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RELOADING THE ARSENAL IN THE INFORMATIONAL WAR ON POLLUTION—CITIZENS AS SOLDIERS IN THE FIGHT AND HOW A LACK OF “ACTIONABLE” LEGS ON WHICH TO STAND NEARLY FORCED A CEASE-FIRE

I. INTRODUCTION

The modern era of technology brought with it potential environmental hazards, including chemicals that can destroy not only plant life, but human life as well. In response to this reality, Congress enacted various pieces of legislation designed to manage these potential problems. One such act is the Emergency Planning and Community-Right-To-Know Act (EPCRA), which requires owners and operators to report hazardous substances releases and enables communities to create emergency response plans and commissions. Like other environmental legislation, EPCRA provides for

1. After a massive chemical spill in Bhopal, India, some residents there suffered medical problems, including difficulties with their lungs, eyes and gastrointestinal tract. See Newsfront Bhopal, A Year Later: Learning From a Tragedy, CHEM. ENG’C, Dec. 9, 1985, available in 1985 WL 2163517 [hereinafter Newsfront Bhopal]. Doctors also found problems with the exposed residents' immune systems and predicted the possibility of birth defects in future generations. See id. See also Under a Noxious Cloud of Fear: A Toxic Gas Leak Rocks “Chemical Valley” Residents, TIME, Aug. 26, 1985, at 13 [hereinafter Noxious Cloud] (comparing chemical accidents in Bhopal, India and Institute, West Virginia). One reporter noted:

Responding to alarm about the Bhopal, India, gas-leak disaster and lesser chemical calamities in this country, Congress . . . passed the Emergency Planning and Community-Right-To-Know Act. It is intended to let citizens know more about the dangerous substances used in their communities, and to stimulate the development of emergency plans for dealing with chemical mishaps.

Gary H. Anthes, Chemical Disclosure Law Brings Burden, WASH. BUS. J., Apr. 27, 1987, at 3. But see Noxious Cloud, supra, at 13 (noting conflict of interest between job security and health security, as "most residents of West Virginia's Chemical Valley were caught between worries about their safety and about their region's economy.").


4. See EPCRA §§ 301-15, 42 U.S.C. §§ 11001-23. For a background analysis of this statute, see infra notes 40-52 and accompanying text.

(127)
citizen suits to enforce violations of this Act. Viewed as an effective and favored tool of enforcement, citizen suits permit activist groups to gain access to the federal courts without having to wait for regulatory agencies to investigate or take action against reported violations.

Citizens traditionally have been able to sue for active violations of an environmental statute. Currently, however, a controversy exists regarding whether citizens may sue for wholly past violations of an environmental act. Since most citizen suit provisions require sixty-days' notice before filing suit, an alleged violator often has time to cure the violation before the actual filing of a suit. After the "curing" of any active violation, the controversy remains as to

5. See EPCRA § 326, 42 U.S.C. § 11046; see also CAA § 304, 42 U.S.C. § 7604; CWA § 505, 33 U.S.C. § 1365. For a description of these provisions and relevant case law, see infra notes 40-124 and accompanying text.

6. See Jack D. Shumate, Citizen Enforcement Suits: Will An Old Tool Take on New Importance?, 24 N. Ky. L. Rev. 55, 57 (1996) (explaining that due to increase in environmental problems, businesses as well as public interest groups are relying on citizen suits to manage environmentally-related issues); see also Jim Scott, Note, Permissibility of Citizen Suits Under EPCRA for Wholly Past Violations in the Seventh Circuit: Citizens for a Better Environment v. Steel Co., 4 Wis. Envtl. L.J. 215, 217 (1997) (noting that early on, citizen suits emerged as "a small, but effective, part of the enforcement effort").


8. For a discussion of cases addressing whether citizens may sue for wholly past violations, see infra notes 53-124 and accompanying text. The United States Supreme Court described wholly past violations as those violations of an act which occur entirely before the plaintiff files a lawsuit. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 49-50 (1987) (addressing wholly past violations with respect to CWA).

The Supreme Court granted certiorari in Steel Co. v. Citizens for a Better Environment, 117 S. Ct. 1079 (1997), and heard oral arguments during the first day of its Fall Term of 1997. See Jan Crawford Greenburg, High Court Reopens Over High-Stakes Turf War, Chi. Trib., Oct. 7, 1997, at 8N (describing these events). The Court rendered its decision in Steel Co. on March 4, 1998, concluding that the environmental group lacked standing to bring suit for wholly past violations under EPCRA. See Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (Stevens, J., concurring). See generally Scott, supra note 6, at 216 ("The paucity of case law belies the importance of citizen suits, which hold the promise of maturing into an effective means to achieve compliance.").

9. See CAA § 304(b), 42 U.S.C. § 7604(b); CWA § 505(b), 33 U.S.C. § 1365(b); EPCRA § 326(d), 42 U.S.C. § 11046(d). For a discussion of notice provisions in the context of case law, see infra notes 59-61, 86-87, 114-18 and accompanying text.

10. For a discussion of the sequence of events between the discovery of a violation, the filing of notice and the filing of suit, see infra notes 43-44 and accompanying text.
whether the alleged violator can be sued for violations which occurred before the "curing."\textsuperscript{11}

This Comment examines the controversy of citizen suits for wholly past violations in light of the recent United States Supreme Court decision, \textit{Steel Co. v. Citizens for a Better Environment}, which involved wholly past violations of EPCRA.\textsuperscript{12} Part II of this Comment examines the factual context and holding of \textit{Steel Co.}\textsuperscript{13} Next, Part III provides a brief background of EPCRA.\textsuperscript{14} Then, Part IV analyzes courts' various interpretations regarding EPCRA and suits for wholly past violations.\textsuperscript{15} Finally, Part V discusses the significance and impact of recent court decisions on enforcement of violations under EPCRA.\textsuperscript{16}

II. WHAT ARE CITIZEN SOLDIERS: ENFORCEMENT OFFICERS OR MERELY PRIVATE CITIZENS?

A. The Controversy Over Citizen Soldiers in \textit{Steel Co.}

Originating from an appeal in the Seventh Circuit, \textit{Steel Co.} involved a non-profit environmental organization, Citizens for a Better Environment (Citizens), which sued an industrial company for failure to file reports in accordance with EPCRA.\textsuperscript{17} Citizens sent notice to the appropriate parties in 1995.\textsuperscript{18} Because the Environ-

\textsuperscript{11} For a discussion of case law examining whether suits may be maintained under such circumstances, see infra notes 55-124 and accompanying text. "One of the more significant issues within [EPCRA's] citizen-suit provision is whether citizens may bring suit for reporting violations that are wholly past and have been corrected before a citizen suit is filed." Denise Marie Lohmann, Comment, \textit{The Uncertain Future of Citizen Suits Under EPCRA: Can Citizens Sue for Past Violations of the Statute's Reporting Requirements?} 30 Loy. L.A. L. Rev. 1709, 1710 (1997). This ambiguity results in frequent litigation. See id. Another key issue in this type of litigation is standing. See Robert B. June, \textit{The Structure of Standing Requirements For Citizen Suits and the Scope of Congressional Power}, 24 Envtl. L. 761, 762 (1994) (recognizing "tension between legislative endowment and judicial restraint of a citizen's right to enforce environmental laws has generated several interacting doctrines which sometimes produce great difficulty in determining the range of citizens who have standing to sue").

\textsuperscript{12} See \textit{Steel Co.}, 118 S. Ct. at 1003.

\textsuperscript{13} For a discussion of the court's holding in \textit{Steel Co.}, see infra notes 17-38 and accompanying text.

\textsuperscript{14} For a discussion of the background of EPCRA, see infra notes 40-124 and accompanying text.

\textsuperscript{15} For an analysis of various courts' holdings regarding EPCRA and suits for wholly past violations, see infra notes 125-62 and accompanying text.

\textsuperscript{16} For a discussion of the impact decisions in EPCRA cases have on future industry behavior and cases, see infra notes 163-80 and accompanying text.

\textsuperscript{17} See \textit{Steel Co.}, 118 S. Ct. at 1008-09.

\textsuperscript{18} See id. at 1009. For a discussion of the notice provision in citizen suits, see infra notes 59-61, 86-87, 114-18 and accompanying text.
The Environmental Protection Agency (EPA) chose not to prosecute, when the sixty-day notice period expired, Citizens filed suit against Steel Company in federal court. The defendant Steel Company moved for dismissal because their filings were now current, even though prior to notice of intent to sue Steel Company had failed to submit the appropriate forms since 1988, which was the first year of the filing requirements. The district court agreed with Steel Company's argument and dismissed the complaint. The Seventh Circuit reversed, recognizing that penalties can be imposed for wholly past violations; namely, for failure to timely file the appropriate reports under EPCRA. The Supreme Court then granted certiorari "to resolve a conflict between the interpretation of EPCRA adopted by the Seventh Circuit and the interpretation previously adopted by the Sixth Circuit" including the issue of standing, which is a constitutional requirement in bringing a suit.

B. The Supreme Court's "Bombshell" Decision

On March 4, 1998, five months after hearing oral argument in the landmark case of Steel Co., the Supreme Court declared:

Having found that none of the relief sought by respondent would likely remedy its alleged injury in fact, we must conclude that respondent lacks standing to maintain this suit, and that we and the lower courts lack jurisdiction to entertain it. However desirable prompt resolution of the merits EPCRA question may be, it is not as important as observing the constitutional limits set upon courts in our system of separated powers. EPCRA will have to await another day.

Choosing to focus on constitutional issues first, the majority sidestepped a prominent statutory issue of the case, whether EPCRA permits suits for wholly past violations, and rendered the issue

19. See id. at 1009.
20. See id. (noting that defendant filed all of its overdue forms immediately after receiving notice).
21. See id.
23. Id.
25. Id. at 1020.
outside of the Supreme Court's jurisdiction.\textsuperscript{26} Relying on its previous decision in \textit{Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.},\textsuperscript{27} the Court concluded that the respondent, Citizens, had not met the redressability requirement.\textsuperscript{28} Despite citizens' failure to meet this requirement, the Court did not explicitly restrict suits for wholly past violations under EPCRA.\textsuperscript{29}

The Court also rejected the "doctrine of hypothetical jurisdiction," under which a court may proceed directly to the merits of an issue, even if jurisdictional questions exist, if the court can resolve

\textsuperscript{26} See id. at 1018-20 (explaining that "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

\textsuperscript{27} 484 U.S. 49 (1987).

\textsuperscript{28} See Steel Co., 118 S. Ct. at 1007, 1010-11, 1018-20 (describing Court's use of its \textit{Gwaltney} opinion and statement that plaintiff did not meet redressability requirement). The Court suggested, however, that respondents could have met the redressability requirement if they had alleged "a continuing violation or the imminence of a future violation" in their complaint, thereby making injunctive relief appropriate. \textit{Id.} at 1019.

Steel Company, petitioner, argued in its brief that a person must have a personal interest that is somehow either harmed, or threatened with harm, to have standing, even though the statute authorizes any person to sue. See \textit{generally Petitioner's Brief} at 29, Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (No. 96-643) (citing EPCRA § 326(a), 42 U.S.C. § 11046(a)). Steel Company asserted that "[h]ad Congress thought a citizen remedy for past EPCRA violations appropriate, it could have fashioned such a remedy. This Court should not find an implied one." \textit{Id.} at 34.

The United States, one of several amici for the respondent (Citizens), "argue[d] that the injunctive relief does constitute remediation because 'there is a presumption of [future] injury when the defendant has voluntarily ceased its illegal activity in response to litigation,' even if that occurs before a complaint is filed." Steel Co., 118 S. Ct. at 1019-20 (citing Brief for the United States as Amicus Curiae at 27-28 & n.11, Steel Co. (No. 96-643)). Although the United States presented a strong argument regarding redressability, the Court refused to accept the argument, stating that the injury the United States set forth was both too speculative as well as contrary to the Court's precedent of requiring "that the allegations of future injury be particular and concrete." Steel Co., 118 S. Ct. at 1020 (citing O'Shea v. Littleton, 414 U.S. 488, 496-97 (1974)).

The \textit{Gwaltney} decision focused on CWA, which is distinguishable from EPCRA. For a discussion of the \textit{Gwaltney} opinion, see infra notes 53-67 and accompanying text. For an analysis of CWA and EPCRA and how the two Acts can be distinguished, see infra notes 77-124 and accompanying text.

\textsuperscript{29} See Tod Robinson, \textit{Emergency Planning: Supreme Court Says Citizen Group Cannot Sue Over Past EPCRA Violations}, DAILY ENVTL. REPORT, Mar. 5, 1998, at A-2 (stating that, although total effect of Scalia's opinion is unclear, it leaves open possibility "that private citizens may have standing to sue companies that present a threat of future violations because of their history of ignoring their EPCRA obligations"). Cf. Jan Crawford Greenburg, \textit{A Blow to Environmental Suits: Ruling on Chicago Firm May Stall Citizen Action}, CHICAGO TRIBUNE, Mar. 5, 1998, at 1N [hereinafter \textit{Chicago Reaction}] (explaining that one attorney for respondent Citizens "predicted that the ruling would have a broad impact because citizens' groups would be less vigilant about urging companies to comply with environmental laws if they couldn't sue to recover expenses").
the merits more easily and if "the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied."  

According to the Court, the doctrine of separation of powers both limits the Court to hearing only those cases over which it has jurisdiction as well as prohibits it from rendering opinions on hypothetical questions. Finding jurisdiction to be a threshold matter, the Court observed that "'[J]urisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" Thus, the Court held that it did not have the constitutional authority to consider the substantive question of whether citizen suits for wholly past violations are viable under EPCRA.

By not requiring that citizens receive the statutorily-mandated information in a timely fashion, the Supreme Court's holding provides a near fatal wound for citizen suits for wholly past violations. This holding increases the risk to people and their environment, thereby rendering EPCRA essentially invalid.

