? How the Bona Fide Prospective Purchaser Exemption from CERCLA Liability and the Windfall Lien Inhibit Brownfield Redevelopment*, 38 IND. L. REV. 789, 793–94 (2005).

58. See 42 U.S.C. § 9601(35)(A)(i) (holding that a purchaser can assert the innocent landowner defense by demonstrating that they had no knowledge or no reason to know of a prior disposal).

59. See Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 221, 115 Stat. 2370 (“[R]eal property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”).

60. ROBERT C. SMITH, BROWNFIELDS REVITALIZATION AND ENVIRONMENTAL RESTORATION ACT OF 2001, S. REP. NO. 107-2, at 2 (2001).

61. “[T]here are more than 450,000 brownfield sites nationwide that . . . pose health and environmental hazards, erode . . . cities’ tax base, and contribute to urban sprawl and loss of farmland.” *Id.* at 1.

62. *Id.*

63. *Id.*

64. President George W. Bush, Remarks by the President in Signing of H.R. 2869, The Small Business Liability Relief and Brownfields Revitalization Act (Jan. 11, 2002) (transcript available at the Office of the Press Secretary).

65. See *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 180 (4th Cir. 2013) (noting that Congress intended the BFPP defense “to promote voluntary brownfields redevelopment”).

BFPP defense.⁶⁶ However, the BFPP defense appears to represent a shift in power from EPA to the regulated community. EPA responded by promulgating a non-legislative rule that interpreted the “appropriate care” standard as much stricter than what a common-sense reading indicates—shifting power back to the agency.⁶⁷

A. The Basics of CERCLA Liability and the Need for a Specific Loosening of Liability

As enacted in 1980, Congress intended CERCLA to respond to the detrimental toll pollution was having on human health and the environment.⁶⁸ CERCLA’s main enforcement mechanism is expansive liability for costly environmental remediations.⁶⁹ CERCLA generally holds a person strictly, jointly, and retroactively liable for remediation costs associated with the unauthorized release of hazardous substances into the environment.⁷⁰ Generally, a person is liable under CERCLA if he or she meets six elements: (1) the property is a “facility”;⁷¹ (2) there has been a “release” or “threatened release” at the facility;⁷² (3) the substance released was a “hazardous substance”;⁷³ (4) the release occurred into the

66. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2360 (2002).

67. COMMON ELEMENTS GUIDANCE, *supra* note 8, at 9–12.

68. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (describing the purpose of CERCLA’s as to combat “the serious environmental and health risks posed by industrial pollution”).

69. *See* Richard G. Opper, *The Brownfield Manifesto*, 37 URB. LAW. 163, 174 (2005) (Congress amended CERCLA “to allow bona fide prospective purchasers (BFPPs) a liability exception to encourage them to invest in a site for the purpose of its redevelopment.”).

70. 42 U.S.C. § 9601(32) (2012); *see also* *United States v. Coeur d’Alenes Co.*, 767 F.3d 873, 875 (9th Cir. 2014); *see generally* Martha L. Judy, *Coming Full CERCLA: Why Burlington Northern Is Not the Sword of Damocles for Joint and Several Liability*, 44 NEW ENG. L. REV. 249, 291 (2010) (noting that only four out of 160 decisions have found divisibility to be judicially viable).

71. *See* 42 U.S.C. § 9601(9) (2012) (“The term ‘facility’ means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.”).

72. *See id.* § 9601(22) (“The term ‘release’ means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.”).

73. *See id.* § 9601(14) (defining “hazardous substance” as the substances listed under § 9602, and analogous provisions of the Solid Waste Disposal Act, Federal Water Pollution Control Act, Clean Air Act, and Toxic Substances Control Act).

“environment”;⁷⁴ (5) an entity has incurred response costs relating to the release or threatened release;⁷⁵ and (6) the party liable for the response costs falls within the four classes of potentially responsible parties (“PRPs”).⁷⁶ The four PRP classes are: (1) persons who currently own or operate a facility; (2) persons who at the time of disposal owned or operated the facility; (3) persons who arranged for disposal at a facility; and (4) persons who transported hazardous substances to a facility.⁷⁷ These expansive PRP categories have contributed to CERCLA’s enormous effectiveness.

CERCLA effectuates timely remediations by either authorizing EPA to initiate a cleanup⁷⁸ or issue Unilateral Administrative Orders (“UAO”).⁷⁹ Under the former, EPA takes the lead on remediations, with the option to complete the remediation in collaboration with PRPs.⁸⁰ After completing a remediation, PRPs are liable for all of EPA’s remediation costs.⁸¹ Under the latter, a UAO requires PRPs to undertake the remediation.⁸² The requirement results from the statutory limitation on challenging UAOs,⁸³ and the statutory consequences for UAO noncompliance.⁸⁴

EPA can fine a PRP \$25,000 and seek treble damages for each day of UAO noncompliance.⁸⁵ Thus, noncomplying PRPs can be liable for the

74. *See id.* § 9601(8) (“The term ‘environment’ means [] the navigable waters, the waters of the contiguous zone, [] the ocean waters . . . and . . . any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.”).

75. *See* 42 U.S.C. §§ 9607(a)(4)(A)–(B) (2012) (explaining that the clean-up costs recoverable must either be “consistent with” or “not inconsistent with” the national contingency plan (“NCP”), depending who is seeking cost recovery).

76. *Id.* §§ 9607(a)(1)–(4).

77. *Id.*

78. *Id.* § 9604(a).

79. *Id.* § 9606(a).

80. *Id.* § 9604(a).

81. *Id.* § 9607(a)(4)(A).

82. *See id.* §§ 9606(b)(2)(A)–(B) (limiting PRPs from petitioning for reimbursement from the Superfund until after completing remediation); *see also id.* § 9613(h) (prohibiting courts from reviewing PRP challenges to Unilateral Administrative Orders).

83. *See id.* §§ 9606(b)(2)(A)–(B) (limiting when a PRP can petition for reimbursement costs from the Fund until after completing remediation); *see also id.* § 9613(h) (prohibiting courts from reviewing a PRP’s challenge to a Unilateral Administrative Order).

84. *See* 42 U.S.C. §§ 9606(b)(1), 9607(c)(3) (defining the high financial penalties a PRP incurs for failing to comply with a Unilateral Administrative Order).

85. *See* 42 U.S.C. § 9606(b)(1) (2012) (“Any person who . . . willfully violates, or fails or refuses to comply with, any [Unilateral Administrative Order] may . . . be fined not more than \$25,000 for each day in which such violation occurs or such failure to comply continues.”); *see also id.* § 9607(c)(3) (“If any [PRP] fails without sufficient cause to properly provide removal or remedial action upon [a Unilateral Administrative Order] such

total response cost multiplied by four, plus the \$25,000 daily fine.⁸⁶ Given that cleanup costs can run into the billions, a PRP must carefully consider whether its defenses are sufficient to counter the risk of incurring such penalties.⁸⁷ However, the statutory limitations on challenging a UAO greatly constrain the defenses a PRP can raise and the PRP's ability to employ its defenses.⁸⁸

Accordingly, § 9613(h) limits a PRP from challenging a UAO until the PRP has completed the cleanup.⁸⁹ Correspondingly, this limitation moots a PRP's ability to enjoin a UAO.⁹⁰ Thus, PRPs are only left with the option to file an action for reimbursement from the government⁹¹ or contribution or cost recovery from fellow PRPs after completing remediation.⁹² However, § 9613(h) provides an exception for PRPs to challenge an action enforcing a UAO.⁹³ As a result, a PRP must forego complying with a UAO, forcing EPA to bring an enforcement action.⁹⁴

person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action.”).

86. Treble damages are added to the original cost of recovery, resulting in a total cost of four times the original cost. *See* *United States v. Parsons*, 936 F.2d 526, 529 (11th Cir. 1991) (“We accordingly believe that the section should be interpreted to allow the government to recover up to a total of four times the amount it expended in cleaning up the hazardous wastes.”).

87. *See* Eve L. Pouliot, *Coercion vs. Cooperation: Suggestions for the Better Effectuation of CERCLA (Superfund)*, 47 SMU L. REV. 607, 622 (1994) (describing a PRP's decision to challenge a Unilateral Administrative Order as “large gamble” resulting from the exorbitant costs of remediation combined with treble damages).

88. *See* 42 U.S.C. § 9606(b)(1) (2012) (“Any person who, *without sufficient cause*, willfully violates, or fails or refuses to comply with, any [UAO] may . . . be fined not more than \$25,000 for each day in which such violation occurs or such failure to comply continues.”) (emphasis added); *see also* 42 U.S.C. § 9607(c)(3) (“If any [PRP] fails *without sufficient cause* to properly provide removal or remedial action upon [a Unilateral Administrative Order] such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action.”) (emphasis added); *see also id.* § 9613(h) (prohibiting courts from reviewing a PRP's challenge to a UAO, except under specific circumstances).

89. *See id.* § 9613(h) (prohibiting courts from reviewing a PRP's challenge to a Unilateral Administrative Order, except under specific circumstances).

90. *See* Michael P. Healy, *Judicial Review and CERCLA Response Actions: Interpretive Strategies in the Face of Plain Meaning*, 17 HARV. ENVTL. L. REV. 1, 53 (1993) (“Once the remedial action is completed, review would be wholly inadequate because the procedural claims would be moot.”).

91. 42 U.S.C. § 9606(b)(2) (2012).

92. *Id.* § 9607(a)(4)(B).

93. 42 U.S.C. § 9613(h)(2) (2012).

94. *Id.*

Hence, to file a pre-enforcement challenge against a UAO, it appears that a PRP must risk the heavy cost of UAO noncompliance.

Following an enforcement action by EPA, a PRP can challenge a UAO on narrow grounds.⁹⁵ Sections 9606(b)(1) and 9607(c)(3) require a PRP to show “sufficient cause” for its noncompliance to validly challenge a UAO.⁹⁶ Satisfying the sufficient cause standard requires a PRP to establish an objectively good faith belief that the UAO is invalid or inapplicable.⁹⁷ One such route to satisfying the sufficient cause standard is by raising one of CERCLA’s landowner liability defenses.⁹⁸

The original three landowner defenses were relatively narrow. They included the “act of god,” an “act of war,” and “third-party” defenses.⁹⁹ Later, Congress adopted the Innocent Landowner defense (ILD), which protected owners who reasonably investigated the land and did not discover any contamination at the time of purchase, but existing contamination was later found.¹⁰⁰ Yet, these defenses do not protect purchasers who are aware of contamination at the time of purchase.¹⁰¹ This created the current Brownfield dilemma, in which no developer wants to risk becoming a PRP by acquiring a Brownfield.¹⁰²

EPA responded to the dilemma by implementing the Prospective Purchaser Agreement (“PPA”) policy, as part of the Brownfields

95. CERCLA holds that a PRP can only challenge a Unilateral Administrative Order if the PRP has sufficient cause. *Id.* §§ 9606(b)(1), 9607(c)(3).

96. *See* 42 U.S.C. § 9606(b)(1) (“Any person who, *without sufficient cause*, willfully violates, or fails or refuses to comply with, any [Unilateral Administrative Order] may . . . be fined not more than \$25,000 for each day in which such violation occurs or such failure to comply continues.”) (emphasis added); *see also id.* § 9607(c)(3) (“If any [PRP] fails without *sufficient cause* to properly provide removal or remedial action upon [a Unilateral Administrative Order] such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action.”) (emphasis added).

97. H.R. Rep. No. 99-253, pt. 1, at 80 (1985), *as reprinted in* 1986 U.S.C.A.N. 2835, 2862; *see also* *Wagner Seed Co. v. Daggett*, 800 F.2d 310, 316 (2d Cir. 1986) (supporting Congress’s reading that sufficient cause requires a showing of good faith).

98. *See* Strickland, *supra* note 57, at 793 (describing to PRPs the “narrow scope of available defenses”).

99. *See* 42 U.S.C. §§ 9607(b)(1)–(3) (2012) (providing three defenses: an act of god, an act of war, and an act by a third party).

100. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 101(f), 100 Stat. 1613, 1616 (codified as amended in 42 U.S.C. § 9601(35) (2012)).

101. *See* Nicholas J. Ortolano III, Note, *Appropriate Care Under the Brownfield Amendments: A Better Standard After the Fourth Circuit’s Holding in PCS Nitrogen v. Ashley II*, 5 SEATTLE J. ENVTL. L. 25, 35 (2015) (noting that a PRP cannot raise the ILD because he had knowledge of the contamination at the time of acquisition).

102. William R. Weissman & J. Michael Sowinski, Jr., *Revitalizing the Brownfields Revitalization and Environmental Restoration Act: Harmonizing the Liability Defense Language to Achieve Brownfield Restoration*, 33 VA. ENVTL. L.J. 257, 257 (2015).

Initiative.¹⁰³ The goal of the policy was to remove “the barriers imposed by potential CERCLA liability while ensuring protection of human health and the environment.”¹⁰⁴ The PPA’s main mechanism was a covenant not to sue.¹⁰⁵ Yet, while the PPA concept was appealing, the program did little to resolve the Brownfield dilemma—prior to the Brownfield Amendments, EPA only entered into 140 PPAs.¹⁰⁶ Recognizing the dilemma, Congress took action.

B. Congress Creates the BFPP Defense

In 2002, Congress enacted the Brownfield Amendments, thereby creating the BFPP defense.¹⁰⁷ The BFPP defense’s purpose is to encourage the redevelopment of Brownfields.¹⁰⁸ The BFPP defense protects PRPs who, at the time of purchasing, had knowledge that the property was contaminated.¹⁰⁹

A PRP qualifies for the BFPP defense by satisfying various elements. First, the PRP must purchase the property after January 11, 2002.¹¹⁰ Second, the PRP must make all appropriate inquiries (“AAI”) of the property’s environmental status.¹¹¹ Third, the PRP must provide EPA

103. U.S. ENVTL. PROT. AGENCY, REUSING LAND RESTORING HOPE: A REPORT TO STAKEHOLDERS FROM THE U.S. EPA BROWNFIELDS PROGRAM 5 (2003), <https://perma.cc/NY7S-EMYE> (“EPA’s investment—nearly \$700 million—in the Brownfields Program has leveraged \$5.09 billion in Brownfields cleanup and redevelopment funding from the private and public sectors, and helped to create more than 24,920 new jobs for citizens in Brownfields communities.”).

104. See Announcement and Publication of Guidance on Agreements With Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34792-01 (July 3, 1995) (highlighting the need to expand the PPA policy).

105. Strickland, *supra* note 57, at 794.

106. Memorandum from Barry Breen, Dir., Office of Site Remediation Enf’t and Bruce Gelber, Chief, Env’t. Enf’t Section, Env’t. & Nat. Res. Div., U.S. Dep’t of Justice to Superfund Senior Policy Managers (Regions I-X) et al. 2, 5–7 (Jan. 10, 2001), <https://perma.cc/7Z3Y-XY45>.

107. President George w. Bush, Remarks by the President in Signing of H.R. 2869, *supra* note 64.

108. See Amy Pilat McMorrow, *CERCLA Liability Redefined: An Analysis of the Small Business Liability Relief and Brownfields Revitalization Act and Its Impact on State Voluntary Cleanup Programs*, 20 GA. ST. U. L. REV. 1087, 1107–08 (2004) (“[T]he purpose of the [the BFPP defense] is to protect and encourage those with full knowledge of the contamination to purchase and redevelop the property.”).

109. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107–118, 115 Stat. 2370 (2002).

110. 42 U.S.C. § 9601(40)(A)(i)(I) (2012).

111. *Id.* § 9601(40)(B)(ii).

notice of the hazardous substances on the property.¹¹² Fourth, the PRP must exercise appropriate care by taking reasonable steps to prevent continuing releases or future releases of hazardous substances, and prevent humans and the environment from exposure to the hazardous substances.¹¹³ Fifth, the PRP must cooperate with relevant agencies.¹¹⁴ Sixth, the PRP must comply with agency-imposed land use restrictions and institutional controls.¹¹⁵ Seventh, the PRP must provide agencies with any information they request.¹¹⁶ Eighth, the PRP must not have sufficient contacts with or connections to third-party PRPs such that the purchaser has PRP status as a result.¹¹⁷ This note focuses on the fourth element: the appropriate care standard.