Unlike the majority, in his concurring opinion, Justice Stevens stated that the Court should have addressed the statutory question first and that "because EPCRA, properly construed, does not confer jurisdiction over citizen suits for wholly past violations, the Court

30. Steel Co., 118 S. Ct. at 1007 (citations omitted).
31. See id. at 1007, 1012 ("We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers."). Further, the Constitution plainly states: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . . to Controversies . . . . between Citizens of different States . . . ." U.S. CONST. art. III, § 2, cl. 1. The Constitution neither states, nor has it been interpreted to mean, that hypothetical cases and controversies are part of this judicial power. See, e.g., Ex parte McCardle, 74 U.S. (7 Wall.) 506, 515 (1868) (emphasizing that "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer").
32. See Steel Co., 118 S. Ct. at 1012 (quoting Ex parte McCardle, 7 Wall. at 514). The Court proceeded to recognize that jurisdiction is an inflexible requirement that must be addressed regardless of whether either party raises the issue. See Steel Co., 118 S. Ct. at 1012.
33. See id. at 1016. The Court noted that "[m]uch more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." Id. (citations omitted).
34. See Chicago Reaction, supra note 29, at 1N (noting that Citizens' attorney, James Brusslan, "predicted that the ruling would have a broad impact because citizens' groups would be less vigilant about urging companies to comply with environmental laws if they couldn't sue to recover expenses").
should leave the constitutional question for another day." Regard-
less of where a Supreme Court Justice begins the analysis, how-
ever, the conclusion is essentially the same: the Court will not
permit citizens to bring suits for wholly past violations under EP-
CRA because, under either the Constitution or the statute itself, the
Court lacks the jurisdiction to hear such cases. The Supreme
Court has declared that federal courts do not have jurisdiction to
hear cases concerning allegations of wholly past violations under
EPCRA since aggrieved parties do not have the necessary standing
to bring such actions.

III. BACKGROUND

Environmental legislation became a prominent legal issue with
Congress's introduction of the Comprehensive Environmental Re-
sponse, Compensation and Liability Act (CERCLA) and the
Superfund. Since then, environmental legislation has expanded
and now covers many relevant domains, including the need for
information.

36. Steel Co., 118 S. Ct. at 1021. Only a minority of justices posited this
concept of lack of jurisdiction, signifying that the Court has not declared the law to be
that EPCRA does not permit suits for wholly past violations. See id. at 1021-27 (Stev-
ens, J., concurring) (discussing jurisdictional issue). Therefore, if the legislature
resolves standing problems, the Court could later interpret EPCRA as permitting
suits for wholly past violations, thereby indicating that the citizens' arsenal in this
informational war on pollution has not yet been fully depleted. See generally June,
supra note 11, at 762, 793-94 (explaining Congress's role in prescribing standing).
This commentator clarified that "[i]n simple terms, the Constitution limits who
may have standing, while Congress prescribes who shall have standing. Given these
bounds, the courts then decide if a party has standing in an individual case. As a
result, standing is primarily a function of congressional directive." Id. at 793 (em-
phasis added).

Justice Stevens proceeded by demonstrating that the Court has the power to
address whether a cause of action exists even if the standing of the alleged ag-
grieved party is questionable. See Steel Co., 118 S. Ct. at 1024 (stating "our prece-
dents clearly support the proposition that, given a choice between two
jurisdictional questions—one statutory and the other constitutional—the Court
has the power to answer the statutory question first"). Later in his opinion, buried
in the text of a footnote, Justice Stevens proclaimed, "I have never understood any
fundamental difference between arguing: (1) plaintiff's complaint does not allege
a cause of action because the law does 'not provide a remedy' for the plaintiff's
injury; and (2) plaintiff's injury is 'not redressable.'" Id. at 1024 n.9 (citation
omitted).

37. See id. at 1023-24.

38. See id. at 1024. During this era of the information superhighway, a high
value is assigned to timely and accurate information. So how is it justifiable that
there is almost no enforcement for failure to provide timely information under
EPCRA?

39. See Michael P. Vandenbergh, An Alternative Ready, Fire, Aim: A New Frame-
work to Link Environmental Targets in Environmental Law, 85 Ky. L.J. 805 (1996-97)
(surveying environmental laws and related enforcement techniques).
A. EPCRA and Its Statutory Foundations

Congress enacted EPCRA in response to problems with the public's exposure to hazardous substances.\(^{40}\) EPCRA has two primary objectives: "[(1)] public access to centralized information, at a reasonably localized level, concerning hazardous chemicals used, produced or stored in the community and [(2)] the use of this information to formulate and administer local emergency response plans in case of a hazardous chemical release."\(^{41}\) These objectives

40. See Newsfront Bhopal, supra note 1, at 1985 WL 2163517. One year after a massive chemical spill in Bhopal, India, both chemical manufacturers and the general population questioned whether current laws were sufficient to protect Americans from a similar fate. See id. While international responses to the Bhopal disaster varied greatly, "[i]n the U.S., where a lot of ambitious legislation was proposed in the months immediately following Bhopal, only one measure — a community-right-to-know amendment tacked on to the Senate's Superfund reauthorization bill . . . made any headway." Id. The bill provision required both reporting of hazardous chemicals as well as emergency response plans in case of accidents involving one of these hazardous chemicals. See id.

In EPA's records of accidents involving hazardous chemicals, it was discovered that between 1980 and 1985 as a result of "3,121 accidents, 138 people were reported killed and 4,717 were injured. In 341 of those accidents, 217,000 people were evacuated. Property damage exceeding $1.5 billion was reported in 476 of the events." Chicago Tribune, Hazardous-Chemical Leaks Still Taking Toll in U.S., Report Says, Seattle Times, Dec. 24, 1986, at A2. Further, firefighters recognize that because certain chemical fires become worse with water, "[h]aving the proper training and equipment can make the difference between firefighters safely trying to control the incident" or being forced to let the fire run its natural course. Legislation Would Give Firefighters Data on Toxins, Harrisburg Patriot & Evening News, Dec. 8, 1987, available in 1987 WL 2778125. Fire chiefs also view EPCRA as valuable since "it mandates that lines of communication be opened between industry and emergency personnel." Id.

In an amicus brief filed in Steel Co., the amici argued:

Their members [the members of the organizations submitting the brief] live, breathe the air, and engage in recreational activities in areas affected by releases of toxic chemicals by companies regulated under EPCRA. These toxic chemicals are known to cause significant adverse effects on human health and the environment. Amici's members use data reported by facilities under EPCRA to learn about toxic chemical releases in their communities.


are achieved through three reporting systems, under which owners and operators must provide information about hazardous substances to local, state and federal authorities.\textsuperscript{42}

EPCRA also provides for citizen suits for violations of its provisions.\textsuperscript{43} Typically, a potential plaintiff files notice of intent to sue,

\textsuperscript{42} See EPCRA §§ 311-13, 42 U.S.C. §§ 11021-23 (providing three different reporting requirements: (1) material safety data sheets; (2) emergency and hazardous chemical inventory forms; and (3) toxic chemical release forms). The section on emergency and hazardous chemical inventory forms describes two tiers, Tier I and Tier II. See EPCRA § 312, 42 U.S.C. § 11022. Tier I requires the following information:

(i) An estimate (in ranges) of the maximum amount of hazardous chemicals in each category present at the facility at any time during the preceding calendar year.

(ii) An estimate (in ranges) of the average daily amount of hazardous chemicals in each category present at the facility during the preceding calendar year.

(iii) The general location of hazardous chemicals in each category.


This section also provides for more detailed information in certain cases where a government entity or private citizen has requested this information. See \textit{id.} § 312(e), 42 U.S.C. § 11022(e). Tier II requires the following under those circumstances:

(A) The chemical name or the common name of the chemical as provided on the material safety data sheet.

(B) An estimate (in ranges) of the maximum amount of the hazardous chemical present at the facility at any time during the preceding calendar year.

(C) An estimate (in ranges) of the average daily amount of the hazardous chemical present at the facility during the preceding calendar year.

(D) A brief description of the manner of storage of the hazardous chemical.

(E) The location at the facility of the hazardous chemical.

(F) An indication of whether the owner elects to withhold location information of a specific hazardous chemical from disclosure to the public under section 11044 of this title.

\textit{Id.} § 312(d)(2), 42 U.S.C. § 11022(d)(2). See Matthew J. Smith, Note, "Thou Shalt Not Violate!": Emergency Planning and Community Right-To-Know Act Authorizes Citizen Suits for Wholly Past Violations — Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Manufacturing Corp., 10 \textit{PACE ENVTL. L. REV.} 1051, 1060-65 (1993) (identifying reporting requirements and explaining their importance in effectuating EPCRA's purpose and policy). In applying these reporting standards, however, "the question of whether a facility is subject to EPCRA regulation differs greatly from section to section." Id. at 1063. See also Eric M. Falkenberry, The Emergency Planning and Community Right-To-Know Act: A Tool for Toxic Release Reduction in the 90's, 3 \textit{BUFF. ENVTL. L.J.} 1, 9 (1995) (explaining that EPA is permitted to set threshold quantities of hazardous substances for reporting requirements under Section 311 (Material Safety Data Sheet)).

\textsuperscript{43} See EPCRA § 326, 42 U.S.C. § 11046. Unless the EPA Administrator is already diligently pursuing a cause of action against an alleged violator:

any person may commence a civil action on his own behalf against the following:
the potential defendant files the reports necessary to "cure" the violation, and then the potential plaintiff actually files suit.\textsuperscript{44} Therefore, courts are left to decide the relatively novel issue of whether plaintiffs may sue defendants for violations which occurred before the defendant remedied the violation.

The typical sequence of events for citizen suits raises concerns regarding the timeliness of providing information as required under EPCRA.\textsuperscript{45} The legislative history of EPCRA, which is found under the Superfund amendments of 1986 where EPCRA was created, suggests that a primary reason for the Act is to protect public health and the environment, which cannot be fully achieved with-

\begin{itemize}
\item[(A)] An owner or operator of a facility for failure to do any of the following:
\begin{itemize}
\item[(i)] Submit a followup emergency notice under section 11004(c) of this title.
\item[(ii)] Submit a material safety data sheet or a list under section 11021(a) of this title.
\item[(iii)] Complete and submit an inventory form under section 11022(a) of this title containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.
\item[(iv)] Complete and submit a toxic chemical release form under section 11023(a) of this title.
\end{itemize}
\end{itemize}

\textit{Id.} § 326(a)(1), 42 U.S.C. § 11046(a)(1). A citizen may also sue the EPA Administrator or governmental entities under this statute. \textit{See id.} § 326(a)(1)(B), (C), (D), 42 U.S.C. § 11046(a)(1)(B), (C), (D).

\textsuperscript{44} For a discussion of district court cases following this sequence of events, see \textit{infra} notes 88-124 and accompanying text.


\begin{quote}
[t]he issue before the Court is whether Congress, in enacting EPCRA's citizen suit provision, intended to authorize citizens to seek penalties for violations that were cured before a citizen suit is filed, "thereby granting EPCRA citizen suit plaintiffs greater enforcement authority than that granted to other citizen suit plaintiffs under other federal environmental statutes."
\end{quote}

\textit{Id.} at 25 (citations omitted).
out timely information. In discussing these amendments, Senator Stafford noted that in applying legal rules, principles of both law and equity should guide a court's decision. Further, Senator Stafford stated that "[o]ne guideline should be to view less favorably the arguments of those who failed to participate when they knew or should have known that they had an opportunity to do so."

Later in the Senate’s discussion of the bill to amend CERCLA and create EPCRA, Senator Stafford noted that “citizens have a right to know about these [hazardous] chemicals — what they are,

46. See Whiting, 772 F. Supp. at 751 (stating that “legislative history also demonstrates Congress’ particular concern that hazardous chemical information be readily accessible at the community level”). In discussing citizen suits, one commentator noted that

[the] notion of citizen suits proved so logical that Congress included similar provisions in nearly every major piece of environmental legislation passed since 1970. The intent and effect of these provisions is to empower citizens and groups with the legal tools necessary to protect their health and environment when government enforcers cannot — or will not — press forward. Robert W. Shavelson, EPCRA, Citizen Suits and the Sixth Circuit’s Assault of the Public’s Right-To-Know, 2 ALB. L. ENVT. OUTLOOK 29, 29 (Fall 1995) (footnote omitted).

In examining the legislative history of EPCRA and its citizen suit provisions, one finds a limited amount of information. See Smith, supra note 42, at 1055. Within this sparse history, however, there exists the theme “of a desire to protect the public by providing valuable information on hazardous chemicals located in their local communities, which can be used to formulate emergency plans.” Id.

47. See 132 CONG. REC. S14,895-02 (daily ed. Oct. 3, 1986) (statement of Sen. Stafford). When Congress enacted amendments to the Superfund in 1986, however, it created two separate citizen suit provisions — one for CERCLA and one for EPCRA. See Abate, supra note 45, at 25. Focusing on language differences, one commentator explained the significance of Congress creating two provisions:

The CERCLA citizen suit provision authorizes suit against persons “alleged to be in violation” of CERCLA, while EPCRA’s citizen suit provision contains no such limitation. Thus, it is fair to assume that Congress intended EPCRA’s citizen suit provision to authorize enforcement against persons who were no longer “in violation” at the time of suit.

Id. at 26.


49. Id. While Senator Stafford’s statement referred more specifically to removals under the Superfund, the general concept should also be applied to EPCRA since it is part of the same series of amendments. Senator Stafford further commented:

This [framework] is because in choosing to abstain from the administrative process such parties, through their own volition, prolonged and complicated a process intended to protect human health and the environment. Such conscious decisions to knowingly increase the risks associated with these poisonous chemicals, motivated by economic self interest or litigation strategy should cause a court to presume that the parties enter without clean hands.

Id.
where they are, and how much of them is [sic] present." Representative Lent noted, in the House’s debate on this bill, that while the intent of the bill is to provide information to the community, the “avalanche of unnecessary paperwork” may make its implementation impossible. Representative Lent also suggested that as long as the information is organized, it is a valuable item to which the community should have access.

B. The Courts’ Application of EPCRA

1. Gwaltney: The First Examination of Citizen Suits for Wholly Past Violations

The Judiciary first addressed the issue of citizen suits based on wholly past violations in a suit filed under the Clean Water Act

50. Id. at S14,907. EPCRA is a reactionary measure that Congress created in response to chemical spills which made the public very aware of the hazardous chemicals present in their neighborhoods. See id. To prepare for emergencies, communities need to know what kinds and how much of the hazardous chemicals are present. See id. Also, according to Senator Stafford, “[j]ust as the public has a right to know about releases that might happen as a result of an accident, the public also has a right to know about releases that do happen every hour and every day that some manufacturing facilities operate.” Id.