The Brownfield Amendments clearly define the appropriate care standard.¹¹⁸ There are three elements to appropriate care. A PRP must take reasonable steps to: (1) “stop any continuing release; (2) prevent any threatened future release; and (3) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.”¹¹⁹ The appropriate care standard represents a shift toward industry self-regulation.

Prior to the BFPP defense, the due care standard governed the level of care a PRP was required to take when raising the Innocent Landowner defense (“ILD”).¹²⁰ The due care standard is incredibly strict, yet fact specific.¹²¹ Thus, PRPs applying for the ILD have great uncertainty regarding remediation costs and liability risk.¹²²

Alternatively, Congress intended the “[appropriate care] standard . . . [to] be sufficiently flexible,”¹²³ and to apply “generally accepted good commercial and customary practices.”¹²⁴ Thus, the appropriate care standard would have helped employ the BFPP as a tool for well-intending

112. *Id.* § 9601(40)(B)(iii).

113. *Id.* § 9601(40)(B)(iv).

114. *Id.* § 9601(40)(B)(v).

115. 42 U.S.C. § 9601(40)(B)(vi).

116. *Id.* § 9601(40)(B)(vii).

117. *Id.* § 9601(40)(B)(viii).

118. *Id.* § 9601(40)(B)(iv).

119. *Id.*

120. Strickland, *supra* note 57, at 796.

121. *Idylwoods Assocs. v. Mader Capital, Inc.*, 956 F. Supp. 410, 417 (W.D.N.Y. 1997) (“[T]he defendant must demonstrate that he took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances.”).

122. Strickland, *supra* note 57, at 801–02.

123. H.R. REP. NO. 106-353, pt. 1, at 63 (1999).

124. H.R. REP. NO. 106-775, pt. 1, at 81 (2000).

developers. However, by promulgating the Common Elements Guidance, EPA steered the BFPP defense from being a useful tool to a shaky defense.

C. EPA Promulgates the Common Elements Guidance

The Common Elements Guidance does not interpret the appropriate care standard. Instead, the Guidance jumps to what it terms the “reasonable steps requirement”—the three steps that define appropriate care.¹²⁵ The Guidance equates the reasonable steps requirement to the due care standard.¹²⁶ However, the Guidance does accurately recognize that the reasonable steps requirement language differs from the innocent landowner language—the origin of the due care language.¹²⁷ Yet, the Guidance continues by stating that the due care standard is the best reference point for understanding the reasonable steps requirement.¹²⁸ Moreover, the Guidance provides a questions-and-answers section that only provides answers by referencing the due care standard.¹²⁹

Thus, it appears that the Common Elements Guidance, by conflating the reasonable steps requirement and the due care standard, is vicariously stating that the appropriate care standard is roughly equivalent to the due care standard. The due care standard itself is a very high standard. Therefore, EPA’s Common Elements Guidance is stating that the appropriate care standard is equally as high. This elevation of appropriate care to due care is likely a legally binding effect which was required to undergo notice and comment.

III. Judicial Review of the Common Elements Guidance

Section 551 of the APA holds that a rule can take many forms—it can be “the whole or part of any agency statement.”¹³⁰ Here, the Common Elements Guidance is a rule. EPA published the Guidance, in whole, on its website.¹³¹ The Guidance is generally applicable to staff and regulated

125. COMMON ELEMENTS GUIDANCE, *supra* note 8, at 9.

126. *Id.*

127. 42 U.S.C. § 9601(35) (2012); *see also* COMMON ELEMENTS GUIDANCE, *supra* note 8, at 9 (stating that the reasonable steps are “consonant with traditional common law principles and the existing CERCLA ‘due care’ requirement”).

128. COMMON ELEMENTS GUIDANCE, *supra* note 8.

129. *Id.* at Attachment B, 1–5.

130. 5 U.S.C. § 551(4) (2012).

131. *See Interim Guidance: Common Elements of the Landowner to Qualify for BFPP, CPO or ILO Superfund Liability Limitations*, EPA (last visited Oct. 23, 2019), <https://perma.cc/WG7A-CWZM> (screenshot of EPA website from June 27, 2017).

entities interested in CERCLA's landowner defenses.¹³² The Guidance also has a future effect on its subjects.¹³³ Correspondingly, the Guidance implements EPA's interpretation of the governing statute and regulations.¹³⁴ These are general factors that indicate when an agency statement is a rule.¹³⁵

Another component for determining if a rule is valid is whether the agency had the authority to promulgate a rule for the specific subject matter.¹³⁶ Congress delegates rulemaking authority to agencies by statutory mandates.¹³⁷ Here, EPA has rulemaking power with respect to the landowner defenses because Congress delegated authority to EPA via the Brownfield Amendments.¹³⁸ Thus, EPA has authority, through proper procedures, to adopt regulations that carry the force of law—or for creating non-legislative rules.

The next inquiry is whether the Guidance is a legislative or non-legislative rule. Agencies can create legislative rules in two ways: with “formal” or “informal” rulemaking.¹³⁹ Formal rulemaking requires lengthy, trial-like hearings.¹⁴⁰ Formal rulemaking procedures are required if the governing statute requires the agency to make rules “on the record after opportunity for an agency hearing.”¹⁴¹ Informal rulemaking has three components: (1) notice to the public of “either the terms or substance of the proposed rule or a description of the subjects and issues involved;”¹⁴² (2) providing the interested public “an opportunity to participate in the rule making through the submission of written data, views, or arguments;”¹⁴³ and (3) “a concise general statement of [the agency’s] basis and purpose” for adopting the final rule.¹⁴⁴ Notably, courts cannot impose more or less

132. COMMON ELEMENTS GUIDANCE, *supra* note 8, at 13.

133. *Id.* at 2.

134. COMMON ELEMENTS GUIDANCE, *supra* note 8, at 9–12.

135. 5 U.S.C. § 551(4) (2012).

136. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979).

137. Stephen M. Johnson, *In Defense of the Short Cut*, 60 U. KAN. L. REV. 495, 499–500 (2012).

138. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 223, 115 Stat. 236 (2002).

139. *See* ADMINISTRATIVE PROCEDURE AND PRACTICE, *supra* note 4, at 126–37 (explaining hybrid rulemaking).

140. 5 U.S.C. § 553(c) (2012).

141. *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 247 (1973).

142. 5 U.S.C. § 553(b)(3).

143. *Id.* § 553(c).

144. *Id.*

procedural rulemaking requirements.¹⁴⁵ However, courts have made the notice and comment requirements more rigid. For example, an agency's final rule must be a "logical outgrowth" of its proposed rule.¹⁴⁶ Furthermore, a rule must have future effect and be of general applicability.¹⁴⁷ Moreover, the statement must be "designed to implement, interpret, or prescribe law or policy."¹⁴⁸ However, the Common Elements Guidance is neither a valid informal nor formal rule because it does not satisfy the APA procedural requirements. At the same time, the Guidance is not simply a non-legislative rule because it creates new legal duties. Thus, the Guidance appears to be a procedurally deficient legislative rule.

A. Standard of Review for the Common Elements Guidance

Section 706 of the APA establishes the applicable standard of review for EPA actions.¹⁴⁹ The Guidance shall be set aside if promulgated "without observance of procedure required by law."¹⁵⁰ Separately, EPA's actions are invalid if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁵¹ If the Guidance is found to be a procedurally deficient legislative rule, a court may render the rule unlawful under the APA.¹⁵²

B. Scope of Review for the Common Elements Guidance

A court will potentially prescribe *Skidmore* deference when reviewing the Common Elements Guidance. For some time, the question as to whether courts granted *Chevron* deference to non-legislative rules was up for debate.¹⁵³ Under *Chevron*, courts defer to agency statutory interpretations of ambiguous terms if the interpretations are "reasonable"

145. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) ("[G]enerally . . . [§553] established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.").

146. *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079–82 (D.C. Cir. 2009).

147. 5 U.S.C. § 551(4).