One commentator explained the congressional reaction as follows:

The potential for another Bhopal in the United States was alarmingly real. The two disasters [Bhopal, India and Institute, West Virginia] and the toxic chemical statistics motivated Congress to pass EPCRA, a law that would “provide for the development of local emergency response plans ... [a]nd ... require that people be informed of hazardous chemicals that are present in their communities.”

Lohmann, supra note 11, at 1715 (internal citations omitted, first alteration added).


Another burdensome area of the legislation is the community right to know provision. I agree with the basic premise that a community located near a hazardous wastesite should be aware of chemicals that threaten them, and I have no quarrel with a proper role for the Federal Government in that effort.

Unfortunately, the community right to know title in this bill goes far beyond that. It would, in fact, place a tremendous burden on industry, and, in my judgment, an unmanageable burden on State and local government.

There are plenty of requirements but no funds to help State and local governments comply with the law. Consequently, there is the potential for massive noncompliance; and where companies do comply with the law, State and local agencies will be inundated with paperwork, thereby rendering the whole exercise useless.

Id. at H9568.

52. See id. at H9564 (explaining that mere piles of paper would not be useful and calling on EPA to assist in organizing information).
(CWA). In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, the Supreme Court held that CWA's provision for citizen suits does not permit suits based on wholly past violations. The Chesapeake Bay Foundation and the Natural Resources Defense Council, two not-for-profit organizations, sued Gwaltney for violating conditions of a permit allowing certain pollutant releases within effluent limitations. From 1981 through 1984, the period in question, Gwaltney installed new equipment, thus bringing its pollutant emissions within the prescribed standards set out in the permit issued pursuant to CWA.

Focusing on the plain language of CWA, the Supreme Court explained that the plain language of the statute does not authorize suits for wholly past violations. Specifically, the Court stated that CWA does not explicitly state that such suits are permissible. The Supreme Court reasoned that Congress could have used specific language to identify this intent, but instead remained silent on the issue. Further, the Supreme Court found that Congress's use of present tense verbs in CWA suggested that violations must be pres-

53. See *Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found.*, 484 U.S. 49 (1987) (discussing availability of wholly past violations under CWA). See also CWA § 505, 33 U.S.C. § 1365 (1994). This section provides:
   
   [A]ny citizen may commence a civil action on his own behalf — (1) against any person ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

   *Id.* § 505, 33 U.S.C. § 1365(a).

54. *Gwaltney*, 484 U.S. at 49-50. The district court and the Court of Appeals for the Fourth Circuit had held that such suits were permissible under section 505(a) of CWA. See *id.* at 54-56.

   The Court found that a wholly past violation involves violations of an act which occur entirely before the plaintiff files a lawsuit. See *id.* at 55. The violation, however, can be active at the time a violator receives notice of intent to sue, but may be cured by the time the plaintiff actually files the lawsuit. See *id.* at 55-56.

55. See *id.* at 53-54 (stating Gwaltney exceeded use limits for five of seven chemicals listed in permit). Gwaltney's most substantial violations involved fecal coliform, chlorine and total Kjeldahl nitrogen. See *id.* at 53.

56. See *id.* at 53-54 (explaining that Chesapeake Bay Foundation filed suit in June 1984, after violations ended).

57. See *id.* at 57-61. Interestingly, the *Gwaltney* decision "is perhaps the most extensively analyzed yet most frequently misunderstood standard in citizen suit jurisprudence under federal environmental laws. Ten years after the Supreme Court issued its decision in *Gwaltney*, federal courts continue to struggle to ascertain the scope and applicability of the *Gwaltney* standard." Abate, supra note 45, at 1.

58. See *Gwaltney*, 484 U.S. at 57-58.

59. See *id.* The Court commented that although Congress could have specifically indicated that although EPCRA was intended to be a past, as well as forward, looking statute, it did not do so. See *id.* The Court further noted that "Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication by using language that explicitly targets wholly past viola-
ently occurring in order to maintain a suit for such violations.60 Additionally, in examining the notice requirement, the Supreme Court explained that this requirement allows time for compliance, which is a goal of enforcement.61

In Gwaltney, the Supreme Court also examined the role of citizens in enforcing these environmental protection laws. The Court stated that "the common central purpose of permitting citizens to abate pollution [is to assist the government] when the government cannot or will not command compliance."62 Further, the Court recognized that "[p]ermitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit."63

60. See id. at 59 (noting that "[t]his definition [of citizen as someone being adversely affected] makes plain what the undeviating use of the present tense strongly suggests: the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past."). In reviewing the legislative history of CWA, the Court noted, "[m]embers of Congress frequently characterized the citizen suit provisions as 'abatement' provisions or as injunctive measures." Id. at 61.

In reviewing the development of environmental citizen suits, one commentator analyzed the CAA model, stating "[t]he Senate report [concerning the Clean Air Act amendments of 1970] did not discuss the disposition of the citizen suit if the alleged violator came into compliance during the notice period. However, the Committee encouraged courts to award the citizen plaintiff reasonable litigation expenses even when the defendant corrected the violation before the court issued its verdict in the case." Jeffrey A. Keithline, Note, Emergency Planning and Community Right-To-Know Citizen Suits: Should the Supreme Court Extend Gwaltney? 54 WASH. & LEE L. REV. 1227, 1236-37 (1997).

61. See Gwaltney, 484 U.S. at 60. The Supreme Court also explained that permitting citizen suits for wholly past violations would render the notice provision "gratuitous" and that even if the alleged violator came into compliance after notification, it would still be subject to litigation. See id. For a discussion of the Seventh Circuit's alternative explanations for the notice provision of EPCRA, see infra notes 77-87 and accompanying text.

62. Id. at 49. 62. James Hecker, an environmental enforcement attorney, stated, "[t]he view that Congress has given citizens a hybrid cause of action to vindicate a mixture of public and private rights. Citizens assert their own rights to be free of harm from pollutant releases, but their enforcement powers are similar to those of the government." James M. Hecker, The Citizen's Role in Environmental Enforcement: Private Attorney General, Private Citizen, or Both?, 8 NAT. RESOURCES & ENV'T. 31, 31 n.4 (1994). He further recognized that "[c]itizen suits allow persons outside of government to prosecute violators for the same type of civil offenses under environmental laws as the government, and thereby create a prosecutorial alternative to the established order." Id. at 62. For an explanation of the policy arguments in favor of citizen suits for wholly past violations of EPCRA, see infra notes 137-62 and accompanying text.

63. Gwaltney, 484 U.S. at 60 (emphasis added). A critical review of citizen suits reveals that while citizen suits have existed for many years, there has recently been an explosion in the number of such suits filed. See Ross Macfarlane & Lori Terry, Citizen Suits: Impacts on Permitting and Agency Enforcement, 11 NAT. RESOURCES
In concluding its opinion, the Court briefly discussed standing, explaining that a plaintiff must make allegations in good faith in order to meet the threshold of standing. The Supreme Court held that a plaintiff may maintain standing by alleging continuing violations of the statute where repetition of violations is likely. Otherwise, mootness prevents a plaintiff from maintaining standing. The Court did not analyze the redressability requirement of standing in this case.

2. The Sixth and Seventh Circuit Split

Thus far, only two circuits have considered the issue of citizen suits based on wholly past violations under EPCRA. Both the Sixth and the Seventh Circuits analyzed a situation where a not-for-profit organization sued a company EPCRA regulated for violations of the reporting requirements under the statute. The Sixth Circuit concluded that citizen suits for wholly past violations are not allowed under EPCRA, whereas the Seventh Circuit concluded the

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& Env't. 20, 20 n.4 (1997). The following observation may explain the explosion in the number of suits:

In previous decades, most suits were brought for one of three reasons: to set favorable precedents, to target highly visible sources, or to respond to local community concerns. Today, these suits are being prosecuted whenever there is evidence of a violation. Citizen attorneys are using law students and paralegals to cull through agency files and are filing notices without any prior knowledge of the facility.

Id. at 20.

64. See Gwaltney, 484 U.S. at 65-66 (explaining that defendant has opportunity to show allegations are untrue and that once plaintiff offers evidence concerning allegations, case goes to trial on its merit). The Court further commented that "the Constitution does not require that the plaintiff offer this proof as a threshold matter in order to invoke the District Court's jurisdiction." Id. at 66.

65. See id. at 64-67 (holding that good faith allegations of continuing violations may be sufficient to maintain cause of action and remanding case to determine whether good faith allegation existed).

66. See id. (citations omitted).

67. See id. at 65-67. See generally June, supra note 11, at 767-93 (discussing development of, and possible limitations on, standing under citizen suits).

68. See Citizens for a Better Env't v. Steel Co., 90 F.3d 1257 (7th Cir. 1996) cert. granted, 117 S. Ct. 1079 (1997); Atlantic States Legal Found., Inc. v. United Musical Instruments, 61 F.3d 473 (6th Cir. 1995) (both addressing citizen suits brought under EPCRA based on wholly past violations).

69. See Citizens, 90 F.3d at 1257; United Musical, 61 F.3d at 473-74. On February 24, 1997, the Supreme Court granted certiorari in the case of Steel Co. See Emergency Planning: Supreme Court Agrees to Review Legality of EPCRA Citizen Suits for Past Violations, 27 Env't Rep. (BNA) 2177 (Feb. 28, 1997) (citing Steel Co. v. Citizens for a Better Env't, 117 S. Ct. 1079 (1997)). Oral arguments were heard on October 6, 1997 as part of the opening session of the Supreme Court's Fall Term. See Greenburg, supra note 8, at 8N.
opposite, finding that citizen suits for wholly past violations are permissible under the Act.\textsuperscript{70}

Both circuits reviewed the language of EPCRA in reaching their conclusions.\textsuperscript{71} In Atlantic States Legal Foundation, Inc., v. United Musical Instruments,\textsuperscript{72} the Sixth Circuit stated that "[t]his language suggests that only the failure to complete and submit the required forms can provide the basis for a citizen suit . . . . The form is completed and filed even when it is not timely filed."\textsuperscript{73} The Sixth Circuit also found the language differences between CWA and EPCRA to be unpersuasive and "hypertechnical."\textsuperscript{74} In relying on

\begin{footnotes}
\textsuperscript{70} See Citizens, 90 F.3d at 1245; United Musical, 61 F.3d at 478. The Seventh Circuit stated, "[t]his scenario [of not permitting suits for wholly past violations] is impossible to reconcile with the clearly expressed intent of Congress, or with the very existence of the citizen enforcement provision." Citizens, 90 F.3d at 1245. The Sixth Circuit, however, explained that "the plain language and structure of EPCRA lead us to conclude that citizen plaintiffs may not bring actions that seek civil penalties for purely historical violations." United Musical, 61 F.3d at 478.

Additionally, Steel Company, in its brief, asserted that "[n]othing is gained by such a suit [for wholly past violations] (with the exception of the citizen group possibly recovering attorneys' fees). A party's resources will be consumed defending an unnecessary lawsuit — resources that could be used to invest in new plants and equipment, creating jobs and benefiting [sic] the community." Petitioner's Brief at 47-48, Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (No. 96-643).

\textsuperscript{71} See Citizens, 90 F.3d at 1240-44; United Musical, 61 F.3d at 474-77 (both analyzing language of EPCRA). See generally Lohmann, supra note 11, at 1724-35 (examining language use in EPCRA in critically analyzing split in holdings between Sixth and Seventh Circuits); Abate, supra note 45, at 8-27 (reviewing Gwaltney decision and its applicability to other environmental statutes, and analyzing language differences between CWA and other environmental statutes).

\textsuperscript{72} 61 F.3d 473 (6th Cir. 1995).

\textsuperscript{73} Id. at 475. In comparing the "alleged to be in violation of" language of CWA and the "failure to" language of EPCRA, the Sixth Circuit asserted, "[w]e reject this rather hypertechnical parsing of the language of the statutes in favor of the most natural reading of EPCRA, which weighs against allowing citizen suits for purely historical violations." Id. at 477. One commentator noted that prior to the Sixth Circuit's decision, courts which had reviewed the Gwaltney decision in EPCRA citizen suits rejected its holding. See Shavelson, supra note 46, at 36. The commentator stated, "[n]onetheless, the Sixth Circuit chose to ignore relevant precedent, congressional intent, and EPCRA's plain language in the course of striking a critical blow to the public's right-to-know about chemical hazards." Id.

\textsuperscript{74} United Musical, 61 F.3d at 476-77. See also Böer, supra note 7, at 1624-31 (reviewing possible shortcomings in Sixth Circuit's analysis in United Musical). This commentator stated:

In [concluding that the language differences between CWA and EPCRA were insignificant], the Sixth Circuit contradicted the first half of its argument, in which it examined the language of the citizen suit provision closely in order to determine whether EPCRA allowed suits for past violations. It seems that the Sixth Circuit agreed with the result in Gwaltney and wanted a similar result in United Musical Instruments. Thus, it simply quoted the argument and glossed over the holes.

Id. at 1624 (footnotes omitted).
\end{footnotes}
Gwaltney, the Sixth Circuit commented that Congress could have expressly stated its intent for timeliness. Congress chose not to do this and, instead, limited the power of citizens to bring suits under EPCRA as compared to the broad power given to EPA.

In Citizens for a Better Environment v. Steel Co., the Seventh Circuit explained that it did not find the reasoning of the Sixth Circuit persuasive because that court appeared to overlook some key distinctions between CWA and EPCRA. The Seventh Circuit found the language difference between the two statutes significant, asserting, "[t]he language of EPCRA contains no temporal limitation; 'failure to do' something can indicate a failure past or present." In addition, the Seventh Circuit noted that EPCRA does not perversely use present tense language while CWA does. The use of the word "under" implies that reporting is to be done in accordance with.

75. See United Musical, 61 F.3d at 475-76.
76. See id. at 475. Expanding upon the absence of explicit congressional intent, Steel Company noted in its brief that:

[i]n the absence of a contrary congressional intent, Congress should not be presumed to have made a substantial change from its customary citizen suit model. A statute conferring jurisdiction on the federal courts should also be strictly construed, and any doubts resolved against jurisdiction. Here there are serious doubts that Congress intended citizens to sue for past EPCRA violations, and all citizen plaintiffs can highlight is a slight difference in language and attempt to stretch that difference into federal jurisdiction.

Petitioner's Brief at 12, Steel Co. (No. 96-643).
77. 90 F.3d 1237 (7th Cir. 1996).
78. See id. at 1243. One commentator noted that "[t]he absence of specific timing requirements within the citizen-suit provision has perplexed courts" and determining whether these timing requirements exist greatly influences the possibility of bringing citizen suits for wholly past violations. Lohmann, supra note 11, at 1710-11. This commentator further stated, "if companies need only complete the required forms prior to the filing of a suit, the citizen-suit provision is meaningless and gives no incentive for the Davids [referring to the story of David and Goliath] of the environmental arena to initiate enforcement proceedings." Id. at 1711.
79. Citizens, 90 F.3d at 1243. The Seventh Circuit explained that the plain language reading of different language in different statutes requires the import of different meaning, recognizing that the selection of different words by Congress is significant to the overall meaning and interpretation of the statute. See id. at 1243-44. Linguistical interpretations are also important in determining standing, which is a constitutional requirement, even though "a plaintiff's satisfaction of the constitutional requirement often depends more particularly upon interpretation of the statutory framework in which the complaint arises." June, supra note 11, at 771.
80. See Citizens, 90 F.3d at 1243-44. The Seventh Circuit stated:

The plain language of the EPCRA citizen enforcement provision does not point clearly to the present tense as its counterpart does in the Clean Water Act. In fact, it does the opposite. The language of EPCRA contains no temporal limitation; "failure to do" something can indicate a failure past or present.

Id. at 1243 (emphasis added).
with the requirements of the section of which it is "under." The Seventh Circuit stated that "[w]e read the provision as authorizing citizen suits not only for failure to complete and submit forms, but for failure to complete and submit forms in accordance with the requirements set forth in the referenced sections."

While interpretations vary, the Seventh Circuit presented strong policy arguments in *Citizens* that support its interpretation of the relevant statutory language. The Seventh Circuit explained that if citizens are not allowed to sue for past violations, their subsequent inability to recover the costs of their efforts, including investigation and litigation, would lower their likelihood to be proactive.

Additionally, in its brief to the Supreme Court, Citizens noted that Congress did not envision use of only government enforcement of EPCRA. *See Respondent's Brief at 21-22, Steel Co. (No. 96-643).* Citizens stated that Congress: envisioned an important role for citizen suits. As we have explained, such a role is consistent with *Gwaltney.* But Congress could not have intended the carefully-designed citizen suit provision of EPCRA to be set at naught by firms that take the simple expedient of filing once their violations of EPCRA are discovered.

*Id.*

81. *Citizens,* 90 F.3d at 1243 (explaining that use of "under" provides reference to statute's requirements without having to list them again).

82. *Id.* The Seventh Circuit explicitly stated, "[t]hese [timeliness requirements] are not guidelines or suggestions; they are essential elements of the provisions citizens have authority to enforce." *Id.* (footnote omitted). To ignore these timeliness requirements "would render gratuitous the compliance dates for initial submissions" as EPCRA sets forth. *Id.* (citing *Whiting,* 772 F. Supp. at 750). *See generally,* Keithline, *supra* note 60, at 1254-58 (emphasizing that since EPCRA is informational statute, receiving information in timely manner is key aspect of fully implementing purpose of EPCRA).

83. *See Citizens,* 90 F.3d at 1244. In concluding, the Seventh Circuit commented, "[p]ut simply, if citizens can't sue, they can't recover the costs of their efforts." *Id.* According to EPCRA, "[t]he court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate." EPCRA § 326, 42 U.S.C. § 11046(f). *See Armstrong et al., Courts Split on Citizen Suits for Past Violations of EPCRA,* KANSAS-IOWA ENVTL. COMPLAINT UPDATE, Oct., 1996 (explaining Seventh Circuit's support of EPCRA's policy basis as "if alleged violators could avoid a lawsuit simply by submitting late forms, citizens could not use the lawsuit to recover their legal fees to compensate for the time and effort put into discovering the violations. This would be a disincentive to citizen suits and therefore contrary to one of the purposes of EPCRA.").

In reviewing the historical development of citizen suits, one commentator explained that because CAA serves as the model for citizen suit provisions, its legislative history is relevant to interpretation of EPCRA. *See Keithline, supra* note 60, at 1232-41 (providing chronicle of citizen suits under environmental statutes). In considering amendments to CAA, the Senate understood that:

[c]itizen enforcement concerned industry executives because the executives thought it would lead to frivolous and harassing lawsuits. Although urged by industry groups to eliminate the citizen suit provision, the Senate Committee did not yield to this pressure. The Senate Committee was aware of concern in the courts that citizen enforcement of legislation
In debates prior to the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA), of which EPCRA is a part, Representative Dingell stated that failure to sign this bill would be like "playing chicken with the health of the American public. Signing this bill, however, will be an opportunity to improve the otherwise dismal environmental record the administration has compiled." Additionally, the Citizens court justified the sixty-day notice requirement by explaining that each day of a violation is considered a separate violation subject to penalty. Therefore, by giving notice, the alleged violator may bring itself into compliance with EPCRA and thereby reduce the amount of penalty fees assessed against it.

would overload the docket, but it encouraged courts to endorse citizen participation in protection of the environment.

Id. at 1235.


86. See Citizens, 90 F.3d at 1244. According to EPCRA, civil and administrative penalties are as follows:

(1) Any person . . . who violates any requirement of section 11022 or 11023 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation.

(2) Any person . . . who violates any requirement of section 11021 or 11043(b) of this title, and any person who fails to furnish to the Administrator information required under section 11042(a) (2) of this title shall be liable to the United States for a civil penalty in an amount not to exceed $10,000 for each such violation.

(3) Each day a violation described in paragraph (1) or (2) continues shall, for purposes of this subsection, constitute a separate violation.

EPCRA § 325 (c), 42 U.S.C. § 11045(c).

87. See Citizens, 90 F.3d at 1244. In reviewing the usefulness of penalties, even if such penalties are paid to the U.S. Treasury instead of the plaintiff, environmentalists believe these penalties still have a deterrent effect. See Amicus Brief of the National Resources Defense Council, Inc., at 18-19, Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (No. 96-643). The Amici noted: "[i]f citizens cannot seek civil penalties for past violations, the deterrent effect of citizen suits and penalties for violations of EPCRA in their communities will be eviscerated. As a result, citizens will be exposed to the risk of increased pollution." Id. at 18. In reviewing legislative history, the Amici concluded, "Congress has [ ] decided that civil penalties are causally related to deterrence. With civil penalties in citizen suits, violators are more likely to comply with the law." Id. at 22.
3. Lower Court Precedent: A Unanimous "Yes" to Citizen Suits for Wholly Past Violations under EPCRA

Several district courts also have considered the issue of whether citizens may sue for wholly past violations of EPCRA. In any given case, the series of events unfolds as follows: the defendant violates EPCRA; the plaintiff gives notice of intent to sue; the defendant files the documents or performs any necessary action for compliance; and the plaintiff files suit. In reviewing the purpose and the language of EPCRA, all of the district courts addressing this issue determined that the Act permits citizen suits for wholly past violations.

The District Court for the Western District of New York asserted, "[t]he plain language of EPCRA's reporting, enforcement and civil penalty provisions, when logically viewed together, compel a conclusion that EPCRA confers federal jurisdiction over citizen lawsuits for past violations." In addition, the Idaho District Court commented, "EPCRA's citizen suit provision, . . . by its terms does not restrict citizen suits to cases alleging ongoing violations. Rather, it authorizes such suits for 'failure to do' certain things, specifically, failure to '[c]omplete and submit' the required forms." 89


89. See Don't Waste Ariz., 950 F. Supp. at 972-74; Computrol, 952 F. Supp. at 691; Delaware Valley, 813 F. Supp. at 1135-36; Williams, 784 F. Supp. at 765-67; Buffalo Envelope Co., 1991 WL 183772, at *3; Whiting, 772 F. Supp. at 746, 748-49 (all demonstrating that essentially, defendant is in compliance with EPCRA by time suit is formally filed, thus eliminating any active violation).

90. See Don't Waste Ariz., 950 F. Supp. at 981; Computrol, 952 F. Supp. at 692-93; Delaware Valley, 813 F. Supp. at 1141; Williams, 784 F. Supp. at 767-68; Buffalo Envelope Co., 1991 WL 183772, at *2-*8; Whiting, 772 F. Supp. at 749-53 (all concluding that policy and purpose of EPCRA is furthered by permitting suits for wholly past violations).

91. Buffalo Envelope Co., 1991 WL 183772, at *4; Whiting, 772 F. Supp. at 750 (emphasis added) (quotation used in both case opinions). The word "compel" is typically defined as a certain amount of force or a mandate to act in a specified manner. See WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 370 (2d ed. 1983) (defining compel as "to drive or urge with force, or irresistibly; to oblige; to necessitate, either by physical or moral force").

92. Computrol, 952 F. Supp. at 692 (quoting Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987)). Highlighting failure to act in a timely manner as legitimate grounds for a citizen suit, the District Court for the Northern District of California explained that "[t]he statute does not expressly
Agreeing with the other district courts, the Idaho District Court concluded that, "[u]nder the plain language of the statute, the Court believes it is at least 'reasonably clear' that EPCRA authorizes citizen suits for wholly past, not just ongoing, violations of the statute." 93

These courts also compared the language of CWA and EPCRA, recognizing that the use of different language implores the court to import different meanings. The District Court for the Eastern District of Pennsylvania held that "[t]he statutory language of the EPCRA and the Clean Water Act differ, . . . [therefore] [c]itizen suits can be brought for past failures to comply with the EPCRA even if the defendant is in compliance with the Act at the time the complaint is filed [whereas CWA does not permit this type of suit]." 94

In Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Manu-

require a continuing violation at the time of filing suit, but rather authorizes a suit against any person who failed to submit an MSDS [Material Safety Data Sheets] by the applicable deadline." Williams, 784 F. Supp. at 768.

In Don't Waste Arizona, the court asserted that "the most natural reading of the EPCRA citizen suit provision is to require that reports be submitted in a timely manner. Failure to submit reports in a timely manner, then, would be a basis for a suit alleging failure to comply with the EPCRA's reporting requirements." 950 F. Supp. at 979. In concluding that such suits are permissible, the Arizona District Court referred to the holding of the Seventh Circuit in Citizens and stated, "[a]nalysis of the plain language of the statute and the policies driving the enactment of the EPCRA compels the conclusion that the Citizens court has embraced the better reasoned approach to statutory construction." Id. at 976.

In discussing federal environmental legislation, one commentator noted that "the Seventh Circuit in Steel Company offers a thorough and accurate analysis of how the EPCRA citizen suit provision is analytically distinct from the Clean Water Act's provision and how EPCRA's citizen suit provision must therefore be interpreted to authorize suits for wholly past violations of the Act." Abate, supra note 45, at 27. Further, without investigations and suits to force compliance, "the people of communities whom the statute is designed to protect and inform, and the public agencies that are charged with providing the information, would be deprived of the information indefinitely." Id. at 26-27.

For a discussion of the Seventh Circuit's analysis in Citizens, see supra notes 77-

87 and accompanying text.


94. Delaware Valley, 813 F. Supp. at 1141. In this suit between non-profit groups and a manufacturing plant for violations of EPCRA, the District Court for the Eastern District of Pennsylvania addressed constitutional claims concerning separation of powers and standing. See id. at 1132. The court held that citizen suits for wholly past violations are constitutional as "citizen suits are not an unlawful delegation of executive power, since Congress in enacting the EPCRA did not grant to a person or persons under its control executive power." Id. at 1138. Also, the court identified types of injuries that are redressable, indicating that the plaintiffs had fulfilled the requirements for standing. See id. at 1139-41.

In exploring standing under environmental statutes, one commentator asserted:

[T]he validity of an aesthetic injury is assumed under environmental statutes, and economic injuries may carry a jurisprudential presumption of invalidity if the interests asserted are not properly aligned with the inter-

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facturing, the District Court of the Western District of New York clarified that the verb tenses used in the two Acts indicate significant differences, with CWA using mainly present tense verbs and EPCRA lacking this "pervasive use of present tense." In Don't Waste Arizona, Inc. v. McLane Foods, Inc., the Arizona District Court accepted the plaintiff's argument that the use of "under" in the EPCRA provision authorizing citizen suits for failure to comply with reporting requirements means "in accordance with," thus recognizing a timeliness element. Additionally, the _____ held that state-

ests of the protected resource. If this standard is maintained, the threshold inquiry of standing may soon resemble a precipice.

June, supra note 11, at 787 (citing Pacific Northwest Generating Coop v. Brown, 822 F. Supp. 1479, 1501-06 (D. Or. 1993), appeal docketed, No. 93-35531 (9th Cir. May 25, 1993)).

95. 772 F. Supp. 745 (W.D.N.Y. 1991). In Whiting, the plaintiff was an environmental activist group known for pursuing environmental enforcement suits. See Wes Hills, Lawsuit Seeks County Fine: Group Says Lead Dumped, DAYTON DAILY NEWS, Apr. 19, 1995, at 2B. One writer articulated, "[e]nvironmentals love what he [Richard Smith, an environmental lawyer for Atlantic States Legal Foundation] came up with, but some companies are crying blackmail at the version of environmental policing Smith is practicing on behalf of an East Coast environmental foundation." Leslie Holdcroft, In Defense of the Environment: Young Attorney Sues Firms Violating Pollution Standards, but Critics Call It Blackmail, NEWS TRIB., (Tacoma), Apr. 8, 1994, at A1. In Whiting, this organization brought suit against an industrial facility for failure to submit information in a timely manner according to the requirements of EPCRA. See Whiting, 772 F. Supp. at 745. By the time the plaintiff had filed suit, the defendant had come into compliance with EPCRA and moved to dismiss the suit. See id. at 746.