148. *Id.*

149. *Id.* § 706.

150. *Id.* § 702(2)(D).

151. *Id.* § 706(2)(A).

152. *Id.* § 553.

153. *A Primer on Nonlegislative Rules*, *supra* note 12, at 1341–42.

or “permissible.”¹⁵⁴ Yet, the general presumption was that *Chevron* only applied to legislative rules.¹⁵⁵

The Supreme Court ended the debate in *Christensen v. Harris*, holding that non-legislative rules were entitled to *Skidmore* deference.¹⁵⁶ Under *Skidmore*, courts view agency expertise as a guiding factor.¹⁵⁷ The weight given to agency expertise will vary depending on the agency’s “thoroughness” and “validity of its reasoning.”¹⁵⁸ A majority of courts have interpreted *Skidmore* deference as a “very weak form of deference.”¹⁵⁹ This seems especially true for technical rules, such as the Common Elements Guidance, where notice and comment would best serve the hard look requirement.¹⁶⁰ The hard look requirement holds that agencies need to provide thorough justifications when promulgating rules.¹⁶¹ When under review, a court considers whether an agency “entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency.”¹⁶²

In *United States v. Mead Corp.*, the Court confirmed that *Chevron* does not apply to non-legislative rules.¹⁶³ Thus, under *Mead* and *Christensen*, it appears that the Common Elements Guidance will only receive the lesser *Skidmore* deference. However, the Court pulled back in *Barnhart v. Walton*, holding that non-legislative rules are not automatically precluded from receiving *Chevron* deference.¹⁶⁴ Furthermore, the Court conflated the *Skidmore* factors with the factors that determine the applicability of *Chevron*.¹⁶⁵ The *Barnhart* holding has greatly challenged

154. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

155. *A Primer on Nonlegislative Rules*, *supra* note 12, at 1341 (“[T]he rationale for the strong deference . . . [is] derived from an implicit delegation of legislative authority to the agency.”).

156. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

157. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1994) (describing this level of deference as putting in the agency’s hands the “power to persuade”).

158. *Id.*; *but see* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1259–60, 1275 (2007) (highlighting that in a five-year sample of federal courts of appeals cases that applied *Skidmore* deference, agencies prevailed in over 60% of cases).

159. ADMINISTRATIVE PROCEDURE AND PRACTICE, *supra* note 4, at 379.

160. *Franklin*, *supra* note 18, at 322.

161. *Id.* at 318.

162. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–51 (1983).

163. *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

164. *Barnhart v. Walton*, 535 U.S. 212, 221 (2002).

165. *Id.* at 222.

and confused the lower courts.¹⁶⁶ While under a strict reading of *Barnhart* a court would likely prescribe *Chevron*, given the confusion it is also possible a court could apply *Skidmore*.

C. Judicial Review for the Common Elements Guidance

Section 704 of the APA stipulates that only final agency actions are judicially reviewable.¹⁶⁷ Regulated entities often view guidance as final, particularly if the guidance's substance curtails or compels the entity's conduct.¹⁶⁸ Agencies often view guidance as intermediary rules because they have yet to exhaust every regulatory option.¹⁶⁹ In reality, guidance is final.¹⁷⁰ Guidance documents have become "process-free vehicles for agency declarations of explicit standards and principles that have a real, direct, and potentially devastating impact."¹⁷¹ Thankfully, courts have provided adequate tests to resolve the issue.¹⁷² However, a court must first find that the rule was a final agency action.¹⁷³

In *Bennett v. Spear*, the Supreme Court created the two-pronged finality test.¹⁷⁴ The test asks: (1) whether the action represents the "consummation of the agency's decision making process"; and (2) whether the action is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"¹⁷⁵ The Guidance potentially meets the consummation prong. While EPA does title the Guidance as "Interim," the Guidance will be the final interpretation until revisions are made.¹⁷⁶ In *National Automatic Laundry & Cleaning Council v. Shultz*, the court reasoned that an interpretive letter written by an agency's division Administrator was a final agency action, even though the

166. See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1447 (2005) (describing the confusion caused by the *Barnhart* decision).

167. See 42 U.S.C. § 704 ("[F]inal agency action . . . [is] subject to judicial review.").

168. McKee, *supra* note 48, at 373–74.

169. *Id.*

170. *Id.* at 377.

171. *Id.*

172. See *infra* Section IV.

173. See 5 U.S.C. § 704 (2012) ("Agency action made reviewable by statute and *final* agency action for which there is no other adequate remedy in a court are subject to judicial review.") (emphasis added).

174. *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

175. *Id.* at 177–78.

176. COMMON ELEMENTS GUIDANCE, *supra* note 8, at 1.

Administrator could change his interpretive position.¹⁷⁷ The court also highlighted that the interpretive letter answered an important legal question and impacted a large swath of the interested industry.¹⁷⁸ Similarly, the Common Elements Guidance was promulgated by the Director of the Office of Site Remediation Enforcement, and the Guidance has impacted the real estate development industry.¹⁷⁹

Furthermore, the Guidance states that comments may be submitted.¹⁸⁰ The Guidance's request for comments resembles the APA's § 553 comment requirement, but it does not project any indication to commenters that their comments will change the Guidance.¹⁸¹ Thus, if anything, the Guidance resembles not a draft rule, but a direct, final rulemaking. However, as opposed to a direct final rule, the agency has no requirement to respond to comments.

Most importantly, fifteen years on, EPA has not revised the Guidance.¹⁸² This significant period of time shows that EPA was providing its final conclusions when it released the Guidance.¹⁸³ Therefore, a challenger can likely argue that the Guidance reflects the consummation of the agency's decision-making process.

The "rights and duties" or "legal consequences" prong is a different, more complicated story. *Bennett* does not clearly define either of these categories, but a plain reading indicates that "legal consequences" is a lesser standard than "rights and duties."¹⁸⁴ While non-legislative rules generally do not determine rights or obligations, non-legislative rules sometimes create legal consequences.

In *Western Illinois Home Health Care, Inc. v. Herman*, another case regarding an Administrator's letter, the court found that the letter met the "legal consequences" standard.¹⁸⁵ The letter provided the Administrator's interpretation of the difference between willful and non-willful violators,

177. Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 701 (D.C. Cir. 1971).

178. *Id.* at 701–02.

179. COMMON ELEMENTS GUIDANCE, *supra* note 8, at 1; ROBERT C. SMITH, BROWNFIELDS REVITALIZATION AND ENVIRONMENTAL RESTORATION ACT OF 2001, S. REP. NO 107–2, at 1 (2001).

180. COMMON ELEMENTS GUIDANCE, *supra* note 8, at 14.

181. *See generally id.*

182. *Id.*

183. McKee, *supra* note 48, at 384.

184. *Bennett*, 520 U.S. at 177–78; Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2164–65 (2019).

185. *W. Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 663–64 (7th Cir. 1998).

and how willful violators will be subject to fines.¹⁸⁶ The letter went on to state that the recipients, under his interpretation, are willful violators.¹⁸⁷ The court found that the letter was not “tentative or interlocutory,” and imparts a “legal obligation” on the recipients.¹⁸⁸ Thus, legal consequence flowed from the letter.¹⁸⁹ Therefore, the letter was a “final and reviewable agency action.”¹⁹⁰

Here, a court could possibly find that the Common Elements Guidance creates legal consequences. While the Guidance does not create specific legal consequences for failing to meet the Guidance’s required standard, failure to meet the standard will lead to general legal consequences, such as the inability to raise the BFPP defense. In the alternative, meeting the second category—rights and duties—might be more appropriate. This paper will evaluate whether the Guidance has an impermissible legal effect to determine whether the second prong is met. The likely result is that the Common Elements Guidance satisfies the finality test for judicial review.

IV. Challenging the Common Elements Guidance’s Legal Effect: A Wolf-in-Sheeps-Clothing

A plaintiff can potentially obtain judicial review of the Common Elements Guidance for EPA’s failure to engage in notice and comment because the Guidance has a legally binding effect.¹⁹¹ A non-legislative interpretive rule can be found invalid because it is in fact a legislative rule, and therefore required notice and comment procedures.¹⁹² Generally, an interpretive rule does not have a legally binding effect.¹⁹³ However, it can gain a legal effect in three ways. First, an interpretive rule gains a temporary legally binding effect if the agency utilizes the interpretation in an adjudication.¹⁹⁴ Second, an interpretive rule gains a legally binding effect if the agency takes the interpretation through the appropriate

186. *Id.* at 663.