96. Id. at 752-53. The district court emphasized that EPCRA focuses on the "failure to" act whereas CWA focuses on owners and operators who are "alleged to be in violation of" the act. Id. at 752. The district court commented, "unlike § 505 of the Clean Water Act, EPCRA § 326 does not contain 'pervasive use of the present tense... which might indicate [EPCRA's] restricted applicability to continuing or intermittent violations." Id. at 753. In another case, the district court explained that "[t]he natural reading of the EPCRA provision at least would seem to include past acts of noncompliance, while a natural reading of the Clean Water Act provision, as the Supreme Court has held, indicates that the statute contemplates only prospective relief." Atlantic States Legal Found., Inc. v. Buffalo Envelope Co., No. CIV-90-1110S, 1991 WL 183772, at *7 (W.D.N.Y. Sept. 10, 1991).

Reviewing the floodgate argument, petitioner in Steel Co. charged that if suits for wholly past violations are permitted,

the federal courts will experience a deluge of EPCRA citizen suits, contrary to Congress's concern that the federal courts not be flooded with unnecessary citizen actions. Not only will citizen groups be able to sue if a company, like Petitioner, achieves compliance within the notice period, but a citizen group will also be able to search old government records to determine which companies filed late EPCRA reports and then sue.


98. Id. at 978. The court reiterated the Citizens Court finding that:

[i]he plain language of the EPCRA citizen enforcement provision does not point clearly to the present tense as its counterpart does in the Clean
utes which are remedial in nature, such as EPCRA, are to be construed broadly.\textsuperscript{99} Allowing citizen suits for wholly past violations of EPCRA, therefore, would be consistent with a broad construction.\textsuperscript{100}

The district courts also surveyed other environmental legislation in determining that citizen suits for wholly past violations of EPCRA are permissible.\textsuperscript{101} Specifically, in reviewing the 1990 amendment to the Clean Air Act (CAA), the district courts explained that Congress had explicitly stated that citizen suits for wholly past violations of CAA are permissible, provided that the first violation was not an isolated occurrence.\textsuperscript{102} Since Congress did not amend EPCRA, the Arizona District Court opined that "Congress did not need to amend the language of the EPCRA's citizen suit provision because that language already authorized citizen suits for wholly past violations."\textsuperscript{103} Accordingly, CWA and EPCRA can be

Water Act. In fact, it does the opposite. The language of EPCRA contains no temporal limitation; "failure to do" something can indicate a failure past or present.

\textit{Id.} at 975 (citing \textit{Citizens}, 90 F. 3d at 1243) (emphasis added). The district court recognized that noncompliance is generally not cured by the time that many alleged violators receive notice of intent to sue. \textit{See id.} at 978. Therefore, the court reasoned, "[t]he venue provision . . . uses the past tense because it contemplates that the alleged violator may have come into compliance between the time the plaintiff files a notice of intent to sue and the time the plaintiff actually files suit." \textit{Id.}

99. \textit{See id.} at 977.

100. \textit{See id.} (citing Wilshire Westwood Assocs. v. Atlantic Richfield Co., 881 F.2d 801, 803 (9th Cir. 1989)). Further, the Arizona District Court's analysis of statutory construction began with the recognition of two key rules of statutory interpretation: (1) the court must start with the statute's plain language; and (2) if the language is "plain and unambiguous on its face, 'the sole function of the courts is to enforce it according to its terms.'" \textit{Id.} at 976-77 (citing Caminetti v. United States, 242 U.S. 470, 485 (1916); United States v. Behnezhad, 907 F.2d 896, 898 (9th Cir. 1990)).


103. \textit{Id.}
distinguished, logically permitting the conclusion that although EPCRA does not require active violations in order to maintain a citizen suit, CWA does require such violations.104

Several district courts also addressed the issue of standing. The elements of standing, as the Supreme Court established in Lujan v. Defenders of Wildlife and Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., are: "(1) an injury in fact; (2) a causal connection between the injury and the defendant's conduct or omissions; and (3) a likelihood that the injury will be redressed by a favorable decision."105

Lack of timely filing causes first a loss of information, then an inability to conduct research and develop appropriate guidelines and, finally, an injury.106 This injury fulfills the injury in fact requirement of the first prong. One district court expounded on the requisite type of injury by asserting that "'[a]llegations of injury to an organization's ability to disseminate information may be deemed sufficiently particular for standing purposes where that information is essential to the injured organization's activities, and where the lack of the information will render those activities infeasible.'"107 A causal connection, in fulfillment of the second prong, also exists because the alleged violator's failure to timely submit information EPCRA requires can be directly traced to the citizen's lack of information.108

Redressability, the prong which the Supreme Court found to be problematic, can be fulfilled by the plaintiff either obtaining a declaratory judgment or injunctive relief.109 Additionally, the court

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104. See generally Böer, supra note 7, at 1622-26 (examining statutory language of CWA and EPCRA). This author explained that "there appears to be a mix of present, past, and ambiguous tenses within the citizen suit provision of EPCRA. Thus, the pervasive use of the present tense relied on so heavily in Gwaltney does not exist in EPCRA." Id. at 1626.


106. See Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132, 1139-40 (E.D. Pa. 1993) (articulating that "[p]ersons experiencing such a loss of information may be found to have suffered a concrete and particularized invasion of their legally-protected interests"); see also Don't Waste Ariz., 950 F. Supp. at 980 (explaining that plaintiff's injury arose out of his inability to complete his "investigative and reporting" projects due to defendant's lack of timely filing of reports EPCRA required).

107. Delaware Valley, 813 F. Supp. at 1140 (quoting Competitive Enter. Inst. v. NHTSA, 901 F.2d 107, 122 (D.C. Cir. 1990)).

108. See Don't Waste Ariz., 950 F. Supp. at 980; Delaware Valley, 813 F. Supp. at 1140 (both tracing causal link between lack of information and injury back to company which failed to timely report statutorily-required information).

may order the defendant to pay a civil penalty and/or the plaintiffs’ “costs of litigation” in order to deter future violations. The court may further order the defendant to refrain from any future violations of EPCRA. If successful, the plaintiffs’ injuries may be redressed by either declaratory judgment, fining the defendant or enjoining it from committing future violations. These remedies coincide with environmental groups’ goals of improving the overall environment and providing the public with information and education. Although the Supreme Court may believe otherwise, according to these district courts, the standing requirement can and has been met when plaintiffs sue for wholly past violations under EPCRA’s citizen suit provision.

Additionally, the district courts have relied on the notice provision of EPCRA in determining that the Act permits citizens to sue for wholly past violations. In reviewing CWA, the Supreme Court

110. See id.
111. See id.
112. Id. (citations omitted) (emphasis added).
113. See Don’t Waste Ariz., 950 F. Supp. at 980-81 (identifying both conditions for individual and representational standing as well as manner in which plaintiff has fulfilled requirements in both domains). The defendant in Don’t Waste Arizona also challenged whether the Arizona District Court had jurisdiction over this matter and whether the plaintiff had standing to maintain an action against the defendant. See id. at 975. In concluding that it had jurisdiction because a citizen suit for wholly past violations is permissible, the district court gave effect to the remedial purposes of the statute. See id. at 977. The court found that EPCRA “grants the district court the power to enforce a requirement and to impose civil penalties. . . . It does not limit the district court to exercising its power only when it will exercise its full range of power.” Id. at 977. Further, the court explained that since a member of Don’t Waste Arizona attempted to complete investigative and reporting projects, but was unable to do so because of McLane Foods’ failure to fulfill its reporting requirements, the organization had standing under the premise of representational standing. See id. at 980.

In reviewing representational standing, one commentator recognized the use of alignment of interests and stated that “because the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others, . . . [t]he only practical judicial policy . . . often is to permit the association . . . in a single action to vindicate the interests of all.” June, supra note 11, at 790 (first omission added) (citations omitted).

114. See Idaho Sporting Congress v. Computrol, Inc., 952 F. Supp. 690, 694 (D. Idaho 1996); Delaware Valley, 813 F. Supp. at 1141; Atlantic States Legal Found., Inc. v. Buffalo Envelope Co., No. CIV-90-1110S, 1991 WL 183772, at *7 (W.D.N.Y. Sept. 10, 1991); Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg., 772 F. Supp. 745, 752 (W.D.N.Y. 1991) (all examining notice provision as part of analysis in determining suits for wholly past violations are permissible); see also Lohmann, supra note 11, at 1710-13 (examining notice provision of EPCRA and explaining uses for provision other than allowing defendant time to come into compliance). By providing notice, the defendant can both limit its noncompliance time and potential fines as well as clarify any mistaken information. See Lohmann, supra note 11, at 1711.
explained that the notice requirement in CWA is designed “to give the alleged violator an opportunity to bring itself into complete compliance with the Act and thus make a citizen suit unneces-
sary.”\footnote{115} A comparison of EPCRA, CWA and the amended version of CAA, however, weakens this argument. Congress amended CAA to permit citizens to sue for wholly past violations, but left the notice requirement intact.\footnote{116} This congressional action rebuts the Supreme Court’s position in \textit{Gwaltney}, in which it held that Congress would not include a notice provision within the same statute designed to permit citizen suits for wholly past violations.\footnote{117} Further, the notice requirement allows the parties to negotiate a settlement rather than proceed with litigation.\footnote{118}

The purpose of EPCRA is to inform citizens about toxic chemicals in their communities so that they can be prepared to respond


In \textit{Whiting}, the Amici explained in their brief that “the sixty days notice provi-
sions served three purposes: (1) to give the alleged violator notice and enable him to verify or contest the citizen’s allegations; (2) encourage a violator to mitigate its violations by taking corrective actions; and (3) enable parties to discuss the alleged violation and negotiate a settlement.” Smith, \textit{supra} note 42, at 1069 (citing Memorandum of Amici Curiae at 10-11, \textit{Whiting Roll-Up Door Mfg. Corp.} (No. CIV-90-11095)).

\footnote{116} \textit{See Citizens}, 90 F.3d at 1244 (noting that “[i]n 1990 Congress amended the Clean Air Act to permit citizen enforcement actions for past violations, yet left the notice provision intact”).

\footnote{117} \textit{See Buffalo Envelope}, 1991 WL 183772, at *7; \textit{Whiting}, 772 F. Supp. at 753 (court provided same reasoning in both cases in examining notice provision). The District Court for the Western District of New York stated:

Therefore, the fact that Congress amended the Clean Air Act citizen suit provision to allow suits for past violations while simultaneously leaving the Clean Air Act’s notice provision unchanged undercuts the importance of the Supreme Court’s discussion in \textit{Gwaltney} that Congress would not have placed such a notice provision in a statute where it also intended [to] authorize citizen suits for past violations.

\textit{Buffalo Envelope}, 1991 WL 183772, at *7; \textit{Whiting}, 772 F. Supp. at 753; \textit{see also Delaware Valley}, 813 F. Supp. at 1141 (explaining that statute can have internal consistency with both notice provision and provision for suits for wholly past violations); CAA § 304, 42 U.S.C. § 7604 (explaining in section entitled “amendments” that Congress changed Act to allow suits for wholly past violations, but did not alter notice provision).

\footnote{118} \textit{See Computrol}, 952 F. Supp. at 694-95. A settlement is not only a time saving device, but more cost effective than litigation. \textit{See} Margaret C. Liu, \textit{From Information to Action: Right-To-Know Laws in the European Community}, 1991-92 U. Chi. LEGAL F. 335, 345-46 (1992) (explaining that as means of promoting reduction in use of hazardous waste, EPA “has entered into consent decrees with companies, reducing fines where firms agree to implement new technologies or to replace chemicals currently in use with less toxic substances”).
to any potential emergency. An essential first step in compiling this information is having owners and operators report such information in a timely manner. Without accurate and timely information, community planning boards are greatly hampered in their efforts to plan adequate response measures. In Whiting, the court commented "[i]f owners or operators fail to comply with the reporting requirements, including the mandatory compliance dates, the development and success of emergency response plans would be seriously, if not critically, undercut, and the entire thrust of EPCRA could be defeated." The district court in Don't Waste Arizona concluded that “[i]f the citizen suit is barred by the alleged violator’s coming into compliance, then a facility has every incentive to wait and see if it is caught before spending the money to


[t]he Senate amendment and the House amendment both establish programs to provide the public with important information on the hazardous chemicals in their communities, and to establish emergency planning and notification requirements which would protect the public in the event of a release of hazardous chemicals. . . . The conference substitute adopts the House approach with respect to establishing the programs as a free-standing provision of law and incorporates substantive provisions from both House and Senate amendments.

1986 U.S.C.C.A.N. 3374, 3374. In response to the disasters in Bhopal, India, and Institute, West Virginia, many pieces of legislation were proposed, but it was only this community-right-to-know amendment to the Superfund reauthorization bill that made enough headway to become a law. See Newsfront Bhopal, supra note 1, at 14.

120. See Whiting, 772 F. Supp. at 751. One commentator suggested that the legislative history of EPCRA emphasizes the importance of providing information to the public as well as recognized that as information is collected, it should be disseminated to the public. See Smith, supra note 42, at 1058 (analyzing necessity of public awareness of potential environmental problems).

121. See Whiting, 772 F. Supp. at 751. “Either the failure to report or late reporting can cause incomplete plans to be formulated, which endanger the public and emergency workers.” Smith, supra note 42, at 1071. Also, by not recognizing the timeliness requirements, the compliance dates become meaningless and then “the public [has] no recourse against violators who endanger the safety of the community.” Id. (citing Whiting, 772 F. Supp. at 752).

As previously stated, communities cannot plan adequately for emergencies if they do not have accurate and timely information. Such lack of planning in turn defeats the statutory purpose of EPCRA. For a discussion of the purpose of EPCRA, see infra notes 137-62 and accompanying text.