187. *Id.*

188. *Id.*

189. *W. Ill. Home Health Care, Inc.*, 150 F.3d at 663.

190. *Id.*

191. ADMINISTRATIVE PROCEDURE AND PRACTICE, *supra* note 4, at 354.

192. *Nat’l Motor Freight Traffic Ass’n v. United States*, 268 F. Supp. 90 (D.D.C. 1967), *aff’d*, 393 U.S. 18 (1968).

193. *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (quoting *Citizens to Save Spencer County v. U.S. EPA*, 600 F.2d 844, 876 (D.C. Cir. 1979)) (“An interpretative rule simply states what the administrative agency thinks the statute means, and only ‘reminds’ affected parties of existing duties.”).

194. ADMINISTRATIVE PROCEDURE AND PRACTICE, *supra* note 5, at 353.

rulemaking procedures.¹⁹⁵ Third, a court can find that the interpretive rule has a legally binding effect if the agency, in promulgating the rule, created an entirely new duty.¹⁹⁶ Here, EPA potentially created an entirely new duty when it expanded the appropriate care standard, via interpreting the reasonable steps requirement, as compared to the due care standard.

Courts have developed several approaches to determine whether a rule is legislative or non-legislative. These approaches, to varying degrees, examine the rule's text, purpose, structure, legislative history, degree of enforcement, relationship to other laws, and more.¹⁹⁷ One of the earlier tests courts applied was the substantial impact test.¹⁹⁸ This test asked whether the non-legislative rule's practical impact would have a substantial impact on affected entities.¹⁹⁹ If the court found that the rule had a substantial impact, the court would require the agency to take the rule through notice and comment.²⁰⁰ However, the Supreme Court's decision in *Vermont Yankee Candle Power Corp. v. Natural Resource Defense Council* restricted courts from requiring further procedures for rulemaking, including non-legislative rules.²⁰¹ Yet, the ruling did not scrap the substantial impact test.²⁰² The test was altered to identify not whether the rule was a non-legislative rule that required notice and comment procedure, but whether the rule was an invalid legislative rule that the court could send back to the agency for failure to follow statutorily prescribed rulemaking procedures.²⁰³ While the substantial impact test still has its place in some courts, it is no longer the dominant test.²⁰⁴ However, there is still value in analyzing the Common Elements Guidance under the substantial impact test because of the muddled arena.

The legally binding test is currently the dominant test.²⁰⁵ Put simply, the legally binding test asks whether an interpretive rule is legally binding

195. *Id.*

196. *Id.*

197. Franklin, *supra* note 18, at 278.

198. See *Nat'l Motor Freight Traffic Ass'n*, 268 F. Supp. 90 (applying for the first time the substantial impact test).

199. *A Primer on Nonlegislative Rules*, *supra* note 12, at 1325.

200. *Id.* at 1326.

201. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553–54 (1978).

202. *A Primer on Nonlegislative Rules*, *supra* note 12, at 1326.

203. *Id.*

204. *Id.* Recent cases have applied the substantial impact test, or at least highlighted its applicability. See *e.g.*, *N.H. Hosp. Ass'n v. Azar*, 887 F.3d 62, 70 (1st Cir. 2018); see also *Def. of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1114 (D. Ariz. 2009).

205. *A Primer on Nonlegislative Rules*, *supra* note 12, at 1326.

or creates legal duties.²⁰⁶ This reasoning is problematic because the test basically reiterates that “only legislative rules can be ‘legally binding.’”²⁰⁷ Furthermore, agencies can always defend a challenged rule by simply specifying that the rule is nonbinding. Thankfully, courts have identified other factors for determining whether an interpretive rule is legislative.²⁰⁸

A. Applying the Substantial Impact Test

The Common Elements Guidance likely fails the substantial impact test. The test’s critical question is whether the non-legislative rule’s practical impact on interested entities is substantial.²⁰⁹ The factors used to assess the degree of the impact include: (1) how pervasive in scope the rule is; (2) whether the rule represents a change from existing law; (3) whether the rule is retroactive; and (4) whether there is “confusion and controversy engendered by practical difficulties of compliance with the new rules.”²¹⁰ These elements are not dispositive, but it has been suggested that meeting only one of them is sufficient to indicate that the non-legislative rule has a substantial impact.²¹¹ If there is a substantial effect, the rule is invalid for failure to undertake notice and comment procedures.²¹²

In *Pharmaceutical Manufacturers Ass’n v. Finch*, the plaintiff sought to enjoin the Secretary of Health, Education and Welfare and the Commissioner of the Food and Drug Administration from taking actions based on a non-legislative interpretive guidance document.²¹³ The effects of the guidance would have been far reaching, affecting marketing designed for over 5,000 pharmaceutical products.²¹⁴ The court held that the far-reaching nature of the guidance document, affecting not only pharmaceutical manufacturers but also prescribing doctors and their patients, was sufficiently large in scope to satisfy the first element.²¹⁵

206. *Id.*

207. *Id.*

208. *Id.* at 1326–31.

209. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 397 (1985).

210. *Cont’l Oil Co. v. Burns*, 317 F. Supp. 194, 197 (D. Del. 1970); Manning Gilbert III Warren, *The Notice Requirement in Administrative Rulemaking: An Analysis of Legislative and Interpretive Rules*, 29 ADMIN. L. REV. 367, 390 (1977).

211. Warren, *supra* note 211, at 390.

212. *Id.* at 389–90.

213. *Pharm. Mfrs. Ass’n v. Finch*, 307 F. Supp. 858, 859 (D. Del. 1970).

214. *Id.*

215. *See id.* at 864 (holding that the challenged non-legislative rules “are pervasive in their scope and have an immediate and substantial impact on the way [plaintiff’s] members subject to FDA regulation, conduct their everyday business.”).

Similarly, the Common Elements Guidance is pervasive in scope. The Guidance pertains to roughly 450,000 Brownfields nationwide.²¹⁶ The Guidance also impacts almost every party involved: developers, environmental consultants, and community members.²¹⁷ Thus, it is likely that a court will find that the Guidance has a pervasive scope.

For the second element, asking whether the rule represents a change from existing law, we turn to *Continental Oil Co. v. Burns*.²¹⁸ There, the court was tasked with determining whether the Federal Reserve Board's non-legislative rule interpreting its own regulation for the Truth in Lending Act was invalid.²¹⁹ Altogether, the court found that the rule was a valid, non-legislative rule.²²⁰ In terms of the second element, the court held that the interpretation "did not effect a drastic change in the existing law."²²¹ The interpretation simply identified the existing exceptions to "late payment charges."²²² In no way did the interpretation include exceptions that were contrary or different from the regulation or the statute.²²³ The interpretive rule was simply clarifying a vague regulatory term.

Here, Common Elements Guidance represents the opposite result. EPA directly interpreted statutory language with an interpretive rule.²²⁴ The statutory language states that to obtain the BFPP defense a party must "exercise[] appropriate care . . . by taking reasonable steps to (I) stop any continuing releases; (II) prevent any threatened future release; and (III) prevent or limit . . . exposure."²²⁵ The due care standard is also referenced in the statute, is recognized by courts,²²⁶ and standard sets a very high bar.²²⁷

216. ROBERT C. SMITH, BROWNFIELDS REVITALIZATION AND ENVIRONMENTAL RESTORATION ACT OF 2001, S. REP. NO. 107-2, at 1 (2001) ("[T]here are more than 450,000 brownfield sites nationwide that . . . pose health and environmental hazards, erode . . . cities' tax base, and contribute to urban sprawl and loss of farmland.").

217. *Id.*

218. *Cont'l Oil Co.*, 317 F. Supp. at 198.

219. *Id.* at 195.

220. *Id.* at 200.

221. *Id.* at 198.

222. *Id.* at 199.