122. Whiting, 772 F. Supp. at 751. A consent decree was part of the settlement in Whiting. See Shavelson, supra note 46, at 54. In reviewing the difference in penalty amounts and the cost of a pollution reduction program, the District Court for the Western District of New York concluded that together, these two items created a fair remedy. See id. Further, “[i]n so ruling, the court strongly suggested that citizen suits promoting pollution prevention — and other supplemental environmental projects (SEP) which go beyond EPCRA’s statutory requirements — can play an important role in furthering EPCRA’s purposes.” Id.
generate and submit the required reports."\textsuperscript{123} Given EPA's limited budget, citizen groups need to supplement the work of EPA by bringing suits on their own in order to encourage compliance within the regulated community.\textsuperscript{124}

IV. UNDERSTANDING AND INTERPRETING EPCRA

A. Language Is the Initial Indicator of the Purpose of a Law

Language is the first source in understanding and interpreting a statute.\textsuperscript{125} The key difference between EPCRA and CWA is in their sections providing for citizen suits: while CWA applies to operators/owners who are "alleged to be in violation of [the Act]," EPCRA applies to operators/owners who "fail[ed] to do [the mandatory reporting]."\textsuperscript{126} To be in violation of an act, one must be currently engaging in a proscribed activity, whereas "failure to perform" a certain act can occur at any time, whether past, present or future.\textsuperscript{127} The notice provision of EPCRA uses the present tense

\textsuperscript{123} Don't Waste Ariz., Inc., v. McLane Foods, Inc., 950 F. Supp. 972, 979 (D. Ariz. 1997) (citing Citizens for a Better Env't v. Steel Co., 90 F.3d 1237, 1244 (7th Cir. 1996)). The court continued, "EPA's resources are severely limited, and the purpose of allowing the citizen suit is to permit the citizen to take enforcement action where the EPA Administrator has determined that its resources would best be applied elsewhere." \textit{Id.}

\textsuperscript{124} See \textit{id.} at 979 (explaining that since citizens can pursue only those actions that EPA is not actively pursuing, "only if the EPCRA authorizes citizen suits for wholly past violations can the citizen suit provision effectively supplement the EPA's role in enforcing compliance").

\textsuperscript{125} See Caminetti v. United States, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.").


\textsuperscript{127} See \textit{Don't Waste Ariz.}, 950 F. Supp. at 975-76 (explaining language differences). The district court explained that: the "occurs" language in the notice provision is consistent with the conclusion that the statute allows citizens to sue for wholly past violations. In most cases, the alleged violator has not cured her noncompliance at the time a plaintiff issues a notice of intent to sue letter. The venue provision, by contrast, uses the past tense because it contemplates that the alleged violator may have come into compliance between the time the plaintiff files a notice of intent to sue and the time the plaintiff actually files suit.

\textit{Id.} at 978.

If Congress designed the notice provision strictly to allow violators to come into compliance with EPCRA, "nothing in the citizen suit provisions prevents a defendant from filing past-due reports when it receives a notice of intent to sue, then simply ignoring EPCRA until it receives another such notice." Respondent's Brief at 21, \textit{Steel Co. v. Citizens for a Better Env't}, 118 S. Ct. 1003 (1998) (No. 96-649). Hence, a cycle of noncompliance is created whereby certain companies only file
verb "occurs" and the venue provision uses the past tense verb "oc-

curred." 128 "The most reasonable inference from this contrast is

that the violation must be ongoing at the time notice is given, but

need not be ongoing at the time suit is brought." 129

the required reports when potential plaintiffs threaten them with litigation. See id.

This cycle contravenes the purposes of EPCRA. For a discussion of the statutory

development of EPCRA, see supra notes 40-52 and accompanying text.

Also, unlike CWA, EPCRA does not require permanent changes to a company,

such as purchasing new equipment to reduce pollution. See Respondent's Brief at

21, Steel Co. (No. 96-643). Therefore, once a company remedies an alleged viola-

tion, it may easily begin to violate EPCRA once again. See id.

In its letter of notice of intent to sue, Don't Waste Arizona recognized that a

historic habit of noncompliance is likely to continue unless some intervening

force, namely litigation, creates a change in behavior. See Letter from M. David

Karnas, Attorney for Don't Waste Arizona, to Grady Rosier, CEO for McLane Com-

pany, Inc., et al. (Apr. 28, 1995). The letter stated:

The violations of EPCRA are continuous and ongoing and there is reason to

believe these violations will continue in the future. Because of the his-

toric and consistent pattern of non-compliance at the McLane Company,

Inc. facility, DWA will request equitable relief and penalties of $25,000

per day per violation from the required dates of submittal. DWA will also

request an award of costs and attorney fees incurred as a result of this

litigation.

Id.

Learning theory holds that the probability of any given behavior (i.e., compli-

ance) is based on the consequences of that behavior (i.e., litigation). See Michael

Nietzel et al., Introduction to Clinical Psychology 278-79 (5d ed. 1991). If a given

behavior (i.e., compliance) is closely associated with the removal of something

negative (i.e., litigation), then the likelihood of that behavior occurring increase,

otherwise known as negative reinforcement. See id. at 279.

128. See EPCRA § 326, 42 U.S.C. § 11046. The notice provision states that

"[n]o action may be commenced under subsection (a)(1)(A) of this section prior to

60 days after the plaintiff has given notice of the alleged violation to the Admin-

istrator, the State in which the alleged violation occurs, and the alleged violator." Id. § 326(d)(1), 42 U.S.C. § 11046(d)(1) (emphasis added).

The venue provision states that "[a]ny action under subsection (a) of this sec-

tion against an owner or operator of a facility shall be brought in the district court

for the district in which the alleged violation occurred." Id. § 326(b)(1), 42 U.S.C.

§ 11046(b)(1) (emphasis added).

129. Respondent's Brief at 16, Steel Co. (No. 96-643). An amicus brief filed in

this case stated, "[t]he legislative history also indicates a [c]ongressional intent to

enforce strictly the deadlines delineated in the statute. Reporting must be 'swift


Petitioner in Steel Co. asserted, "[t]he goal of the citizen group is achieved with

compliance, even though at a small cost for posting the notice." Petitioner's Brief

at 45, Steel Co. (No. 96-643). Petitioner justified this position by stating:

Because of EPCRA's complexity, companies that receive an EPCRA no-

tice letter may not be able to easily comply and submit the required forms

with the 60-day notice period. To those companies, including The Steel

Company, whose regulatory burden is great and whose resolve to cure a
Moreover, Congress selects language for statutes which reflects its intent. It is illogical for Congress to provide the remedy of a citizen suit, and then prohibit bringing such a suit for violations of the Act. As one environmental group noted:

Had Congress wanted to limit citizen suits under EPCRA . . . , Congress could simply have borrowed the phrase “al-

violation is strong, Congress offers an opportunity to come into compliance during the 60-day period, thus avoiding a citizen suit and leaving to EPA’s “broad perspective” whether enforcement is truly necessary. This makes EPCRA no different from other environmental statutes where, if a violation is cured within 60 days, citizen enforcement is barred. Moreover, should a company simply “throw” reports together after receiving a citizen notice of intent to sue, it opens itself up to a wide range of civil and criminal penalties.

Id. at 43-44.

130. See Roger Colinvaux, What Is Law? A Search for Legal Meaning and Good Judging Under a Textualist Lens, 72 Ind. L.J. 1133, 1151-52 (1997) (explaining use of language to reflect intent). The author identified some potential problems with attempting to infer intent from the language of the statute by noting the existence of an assumption “that Congress has the ordinary meaning in mind when it votes on the words of a statute . . . .” [Establishing objective intent] also means that Congress conscientiously and studiously respects the rules of grammar during the drafting process. Moreover, it depends on the notion that there is a shared ordinary meaning.” Id. (citations omitted). The author next suggests that Congress’ failure to focus on the relationship between laws and their effect on each other further complicated attempts to infer intent from statutory language. The author concluded that the judiciary, not Congress, should focus on this relationship. See id. at 1152.

131. See Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n., 453 U.S. 1, 2 (1981) (interpreting remedy provisions of other environmental laws and stating that “[i]n the absence of strong indicia of a contrary congressional intent, it must be concluded that Congress provided precisely the remedies it considered appropriate.”).

Additionally, Congress created EPCRA as part of SARA and established within SARA provisions for citizen suits under each of EPCRA and the Superfund law. See Sharelson, supra note 46, at 37. Interestingly, “while the Superfund law’s citizen suit provision only authorizes enforcement against persons ‘alleged to be in violation,’ EPCRA contains no such limitation. Thus, in the very law in which Congress created EPCRA, it evinced a clear intent that citizens could pursue past violations.” Id. (emphasis added). See also Abate, supra note 45, at 25-26 (explaining that since these two separate provisions exist, “it is fair to assume that Congress intended EPCRA’s citizen suit provision to authorize enforcement against persons who were no longer ‘in violation’ at the time of suit”).

Another commentator argued:

The result of the sixty-day notice period is that whenever a citizen files suit against a party who is violating a requirement of EPCRA, the violator can come into compliance within the notice period by filing the required forms. If EPCRA does not allow citizen suits for past violations, the suit is mooted. It does not seem possible for Congress to have intended that citizens could never sue violators. The more plausible solution is that Congress felt that citizens could take a role in ensuring that facilities comply with the Act so the goals of community knowledge and chemical accident prevention plans could be met.

Böer, supra note 7, at 1628.
leged to be in violation” from the Clean Water Act. But there is overwhelming evidence that Congress deliberately chose not to use that phrase in EPCRA. Every other citizen suit provision in an environmental statute at the time of EPCRA used the phrase “alleged to be in violation.” As the Court explained in its most recent decision dealing with a citizen suit provision, the language in a statute must be “compared with the language Congress ordinarily uses.” In EPCRA, Congress used different language from what it used in every other citizen suit provision.132

The language of EPCRA also differs from other environmental statutes because EPCRA is strictly an informational statute.133 Thus, this difference in purpose and application necessitates the use of different language.134

The language of the different acts was the central factor in courts’ analyses of whether citizen suits are authorized for wholly past violations of EPCRA. While the Sixth and Seventh Circuits are split concerning this issue, the Supreme Court stated that plaintiffs bringing such actions lack standing and never offered a conclusive statement regarding whether citizen suits are authorized for wholly past violations of EPCRA.135 Additionally, the district courts that

132. Respondent’s Brief at 13, Steel Co., 118 S. Ct. 1003 (1998) (No. 96-643) (internal citations and footnotes omitted) (emphasis added). Respondent also noted that “Congress’s decision to deviate, in EPCRA, from ‘the language it ordinarily uses’ in citizen suit provisions establishes that Congress did not want to require citizens suing under EPCRA to ‘allege [the defendant] to be in violation’ of the Act at the time of the suit.” Id. at 14 (citing Bennett v. Spear, 117 S. Ct. 1154, 1162 (1997)).

133. See Respondent’s Brief at 19, Steel Co. (No. 96-643). Given that EPCRA is not a typical command and control environmental regulation, “Congress’ choice of distinctive language in Section 326, can . . . only be seen as authorizing — for this distinctive, informational statute — citizen suits for overdue reporting violations.” Id. at 20. See also Shavelson, supra note 46, at 32 (explaining statutory scheme of EPCRA and noting that “[t]hese ‘information forcing’ provisions are an integral part of EPCRA’s purpose of providing timely and relevant information about toxic and hazardous chemicals to concerned citizens”).

134. See Respondent’s Brief at 20, Steel Co. (No. 96-643). The respondent explained that since EPCRA is “strictly an informational statute, [t]his fundamentally alters the way citizen suits function, and it explains why Congress used different language in EPCRA.” Id.

For a discussion of petitioner’s conceptualization of EPCRA and jurisdiction under that statute, see infra note 137.

135. See Steel Co., 118 S. Ct. at 1007. For a discussion of recent Supreme Court decisions concerning suits under EPCRA, see supra notes 17-39 and accompanying text.
have addressed this issue have unanimously found that such suits are authorized. 136

B. The Purpose of a Law also Promotes the Policy of the Law

Laws consist of more than just language; laws also capture the spirit of the times by promoting different policies. 137 Allowing citi-

136. For a discussion of district courts’ holdings in the context of EPCRA suits involving wholly past violations, see supra notes 88-124 and accompanying text. Since a majority of informed judges agree that citizens should be able to file suit for wholly past violations of EPCRA, it seems apparent that such suits are permissible and reflect the intent of Congress. Congressional intent, however, cannot override constitutional mandates. To bring suits for wholly past violations, plaintiffs must still meet constitutional standing requirements, regardless of congressional intent. Congress may use its legislative power to assist these citizen soldiers in establishing standing by modifying EPCRA.

In reviewing the jurisdiction the citizen suit provision grants to courts, one commentator noted that the grant of jurisdiction empowers courts to enforce all relevant requirements and that “this language is fairly neutral . . . suggest[ing] that the violation could be wholly in the past, ongoing, or in the future. This in turn shows that both past violations and present violations are given jurisdiction under the EPCRA citizen suit provisions.” Boer, supra note 7, at 1625-26. See also June, supra note 11, at 767-93 (providing overview of standing requirements concerning jurisdictional issue for environmental citizen suits).

137. See Director, Office of Workers’ Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 278 (1994) (explaining that while precedent is important in statutory interpretation, when precedents conflict, court must determine which precedent makes most logical sense).

One commentator described the courts’ determination of what the law is as follows:

Presumably, judges “find” the law leftover after the legislative wheels stop spinning. But what is there to find? After all, there is a statute. The judge charged with interpreting it and the agency charged with enforcing it each have access to a copy. Clearly there is more to finding law than being able to locate and read a statute.

Colinvaux, supra note 130, at 1133 (emphasis added). This commentator recognized that there are multiple ways in which to interpret a statute. See id. at 1133–34. Laws, however, are created via a process which involves research and legislative hearings. See id. at 1137-38. Once this process is complete, if a situation arises in which the law does not clearly identify the outcome, the courts must use their power of judicial interpretation to determine the appropriate outcome. See id. The commentator noted that:

the judicial choice is not arbitrary but depends on context. It occurs before a background or a legal landscape that includes factors such as the mischief to which the statute is directed; the broader purpose of the statute; and the political, social, moral, and legal traditions of the polity. Literally, when considered without such a background, a “statute” is no more than a text filled with combinations of letters and figures.