223. *Id.* at 198.

224. COMMON ELEMENTS GUIDANCE, *supra* note 8, at 9-12.

225. 42 U.S.C. §§ 9601(40)(B)(iv)(I)-(III) (1980).

226. *Id.* §§ 9601(1), 9607(b)(3).

227. From a statutory vantage, the due care standard requires a landowner to prevent all releases short of those caused by an act of god. *Id.* § 9601(1). CERCLA defines an act of god as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." *Id.* Considering Congress's intent to ease the restrictions on prospective purchasers, it is logically inconceivable that Congress plausibly expected prospective purchasers to remotely anticipate "unanticipated

Legislative history for the BFPP defense indicates that due care is a much higher standard than the appropriate care standard.²²⁸ Furthermore, the legislative history indicates that appropriate care is the BFPP provision's operative term.²²⁹ Meanwhile, the Common Elements Guidance attempts to achieve two things. First, the Guidance, by creating the "reasonable steps requirement," holds that the operative term is not "appropriate care," but is in fact "reasonable steps."²³⁰ Second, the Guidance elevates the "reasonable steps requirement" to roughly the same level as due care, thus transitively elevating appropriate care to due care.²³¹ This elevation of appropriate care to due care is a clear change from existing law. Therefore, Common Elements Guidance likely satisfies the second element, which requires that the rule represents a change from existing law.

For the third element—retroactivity—we turn to *St. Francis Memorial Hospital v. Weinberger*.²³² There, the plaintiff charged the Secretary of Health, Education and Wellness with failing to take its Provider Reimbursement Manual through notice and comment procedures.²³³ While the court found in favor of the Secretary, the court elucidated that retroactive non-legislative rules are likely to have a substantive impact.²³⁴ The Common Elements Guidance is inherently retroactively because its overarching statutory liability scheme is retroactive.²³⁵ Thus, the Guidance meets the third element.

grave natural disaster[s] or other natural phenomenon of an exceptional, inevitable, and irresistible character." *Id.* However, later amendments, legislative history, and case law clarified that in reality, the due care standard is less stringent than its plain meaning. H.R. REP. NO. 96-1016, pt. 1, at 34 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119, 6137; *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 181 (4th Cir. 2013); *New York v. Lashins Arcade Co.*, 91 F.3d 353, 361 (2d Cir. 1996).

228. See H.R. REP. NO. 106-353, pt. 1, at 63 (1999) ("[The appropriate care] standard should be sufficiently flexible based upon the nature of the contamination, the characteristics of the site, and the risks to human health and the environment that the contamination poses."); see also H.R. REP. NO. 106-775, pt. 1, at 81 (2000) ("[The appropriate care standard] requires . . . generally accepted good commercial and customary practices . . .").

229. H.R. REP. NO. 106-353, pt. 1, at 63; H.R. REP. NO. 106-775, pt. 1, at 81.

230. COMMON ELEMENTS GUIDANCE, *supra* note 8, at 9.

231. *Id.*

232. See generally *St. Francis Mem'l Hosp. v. Weinberger*, 413 F. Supp. 323 (N.D. Cal. 1976).

233. *Id.* at 326.

234. See *id.* at 328 ("[A court] should look to the impact on the parties subject to the regulation—are they subject to any new substantive duties or deprived of any preexisting substantive rights. [A court] may consider the impact of retroactive application; if such application appears inequitable the rule apparently has substantive impact.").

235. See generally 42 U.S.C. § 9607(a) (2012) (holding PRPs liable for all past disposals).

Finally, for the fourth element we turn to *Springs Mills, Inc. v. Consumer Protection Safety Commission*.²³⁶ There, the Secretary of Commerce, under the Flammable Fabrics Act,²³⁷ promulgated a legislative rule without utilizing the notice and comment procedure.²³⁸ The rule prohibited the sale of and called for the repurchase of all children's apparel that contained the fire retardant TRIS.²³⁹ The court found the confusion and controversy prong satisfied, as evidenced by the resulting litigation and the confusion between the parties as to how they got into such a mess.²⁴⁰

Here, the Common Elements Guidance causes similar confusion and controversy. Courts have heard many CERCLA cases that have included controversy over EPA's interpretation of appropriate care.²⁴¹ Moreover, numerous articles have noted that industry has struggled for years to truly understand the appropriate care standard.²⁴² From a reasonable observer's perspective, the appropriate care standard appears to be more flexible and achievable than due care. However, the reasonable observer likely views the Common Elements Guidance as taking appropriate care in the opposite direction—even if the reasonable observer recognizes that the Guidance is not legally binding. Accordingly, the Common Elements Guidance has produced significant confusion and controversy, thus satisfying the fourth element.²⁴³

Altogether, the Common Elements Guidance passes the substantial impact test because it satisfies all four elements of the test. Hence, a court—in the rare occasion it applies the test—would likely find that the Common Elements Guidance is a procedurally deficient legislative rule. As a result,

236. *Springs Mills, Inc. v. Consumer Prod. Safety Comm'n*, 434 F. Supp. 416 (D.S.C. 1977).

237. 15 U.S.C § 1191 (2012).

238. *Springs Mills, Inc.*, 434 F. Supp. at 419.

239. *Id.* at 418.

240. *Springs Mills, Inc.*, 434 F. Supp. at 430.

241. *Cal. Dep't of Toxic Substances Control v. Westside Delivery LLC*, No. 2:15-cv-07786-SVW-JPR, 2016 WL 7665414 (C.D. Cal. Sept. 12, 2016), *rev'd and remanded*, 888 F.3d 1085 (9th Cir. 2018); *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013); *Voggenthaler v. Maryland Square LLC*, 724 F.3d 1050 (9th Cir. 2013); *3000 E. Imperial, LLC v. Robertshaw Controls Co.*, No. CV 08-3985 PA EX, 2010 WL 5464296 (C.D. Cal. Dec. 29, 2010).

242. Ortolano III, *supra* note 101, at 34–36; Jenny McClister, *CERCLA's Bona Fide Prospective Purchaser Defense: The Good, the Bad, and the Ugly*, 29 NAT. RES. & ENV'T 13, 17 (2014); Strickland, *supra* note 57, at 795–803; William H. Dolan, *Maintaining Innocence: All Appropriate Inquiry Under the Small Business Liability Relief and Brownfields Revitalization Act*, 8 J. SMALL & EMERGING BUS. L. 117 (2004).

243. Of the four prongs that I present, I recognize that the fourth prong argument is the weakest.

the court will likely require the agency to take the Common Elements Guidance through notice and comment procedures.

B. Applying the Legally Binding Effect Test

While the Common Elements Guidance likely fails the substantial impact test, it is more difficult to say whether the Guidance fails the legally binding effect test. The test has several factors, some of which are dispositive and some of which are not.²⁴⁴ The first four dispositive factors are: (1) “whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties”;²⁴⁵ (2) “whether the agency has explicitly invoked its general legislative authority”;²⁴⁶ (3) “whether the rule effectively amends a prior legislative rule”;²⁴⁷ and (4) whether the rule created a new legal duty or standard.²⁴⁸ The four persuasive factors are: (1) whether the agency declared its intent to publish a non-legislative rule by characterizing the rule as interpretive;²⁴⁹ (2) whether the agency published the rule in the Code of Federal Regulations (“CFR”);²⁵⁰ (3) whether the agency previously adopted a similar rule after notice and comment;²⁵¹ and (4) whether the consequences for violating the non-legislative rule are significant.²⁵²

244. *A Primer on Nonlegislative Rules*, *supra* note 12, at 1326–31.

245. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

246. *Id.*

247. *Id.*; *see also* *Hocor v. U.S. Dep’t of Agric.*, 82 F.3d 165, 171 (7th Cir. 1996) (“The Department’s position might seem further undermined by the fact that it has used the notice and comment procedure to promulgate rules prescribing perimeter fences for dogs and monkeys.”); *and see* *United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989) (“We do note, however, that the Park Service’s previous adoption of extensive and detailed site-specific regulations after notice and comment erects a high burden of persuasion.”).

248. *Hocor*, 82 F.3d at 167; *Picciotto*, 875 F.2d at 348 (“In contrast, we have found rules that grant rights and impose obligations to be substantive.”).

249. *Metropolitan School District v. Davila*, 969 F.2d 485, 489 (7th Cir. 1992); *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980) (“We would be less than candid if we pretended that the labels of ‘legislative’ and ‘non-binding’ rules neatly place particular agency actions within any particular category. Instead, the categories have ‘fuzzy perimeters’ and establish ‘no general formula.’”); *A Primer on Nonlegislative Rules*, *supra* note 12, at 1330.

250. *Am. Mining Cong.*, 995 F.2d at 1109.

251. *A Primer on Nonlegislative Rules*, *supra* note 12, at 1331.

252. Admittedly, this factor is not explicitly recognized by the court, but appears to be a general principle.

1. Dispositive factors

Of the four dispositive factors, the Common Elements Guidance possibly satisfies the fourth factor because it prescribes new legal duties. Meanwhile, the first factor—whether without the rule the agency cannot adequately enforce statutory duties or rights—is not satisfied because EPA can enforce the BFPP defense without the Guidance. Similarly, the second factor—whether the agency has explicitly invoked its general legislative authority—is not met because EPA does not explicitly invoke its rulemaking authority in the Guidance. Finally, the third factor—whether the rule effectively amends a prior legislative rule—is not met because EPA did not promulgate a legislative rule regarding appropriate care prior to the Guidance.

The Common Elements Guidance most likely satisfies the fourth factor. In *Hocor v. United States Department of Agriculture*, Hocor ran a small, exotic animal sales business.²⁵³ Many of Hocor’s animals were in the Big Cat family—ligers, tigers, lions, etc.²⁵⁴ The Animal Welfare Act (“Act”) governs the humane treatment of animals and authorizes the Department of Agriculture to promulgate rules consistent with the purpose of the act.²⁵⁵ Subsequently, the Department promulgated a legislative rule stating that a “facility . . . must be constructed of such material and of such strength as appropriate for the animals involved.”²⁵⁶ Next, the Department issued an interpretative rule of the regulation, addressed to staff, stating that dangerous animals, such as those in the Big Cat family, “must be inside a perimeter fence at least eight feet high.”²⁵⁷ Hocor’s big cats were contained inside pens, surrounded by containment fences, all of which was within a six-foot perimeter fence.²⁵⁸ The Department cited and sanctioned Hocor for not having an eight-foot perimeter fence.²⁵⁹ Hocor then challenged the Department’s actions and sought judicial review of the interpretive rule.²⁶⁰

The court held that the interpretive rule was a procedurally deficient legislative rule.²⁶¹ The court recognized that the Act authorized the Department to establish containment standards for dangerous animals, such

253. *Hocor v. U.S. Dep’t of Agric.*, 82 F.3d 165, 168 (7th Cir. 1996)

254. *Id.*

255. *Id.* at 167.

256. *Id.* at 167–68.

257. *Id.* at 168.

258. *Id.*

259. *Id.* at 168.

260. *Id.* at 168.

261. *Id.* at 172.

as requiring an eight-foot perimeter fence.²⁶² However, such a standard would have to be created by procedural rulemaking because it is not simply an interpretation—it prescribed new duties.²⁶³ Congress delegated to the Department legislative authority precisely to prescribe new duties.²⁶⁴ Yet, the Department created the eight-foot standard without utilizing its legislative authority.²⁶⁵ Thus, the court found that the Department created a legislative rule without following the mandatory notice and comment procedure.²⁶⁶ Therefore, the court vacated the lower court’s ruling against *Hector*, and invalidated the rule.²⁶⁷

Here, the Common Elements Guidance is not interpreting the appropriate care standard but rather articulating a new standard. Similarly to *Hector*, a Brownfield developer controls the hazardous substances on the property, and therefore has the responsibility to deal with those substances.²⁶⁸ CERCLA governs how the developer controls the hazardous substance on their property, and EPA is authorized to promulgate rules to effectuate CERCLA’s goals.²⁶⁹ Specifically, CERCLA requires a Brownfield developer to “exercise[] appropriate care . . . by taking reasonable steps to (I) stop any continuing releases; (II) prevent any threatened future release; and (III) prevent or limit . . . exposure.”²⁷⁰ As noted above, the appropriate care standard is the operative term and is a lesser standard than due care.²⁷¹ EPA has not promulgated any legislative rules regarding the appropriate care standard. However, EPA issued an interpretative rule on the statute, addressed to staff, stating that the “reasonable steps” required are equivalent to the requirements of the due care standard.²⁷²

As in *Hector*, this change from appropriate care to due care is a change in substantive law. CERCLA clearly establishes the requirements

262. *Id.* at 169.

263. *Id.* at 169–70.

264. *See id.* at 169 (“[W]hen a statute does not impose a duty on the persons subject to it but instead authorizes . . . an agency to impose a duty, the formulation of that duty becomes a legislative task entrusted to the agency.”).

265. *Id.*

266. *See Hector*, 82 F.3d at 169–70 (holding that the eight-foot standard is a rule not an interpretation because, while consistent with the act, it is not “derived from it . . .”).

267. *Id.* at 172.

268. 42 U.S.C. § 9601(40) (2012).

269. *Id.* § 9601(35)(B)(iii).

270. 42 U.S.C. §§ 9601(40)(B)(iv)(I)–(III).

271. H.R. REP. NO. 106-353, pt. 1, at 63 (1999); H.R. REP. NO. 106-775, pt. 1, at 81 (2000).

272. H.R. REP. NO. 106-353, pt. 1, at 63; H.R. REP. NO. 106-775, pt. 1, at 81.

for appropriate care.²⁷³ Yet, EPA subverts the statutory language and the Brownfield Amendments' purpose by reading the due care standard into the appropriate care's reasonable steps. Such a prescription of new duties requires notice and comment, which EPA neglected. Thus, it is possible that the Common Elements Guidance satisfies the first dispositive factor—whether without the rule the agency cannot adequately enforce statutory duties or rights. Therefore, a court may find that the Guidance is a procedurally deficient legislative rule. Moreover, even if EPA promulgated the Guidance after notice and comment, it is possible a court would find that the rule is arbitrary and capricious. Under Chevron's first step, the meaning of appropriate care is clear. Even if the meaning were not clear, a court would still be hard pressed under the deferential second step to agree with EPA's interpretation.

2. Persuasive factors

The first three persuasive factors weigh in favor of the Guidance's interpretive nature. However, these factors are likely not significantly persuasive to overcome the dispositive fourth factor—whether the rule created a new legal duty or standard. Moreover, the fourth factor demonstrates the Guidance's invalidity. Furthermore, CERCLA's retroactive liability strongly supports the Guidance's invalidity.

EPA explicitly makes clear that the Guidance is only an interpretive rule—satisfying the first persuasive factor.²⁷⁴ The Guidance further states that it only applies to agency staff.²⁷⁵ Most significantly, however, the Guidance interprets the Brownfields Amendment by examining its legislative history, case law, and text.²⁷⁶ This interpretation resembles the interpretation in *Metropolitan School District v. Davila*.²⁷⁷ There, the court stated that an agency's use of the classic interpretive tools supports the agency's assertion that the rule is interpretive.²⁷⁸ However, specifying that the rule is interpretive, only meant for agency staff, and includes classic interpretive tools has not precluded courts from vacating interpretive rules.²⁷⁹ In *Hocor*, the interpretive rule contained the abovementioned

273. 42 U.S.C. §§ 9601(40)(B)(iv) (I)–(III).

274. See COMMON ELEMENTS GUIDANCE, *supra* note 8, at 14 (“This memorandum is intended solely for the guidance of employees of EPA [I]t creates no substantive rights for any persons. It . . . does not impose legal obligations.”).

275. *Id.*

276. See generally COMMON ELEMENTS GUIDANCE, *supra* note 8.

277. See generally *Metro. Sch. Dist. v. Davila*, 969 F.2d 485 (7th Cir. 1992).

278. *Id.* at 494.