Id. at 1158. Likewise, the petitioner in Steel Co. involving citizen suits for wholly past violations noted that:

in the absence of a contrary congressional intent, Congress should not be presumed to have made a substantial change from its customary citizen suit model. A statute conferring jurisdiction on the federal courts should also be strictly construed, and any doubts resolved against jurisdiction. Here there are serious doubts that Congress intended citizens to sue for
zen suits for wholly past violations aids in achieving the objectives of EPCRA. One commentator noted that "[n]ot only does the citizen suit provision in EPCRA aid the EPA in its efforts, but it also affords environmental groups a means of advancing their own environmental objectives." Some courts have construed preventing the achievement of one's environmental objectives as a redressable injury.

Since EPA does not have an unlimited budget, citizen past EPCRA violations, and all citizen plaintiffs can highlight is a slight difference in language and attempt to stretch that difference into federal jurisdiction.


138. See Sidney M. Wolf, Fear and Loathing About the Public Right To Know: The Surprising Success of the Emergency Planning and Community Right-To-Know Act, 11 J. LAND USE & ENVTL. L. 217, 279-80 (1996) (analyzing effect and implications of successful citizen suits under EPCRA for environmental groups). This commentator explained that one prominent environmental group, Atlantic States Legal Foundation, has been very successful in this area:

Its victories include not only monetary penalties, but also court orders and settlement agreements which creatively require facilities to gather and report information over and above the minimum requirements of the statute and to contribute money, property or services to environmentally beneficial services, such as environmental groups or state and local bodies administering EPCRA.

Id. at 280. For additional information about cases involving Atlantic States Legal Foundation, see supra notes 88-124 and accompanying text.

139. Falkenberry, supra note 42, at 2. In reviewing the decision in Whiting, one author commented that "[i]n so ruling [that successful plaintiffs can recover attorneys fees and expert witness fees], the [district] court strongly suggested that citizen suits promoting pollution prevention — and other supplemental environmental projects (SEP) which go beyond EPCRA's statutory requirements — can play an important role in furthering EPCRA's purposes." Shavelson, supra note 46, at 34.

140. For a discussion of standing and redressability, see supra notes 27-33, 62-67, 105-13 and accompanying text. See also Karl S. Coplan, Private Enforcement of Federal Pollution Control Laws — The Citizen Suit Provisions, SB91 ALI-ABA 1097, 1106 (1997) (noting that "[c]ourts have been quick to find standing where a plaintiff or [ ] member of [ ] plaintiff[s'] organization lives or recreates in the area affected by a pollution source"). Referencing courts' limited ability to determine that standing exists in claims they consider, one author noted that "[s]ince Lujan, other decisions have rejected standing for failure to identify specific imminent injuries traceable to the claimed violation." Id.

141. See Wolf, supra note 138, at 270-76 (explaining EPA's enforcement of environmental law). The commentator asserted:

EPCRA settlements pale in comparison with those achieved under other federal environmental laws. EPCRA enforcement actions and penalty collections by the EPA, while seemingly significant in themselves, appear to make up only a small portion of total EPA enforcement and penalties. . . . Moreover, though the EPA has announced significant settlements, it reportedly has a checkered record in pursuing and collecting the penalties agreed upon in settlements.

Id. at 274-75 (internal citations omitted). Further, EPA tends to use administrative action rather than judicial action for enforcement, even though judicial action
groups must assist EPA in its efforts to preserve the environment.\textsuperscript{142} Although citizen suits supplement the work of EPA, these suits do not give citizens unyielding power to demand compliance by all members of the regulated community.\textsuperscript{143} The citizen suit provisions allow suits for failure to submit information and “[t]hese ‘information forcing’ provisions are an integral part of EPCRA’s purpose of providing timely and relevant information about toxic and hazardous chemicals to concerned citizens.”\textsuperscript{144} A lack of timely information hinders effective community planning and not allowing citizen suits for this lack of timeliness “‘would render gratuit-

would likely result in higher penalties. See id. at 271-72. However, “EPCRA is not only an environmental law which the EPA can enforce but it also can be and is used by the EPA as a tool to enforce other federal environmental laws.” Id. at 273.

While EPA aggressively seeks out violators to enforce EPCRA’s requirements, “it is estimated that there are several million facilities subject to EPCRA reporting requirements. The EPA simply lacks the resources to assure total enforcement over all facilities.” Falkenberry, supra note 42, at 2. Citizen suits are a viable alternative in the enforcement process. See id.

142. See Macfarlane & Terry, supra note 63, at 25 (commenting that because agencies do not have resources to pursue minor violators, they must focus their efforts on worst violators, thereby leaving gap in enforcement). Because agencies focus their efforts on the worst violators, agencies are reluctant to make it difficult for people to bring citizen suits as “[the agencies] often view their role as partners with the environmental groups, working together toward the enforcement goals of the various environmental statutes.” Id.

Another commentator noted that allowing private “citizen attorney generals” adds to the government’s enforcement power. See Smith, supra note 42, at 1075. Further, “[t]his acts as a catalyst to develop better cooperation between the public and government, as well as to ensure the development of more accurate emergency plans.” Id.

143. See Macfarlane & Terry, supra note 63, at 22 (positing that theory of citizen suits assumes citizens will bring suits where administrative agency either cannot or will not bring suit itself). These commentators assert that “Congress ‘intended citizen suits to both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained inert, to provide an alternative enforcement mechanism.’” Id. (quoting Baughman v. Bradford Coal Co., 592 F.2d 215, 217 (3d Cir. 1979)).

144. Shavelson, supra note 46, at 32. See also EPCRA § 326, 42 U.S.C. § 11046 (providing grounds for citizen suit). A lack of timely reporting constitutes an “informational” injury. See Abate, supra note 45, at 26. It has been noted that an “[i]nformational injury exists when the government or a private party fails to provide or collect information, impairing an individual’s or organization’s ability to obtain or disseminate information.” Randall S. Abate & Michael J. Myers, Broadening the Scope of Environmental Standing: Procedural and Informational Injury-In-Fact after Lujan v. Defenders of Wildlife, 12 UCLA J. ENVTL. L. & POL’Y 345, 346 (1994). Further, one author noted that “[l]ate reporting cannot ‘cure’ informational harm just as installing new pollution control equipment cannot ‘cure’ past water pollution violations. Thus, precluding EPCRA citizen suits for past violations would thwart the goals of the statute.” Abate, supra note 54, at 26.
tous the compliance dates,' and provide the public no recourse against violators who endanger the safety of the community."145

Additionally, a lack of specific information concerning a chemical's effects on health and the environment belittles EPCRA's role in assisting communities with emergency planning.146 An environmental group noted that the deadlines in the statute are an essential element in promoting the purpose of the law as "Congress would not have [required annual disclosures] if outdated information was as useful."147 The filing of timely information, therefore, promotes the purpose of EPCRA because current information is the most valuable information.148

C. The Effect of the Law Reflects the Purpose and Policy of the Law

Nonadversarial techniques are being used to encourage compliance in the regulated community, rather than the command and control techniques frequently used in the past.149 EPCRA is chang-

145. Smith, supra note 42, at 1071 (citing Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg., 772 F. Supp. 745, 750 (W.D.N.Y. 1991)). Citizens emphasized in its brief to the Supreme Court that "EPCRA can be successful only if the information on file is accurate and up to date. Out-of-time filings, prompted only by the threat [sic] of litigation, will not serve EPCRA's purposes." Respondent's Brief at 20, Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (No. 96-643).

146. See Christiansen & Urquhart, supra note 85, at 250-51 (noting importance of specific information in assisting communities in emergency planning). These commentators stated, "[w]ithout specific information on the health and environmental effects of each chemical, EPCRA would do little to aid communities in emergency planning." Id. Also, these commentators advocated a complete analysis of each chemical's potential harm, including both its toxicity as well as its route of release and exposure. See id.

Additionally, Congress passed EPCRA to stress the free flow of information in preparing communities for emergency response, which has in turn "proven surprisingly useful and has led to some unexpected results." Michael J. Vahey, Comment, Hazardous Chemical Reporting Under EPCRA: The Seventh Circuit Eliminates the "Better Late Than Never" Excuse From Citizen Suits, 29 Loy. U. Chi. L.J. 225, 229 (1997). "Once compiled and made available pursuant to the Act's guidelines, EPCRA-generated information has served as a 'benchmark' and 'catalyst' for other environmental regulatory laws and new pollution prevention programs." Id.

147. Respondent's Brief at 12, Steel Co. (No. 96-643) (emphasis added) (discussing importance of deadline requirements in assisting communities' attempts to protect themselves from EPCRA violators).

148. See id.

149. See Macfarlane & Terry, supra note 63, at 20 (stating "EPA has been stressing innovative ways to move beyond traditional compliance toward partnering with the regulated community [by emphasizing methods which promote] . . . regulatory flexibility and efforts to move 'outside the box' of traditional regulations"). While citizen suits may seem traditional, the notice requirement of such suits, as well as the structure of environmental statutes, provide an opportunity for the regulated member and the community member to negotiate an agreement,
ing the regulated industry's approach to hazardous chemicals through its reporting requirements. Once consumers and stockholders reviewed the data that existed concerning hazardous chemicals, they demanded that companies be responsible for their chemicals. In turn, wishing to avoid being known as either a "polluter" or "environmentally unfriendly," companies have reviewed their operating procedures in attempts to reduce potential problems with hazardous chemicals. EPCRA has changed the industry's behavior, therefore, without using expensive command and control techniques.

Citizen suit provisions in environmental statutes provide the public with more access to the courts. A conflict is therefore created if Congress provides such access while simultaneously prohibiting citizens from bringing suits. One commentator summarized the current trend in citizen suits for environmental protection by which in turn allows space for creativity and cooperation among the two groups. See id. at 21. Additionally, the "combination of strict liability and mandatory penalties creates tremendous leverage for citizen plaintiffs". Id. For a discussion of the notice requirement's purpose and its use in negotiation, see supra notes 114-18 and accompanying text. See also Falkenberry, supra note 42, at 21-23 (explaining process of negotiating consent decree for settling environmental litigation).

150. See Wolf, supra note 138, at 286-91 (attributing change in legislation to citizen activism). One commentator stated that "[o]ne of the most important uses of EPCRA data by grass roots citizen and environmental groups has been to induce or compel companies and governmental bodies to mitigate or eliminate the generation, release, or impact of toxic substances." Id. at 287. Moreover, "[e]xperience shows that better public accountability on this score powerfully influences companies to design cleaner products." Shelley A. Hearne, Tracking Toxics: Chemical Use and the Public's "Right-To-Know," ENV'T, July, 1996, at 4, available in LEXIS, News Library, Arcnws File.

151. See Shavelson, supra note 46, at 30 (explaining that accounting for chemical use and storage should be ingrained part of good business). These environmentally-conscious consumers and stockholders may use citizen suits as a tool in having their demands heard. See Scott, supra note 6, at 235 (explaining that surrounding community which is most likely to receive benefits of enforcement should bear costs).

152. See Shavelson, supra note 46, at 30 (discussing companies attempts to reduce potential problems). Businesses strive to keep their costs low and maximize their profits "while avoiding the public relations damage and civil liability that follows a release of a hazardous chemical." Smith, supra note 42, at 1053.

153. See Shavelson, supra note 46, at 30. "[M]arket forces have driven industries to conduct pollution prevention audits, implement company-wide policies to protect workers and the environment, and take other proactive measures aimed at lowering toxic releases to the environment." Id. EPCRA compliance can be valued by looking at the total value of all the resulting environmental, health and safety benefits. See Scott, supra note 6, at 233.

154. See Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976) (stating that citizen suit provisions in environmental statutes reflect "a deliberate choice by Congress to widen citizen access to the courts, [and to ensure] . . . that the Act[s] would be implemented and enforced"). Two commentators noted that "[c]itizen suits are increasingly important because Congress has consistently eli-
stating, "[i]n short, citizens provided with timely and accurate information can take the informed actions necessary to improve the communities in which they live, work, and recreate." Additional-

ly, James Brusslan, an attorney for Citizens for a Better Environment, stated that the recent Supreme Court decision "'will stall Congress' efforts to clean our environment . . . [and lead to] less citizen enforcement.'" Once citizens meet the jurisdictional requirements, they should be able to challenge the same scope of violations as the government can, including past violations.

Another key aspect of citizen suits is that any damages a court awards go to the cost of litigation, the Treasury and environmental

nated barriers and created incentives for the private enforcement of environmental laws." Macfarlane & Terry, supra note 63, at 20-21.

Also, self-reporting schemes often fall prey to noncompliance. See Respondent's Brief at 20, Steel Co. v. Citizens for a Better Envi-

ronment, 118 S. Ct. 1009 (1998) (No. 96-643). If the notice provision of EPCRA is designed to allow time to come into compliance, as some contend, citizens may lose both their motivation and their funding to investigate possible instances of noncompliance. See id. Citizens for a Better Environment, in Steel Co., summarized this scenario as follows:

Because nearly all defendants will come into compliance once they receive notice, citizen suits under Section 326 will become virtually unknown. In view of the importance Congress attached to citizen enforcement — and the well-known problems of enforcement that always plague self-reporting schemes, and that appear to afflict EPCRA as well — it is extremely unlikely that Congress intended these results. Congress's choice of distinctive language in Section 326, can, therefore, only be seen as authorizing — for this distinctive, informational statute — citizen suits for overdue reporting violations.

Id.

For a discussion of petitioner's challenge to this argument, see infra note 173.

155. Shavelson, supra note 46, at 29. For a discussion of the harmful effects of chemical spills, see supra note 1.

In describing their interest in the outcome of the recent Supreme Court case involving EPCRA and wholly past violations, the Amici asserted:

The thirteen organizations submitting this brief have a direct and substantial interest in this information and in enforcing EPCRA. Their members live, breathe the air, and engage in recreational activities in areas affected by releases of toxic chemicals by companies regulated under EPCRA. These toxic chemicals are known to cause significant adverse effects on human health and the environment. Amici's members use data reported by facilities under EPCRA to learn about toxic chemical releases in their communities. The interests of amici's members and their right to know about such releases is adversely affected whenever companies fail to file required and timely reports under EPCRA.