279. *Hocor v. U.S. Dep’t of Agric.*, 82 F.3d 165, 172 (7th Cir. 1996); *United States v. Picciotto*, 875 F.2d 345, 349 (D.C. Cir. 1989).

interpretive analysis, and was meant for staff only.²⁸⁰ Yet, the court was not persuaded.²⁸¹ This is likely because of the first factor's minimal persuasive strength. Several courts have watered down the deference applied to an agency's characterization of its rule.²⁸² Furthermore, the Guidance's interpretations are written with mandatory words such as "shall" and "must," as opposed to "may" and "should."²⁸³ These mandatory words characterize the interpretation as binding. Thus, while the first factor weighs slightly in favor of EPA, it likely does not outweigh the fourth dispositive factor.

Similarly, the second persuasive factor—whether the agency published the rule in the CFR—has relatively little persuasive force at this point. The Federal Register Act generally states that agencies are required to publish any statement with "general applicability and legal effect" in the CFR.²⁸⁴ Here, the Guidance was not published in the CFR, which suggests that it does not have "legal effect." However, this element is a dangerous loophole for agencies to fall back on when non-legislative rules are challenged. The D.C. Circuit, which created the factor, subsequently dismissed it, holding that it is nothing more "more than a snippet of . . . agency intent."²⁸⁵ Thus, while the second persuasive factor weighs slightly in favor of EPA, it likely does not defeat the fourth dispositive factor.

The third persuasive factor—whether the agency previously adopted a similar rule after notice and comment—does not hurt either side of the argument. If EPA previously promulgated a legislative interpretive rule through notice and comment, EPA could only amend that interpretation through notice and comment.²⁸⁶ Thus, the third persuasive factor does not sway the argument in either direction.

The fourth factor—whether the consequences for violating the non-legislative rule are significant—likely weighs heavily in favor of vacating the Guidance. In *Hector*, the court found persuasive the significant financial strain (and apparent redundancy) that erecting an eight-foot-tall perimeter fence would place on Hector.²⁸⁷ Here, the stakes are far higher.

280. See generally *Hector*, 82 F.3d at 171.

281. *Id.*

282. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 (D.C. Cir. 1986); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1575 (D.C. Cir. 1984) (Bazelon, J., dissenting); *Chamber of Commerce v. Occupational Safety & Health Admin.*, 636 F.2d 464, 470 (D.C. Cir. 1980).

283. See COMMON ELEMENTS GUIDANCE, *supra* note 8.

284. 44 U.S.C. § 1510(a) (2012).

285. *Health Ins. Ass'n of America, Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994).

286. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

287. *Hector v. U.S. Dep't of Agric.*, 82 F.3d 165, 168 (7th Cir. 1996) (noting a replacement fence would cost "thousands of dollars . . .").

If a developer fails to obtain the BFPP defense because of the overly demanding Common Elements Guidance, the developer stands to lose millions.²⁸⁸ A court would likely find that this factor weighs against the Guidance.

Altogether, the legally binding effect test's factors likely weigh in favor of finding the Common Elements Guidance to be a procedurally deficient legislative rule. Therefore, a court is likely to vacate the Guidance. Additionally, CERCLA's retroactivity should weigh heavily in a court's analysis. New interpretive rules could have far-reaching impacts on developers who acted long ago on past agency interpretations.

Conclusion and Moving Forward

While this Note outlines how the Common Elements Guidance appears to be a procedurally deficient legislative rule, a reviewing court could decide either way. The likely outcome is that a court will rule in favor of EPA—but not because the facts or laws are in favor of EPA. To the contrary, a challenger would likely have the advantage from the plain meaning, legislative history, and purpose standpoints. However, courts simply defer greatly to agencies, especially if a court applies *Chevron*. In most wolf-in-sheep's-clothing actions, courts will find in favor of the agency, upholding the law and informing the public that they “should obey the agency's interpretation.”²⁸⁹ The biggest hurdle to challengers is the fact that EPA included a “reasoned” analysis in its Guidance.

There are several cases (not wolf-in-sheep's-clothing actions) where the courts have affirmed EPA's interpretation of appropriate care, consistently citing to the Common Elements Guidance. The most prominent case is *PCS Nitrogen, Inc. v. Ashley II of Charleston LLC*.²⁹⁰ There, the Fourth Circuit stated in dicta that not only is appropriate care equal to due care, appropriate care may in fact be stricter.²⁹¹ Conversely, in a now overturned case, a Federal District Court in California viewed the due care standard as a much higher standard than the appropriate care standard.²⁹² That court held that appropriate care was meant to be a more

288. See Aicher, *supra* note 54, at 559 (estimating in 1993 that the average site cleanup cost is roughly “\$30 million . . .”).

289. McKee, *supra* note 48, at 377. McKee also points out that many wolf-in-sheep's-clothing actions never receive judicial review. *Id.* at 777 n.30.

290. See generally *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161 (4th Cir. 2013).

291. *Id.* at 180.

292. *Cal. Dep't of Toxic Substances Control v. Westside Delivery LLC*, No. 2:15-cv-07786-SVW-JPR, 2016 WL 7665414, at *6 (C.D. Cal. Sept. 12, 2016), *rev'd and remanded*, 888 F.3d 1085 (9th Cir. 2018).

flexible standard.²⁹³ However, this case was overturned on separate grounds.²⁹⁴ Thus, there is currently no case law supporting the appropriate care standard's congressional meaning. Therefore, if someone were to challenge the Guidance on APA grounds, a reviewing court would likely depend on the Fourth Circuit's ruling in *PCS Nitrogen*.²⁹⁵

Alternatively, Congress or EPA could step up to the plate. Congress could amend CERCLA again to more clearly define the appropriate care standard, thus preventing EPA from enforcing it at an arbitrarily heightened standard. Otherwise, EPA could reinterpret appropriate care in line with Congress's intent. If EPA has further concerns, it can ensure that PRPs follow industry standards by mandating the PRP's environmental consultant list recommended remediation techniques in the AAI. EPA can further require PRPs to implement the environmental consultant's recommendations, ensuring PRPs meet the industry standard. All of this should be done through notice and comment rulemaking. The notice and comment process would allow stakeholders to advocate for a rule that reflected congress's true intent—to enable the public the power to remediate for the benefit of all.

The Trump Administration has recognized the need to reformulate EPA's approach to CERCLA. In 2017, EPA formed the Superfund Task Force.²⁹⁶ In its recommendations, the Task Force explicitly recognized that "Congress intended" the BFPP defense to be "self-implementing," but that third parties remain concerned about the defense's effectiveness.²⁹⁷ Unfortunately, the recommendation did not include a review of the appropriate care standard. However, EPA's special advisor on Superfund issues recently indicated that EPA is continuing to reevaluate Superfund guidances.²⁹⁸ At a recent ABA conference on Superfund sites, the special advisor asked: "Have we designed things that are really working?"²⁹⁹ Hopefully, the special advisor is alluding to the appropriate care standard.

As for the administrative law question, the legally binding effect and substantial impact tests both provide a more balanced and equitable

293. *Id.*

294. *Id.*

295. *PCS Nitrogen Inc.*, 714 F.3d at 161.

296. On May 22, 2017, former EPA Administrator Scott Pruitt requested that EPA create the Superfund Task Force. U.S. ENVTL PROT. AGENCY, SUPERFUND TASK FORCE RECOMMENDATIONS 1 (July 25, 2017) <https://perma.cc/Y423-2CRH>.

297. *Id.* at 15 ("Congress intended these liability protections to be self-implementing, although some third parties still remain concerned about potential liability and the availability of the BFPP protection at contaminated properties.").

298. Sylvia Carignan, *EPA Seeks Lawyers' Help Implementing Superfund Changes*, BLOOMBERG LAW (June 12, 2019), <https://perma.cc/H4T8-UG5>.

299. *Id.*

approach to judicial review of non-legislative rules than the proposed “notice and comment” test. While the current state of affairs surrounding how courts should review non-legislative rules is treacherously murky, courts are still able to draw a line between non-legislative and legislative rules. The Common Elements Guidance exemplifies why courts need to continue scrutinizing non-legislative rules. These tests should not be thrown out in favor of judicial efficiency, especially considering that *Barnhart* opened the door to *Chevron* deference for non-legislative rules.