Amicus Brief of Natural Resources Defense Council, Inc., at 1-2, Steel Co. (No. 96-643). See also Abate & Myers, supra note 144, at 345-58 (clarifying that this lack of information qualifies as injury under many environmental laws). 156. Chicago Reaction, supra note 29, at 1 (discussing effect of recent Supreme Court decision on efforts to clean environment).

157. See Becker, supra note 62, at 32-33 ("Citizens can look just as far back as the government, if there is a risk of continuing violations at the time the complaint was filed."). Allowing citizens to challenge this full scope of violations supports Congress's intent in creating citizen suits provisions. See id. at 33.
programs, and not to the citizens themselves. Therefore, because the rewards of a suit will reach them only tangentially, citizens' desire to protect their environment and maintain the well-being of their community must motivate them. By allowing citizen suits for wholly past violations, the courts do not open the floodgates to volumes of litigation; instead, citizens are encouraged to be active in protecting their communities. Given the context of a citizen suit, it is reasonable to permit such suits for wholly past violations as a proper means to reach the desired end of community well-being

158. See Macfarlane & Terry, supra note 63, at 21-22 (explaining limits on citizen suits, including remedies). These commentators noted that "while penalties assessed must go to the federal treasury and citizen plaintiffs are not entitled to sue for damages, courts generally have been liberal about allowing settlements to include 'supplemental environmental projects' (SEPs) that can include payments to environmental groups and projects." Id. at 21.

Also, since citizens may only recover their litigation costs if they prevail or substantially prevail, citizens have "a personal stake in the outcome of the controversy." Respondent's Brief at 30, Steel Co. (No. 96-643) (citing Flast v. Cohen, 392 U.S. 83, 101 (1968)) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). Respondent, Citizens, noted in its brief that "EPCRA provides for 'litigation costs,' not just attorney's fees, so the citizen plaintiff himself will be compensated for resources spent on the litigation. Of course, the citizen plaintiff may not show a net financial gain, but that is true of any victorious civil plaintiff who finds that the amount of judgment he has recovered . . . is equal to or less than the costs of litigation." Id. at 30-31.

159. See Falkenberry, supra note 42, at 20 (noting that beyond litigation costs, successful citizen plaintiffs do not enjoy collection of large monetary judgment). While the deciding court maintains jurisdiction to award attorney fees to the successful plaintiff, that court does not have the authority to award damages directly to that plaintiff. See Shumate, supra note 6, at 57.

Judicially-approved consent decrees are the settlement of choice in EPCRA suits. See Shavelson, supra note 46, at 35. The benefit of consent decrees is that they allow flexibility so that environmental goals can be met. See id. at 34-35. One commentator noted, "in light of EPCRA's strict liability framework, coupled with its hefty per violation penalties, plaintiffs often are in a good position to negotiate settlements designed to maximize environmental protection." Id. at 35. Additionally, citizen groups potentially could receive funds as part of a settlement which provides for a "supplemental environmental project." Macfarlane & Terry, supra note 63, at 21. These supplemental environmental projects, however, are furthering the objective of EPCRA: they protect the well-being of the environment and the community. See Falkenberry, supra note 42, at 21-25 (explaining consent decrees, which often include environmental projects, as pollution reduction bargaining).

160. See Macfarlane & Terry, supra note 63, at 22 (discussing citizen suits, these commentators noted that "[t]he legislative history of the citizen suit provisions reflects a strong tension between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." (citing Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989))). Additionally, "the [legislative] history provides an extremely limited discussion of the section 326 citizen suit provision, having only one limitation — the inability to sue local emergency planning committees." Smith, supra note 42, at 1059.
and protection.\textsuperscript{161} Citizen suits also provide the plaintiff group, often a not-for-profit organization, with an opportunity to recoup the costs of filing the complaint and other related legal fees.\textsuperscript{162} If citizens were not allowed to sue for wholly past violations, plaintiff groups would expend large quantities of funds for little or no return, reducing the motivation of these groups to enforce compliance with EPCRA.\textsuperscript{163}

V. IMPACT AND CONCLUSION

Permitting citizen suits for wholly past violations will likely lead to the emergence of two trends: (1) citizens will be motivated to supplement EPA’s work in enforcing EPCRA and (2) industries will be motivated to follow reporting requirements without being monitored and threatened with a lawsuit.\textsuperscript{164} The federal government’s

\textsuperscript{161} See Scott, supra note 6, at 235 (explaining need for timely information to protect lives and property within community and noting “broader scope of benefits resonates in improved community health and better community peace of mind”).

\textsuperscript{162} See Shavelson, supra note 46, at 33 (“EPCRA’s ‘fee shifting’ mechanism is a critical element for furthering the purposes of EPCRA, because without the prospect of reimbursed fees and costs, most citizens and environmental groups would be unduly hampered by the costs of litigation.”). Also, because uncovering violators requires considerable amounts of time and resources, without the ability to maintain an action for wholly past violations, citizen groups cannot recover their fees and costs. See id. at 38. The citizen-researcher must review databases on chemicals found in industry as well as interpret data from government sources. See id. at 35. Additionally, the law limits formal discovery, so the citizen-researcher must consult multiple sources of public information to determine who has violated EPCRA. See id. See also Falkenberry, supra note 42, at 15 (explaining that by allowing plaintiffs to recover reasonable attorney fees, expert witness fees and other litigation costs, “[t]his provision of EPCRA gives grass-roots environmental groups an opportunity to help enforce many of EPCRA’s requirements”); EPCRA § 326(f), 42 U.S.C. § 11046(f) (providing for award of attorney fees and costs).

\textsuperscript{163} See Amicus Brief of National Resources Defense Council, Inc., at 2, Steel Co. v. Citizens for a Better Env’t, 118 S. Ct. 1003 (1998) (No. 96-643) (examining notice requirement in EPCRA, explaining how easily companies can cure violations once they receive notice and concluding that suits for wholly past violations are necessary). The Amici stated:

This outcome [not permitting citizen suits for wholly past violations] would destroy the deterrent effect of civil enforcement, in two ways. First, it would discourage voluntary compliance and reward noncompliance by the regulated community. Second, it would mean that citizen investigations and enforcement efforts against violators are a waste of time and resources, because those violations would have a foolproof and simple defense in nearly every case. It is therefore critical that [the Supreme Court] affirm the decision below and reaffirm the right of citizens to sue for violations of EPCRA’s reporting requirements.

\textit{Id.}

\textsuperscript{164} See Falkenberry, supra note 42, at 20 (stating that citizen suits for violations of environmental legislation are viewed as winning proposition because “EPCRA suits not only allow environmental groups to enforce the statute, but also
largest environmental administrative agency, EPA, "believes that EPCRA’s implementation has caused positive changes in industry, including fewer accidents and spills, reuse or recycling programs . . . and changes in production which result in decreased chemical releases." Additionally, EPCRA is viewed as one of the most effective environmental statutes. Furthermore, one commentator noted that once the public receives "sufficient, comprehensible data," this knowledge "should drive individuals to make the correct economic and political decisions concerning industry’s use of toxic substances." 

force industries to pay civil penalties for their violations"). These citizen suits assist non-profit organizations in furthering their agendas, which include protecting both the environment and health and well-being of members of the community. See id. at 20-21.

Additionally, environmental consultants, whether representing industry or non-profit groups, recognize the value of pollution prevention programs and believe that in the long term, such programs will actually save industry money. See id. at 23. Two commentators stated:

Under the new reality, you answer to a potentially infinite number of bosses. Your success [as a company] in meeting the environmental standards is subject to review by the state regulators, EPA, criminal investigators, local governments, other companies, community groups, and citizen suit lawyers. The sole measure of your performance is strict compliance with all permit and regulatory requirements.

Macfarlane & Terry, supra note 63, at 23. These commentators also note that regulations need to be created that can be met 100 percent of the time, as there are few defenses or exceptions that can be used against a citizen suit. See id. at 24-25.

165. Falkenberry, supra note 42, at 32. Respondent, Citizens, highlighted the effectiveness of the Act in its brief by noting, "[t]he overall effects of EPCRA have been dramatic: Reported releases of toxic chemicals by firms complying with EPCRA have been reduced nearly 46 percent since 1988." Respondent's Brief at 3, Steel Co. (No. 96-643) (citing Environmental Protection Agency, 1995 Toxics Release Inventory Public Data Release (May, 1997)).

Social psychologists have theorized that "as humans have learned to master the environment, they have also learned how to destroy it." ELLIOT ANDERSON ET AL., SOCIAL PSYCHOLOGY: THE HEART AND THE MIND 561 (1994). When the public is aware of a company’s action, however, the company is more likely to follow normative demands, rather than promote its own self-interest. See id. at 570. EPCRA, by requiring reporting of hazardous chemicals and the dissemination of this information to the public, creates a monitoring situation which is associated with positive environmental behavior. See EPCRA § 311-13, 42 U.S.C. §§ 11021-23.

166. See Respondent’s Brief at 1, Steel Co. (No. 96-643) (citations omitted). See also Christiansen & Urquhart, supra note 85, at 259 ("As the most recent EPA report under EPCRA noted, the public’s environmental awareness has been enhanced by the Act.").

Additionally, one commentator adamantly asserted, "[i]n order to ensure that EPCRA’s provisions are given full effect and substance, the Supreme Court must conclude that citizens can hold facilities liable for all violations, past or present, and thereby discourage corporations from contravening EPCRA’s mandates." Lohmann, supra note 11, at 1712.

167. Liu, supra note 118, at 336. Multiple facets of pollution prevention that are related to the right to know have been identified as: “[1] industry’s duty to disclose information pertaining to its use of hazardous substances, [2] the public’s
Some oppose EPCRA because of its potential to create massive paperwork and inefficient dissemination of information. By educating themselves about interpreting information, environmental organizations are enabling themselves to take proactive measures. The success of EPCRA is related to its purely informational nature and “EPCRA seeks to achieve its environmental goals not through regulatory mandates but through the disclosure of polluting activity.” Additionally, businesses may find it more cost-effective to comply with EPCRA’s requirement than to face hefty penalties and the associated public image difficulties, such as being known as “environmentally unfriendly.” Furthermore, EPCRA’s citizen suit provision is not an opportunity for the United States’ environmentally right to access such information, and [3] the community’s need to develop emergency notification and response plans for accidental release.”

168. See Anthes, supra note 1, at 3 (noting that because data collected will be highly technical, it will be almost useless to average lay person in community). Advocating against this generation of paperwork, W. Glover, Chief Counsel for Advocacy, U.S. Small Business Administration Oversight Committee, declared “[p]aperwork and reporting requirements remain a major cost problem for small businesses. Small companies do not have specially hired staff to complete the myriad of reports required by government.” Prepared Statement of W. Glover, National Economic Growth, Natural Resources, and Regulatory Affairs, Fed. News Serv., Mar. 5, 1998, available in LEXIS, News Library, Cnws File. For a discussion of Representative Lent’s critical view on the effective use of data, see supra notes 51-52 and accompanying text.

169. See Falkenberry, supra note 42, at 18 (emphasizing that with focus on whether owners or operators filed reports in timely manner, “[i]f citizen groups can determine which facilities are required to report under EPCRA, they can usually make strong cases against violators”); see also Christiansen & Urquhart, supra note 85, at 259 (highlighting that EPCRA has increased awareness among general community and people are therefore more alert to potential environmental problems).

170. See Respondent’s Brief at 1, Steel Co. (No. 96-643) (citing General Accounting Office, Toxic Chemicals: EPA’s Toxic Release Inventory is Useful But Can Be Improved 32 (June 1991)).

171. Respondent’s Brief at 2, Steel Co. (No. 96-643).

172. See Smith, supra note 42, at 1076-77 (characterizing non-compliant businesses as “Public Enemy” in opinion of environmental activists); see also Fred Zimmerman, A Small Business Environmental Primer; Information on Different Environmental Protection Laws, Nat. Public Acct., June, 1992, at 18 (emphasizing that companies realize that compliance with environmental regulations improves business operations and products). One commentator noted that “companies are experiencing a more positive public image and appear to benefit from an increase in customer demand for their products if the customers are aware of a company’s compliance record with the appropriate environmental statutes and regulations.” Id. Creating a positive trusting public image aids companies not only in their current transactions, but also in future transactions, including applying for construction permits. See Peter H. Anderson, Emissions Management Program Plays Major Role in Pollution Prevention: From Pulp and Paper Mills, Pulp & Paper, Sept. 1991, at 129.
conscious to attack the "big, bad corporation." It gives citizens an opportunity to promote their own well-being and interests where the government either cannot afford, or refuses, to act.\footnote{173. See Respondent's Brief at 2 n.1 (No. 96-643) (stating that "[i]ndeed, even petitioner acknowledges that EPCRA has proved effective."). The petitioner commented that "[t]he United States Environmental Protection Agency (EPA) acknowledges that financial incentives, in addition to EPCRA's reporting obligations, motivate industry to reduce its emissions. Whatever its role, EPCRA has contributed to the significant improvement in the nation's environmental quality over the past decade." Petitioner's Brief at 6, Steel Co. (No. 96-643) (internal citations omitted).}

While promoters of a pollution controlled earth are afforded the opportunity to litigate pollution cases, there are other options available that are widely used. In many instances, the parties settle outside of court by creating a consent agreement.\footnote{174. For a discussion of citizen suits as supplemental to government enforcement, see supra notes 119-62 and accompanying text. Additionally, some recognize that in order for public policy to improve the environment, it must not only be designed well, but enforced well, also. See Wendy Naynerski & Tom Tietenberg, Private Enforcement of Federal Environmental Law, LAND ECON., Feb. 1992, at 28. These commentators noted: When profit-making firms ignore the social consequences of their activities, they may be maximizing their profits while making choices which do not maximize social net benefits. Environmental problems represent one well-known example of this type of inefficient behavior. In absence of some kind of external restraint [i.e., citizen suits] a polluting firm will typically produce too much pollution. \textit{Id.} Petitioner in Steel Co., emphasizing the floodgate argument, stated that "[r]espondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result." Petitioner's Brief at 21, Steel Co. (No. 96-643).} These consent decrees promote the aims and policies of EPCRA: 1) they force the violator to report needed information and permit the prosecuting entity to recoup attorney fees; and 2) they authorize the prosecuting entity to funnel some of the penalties into programs that will...
promote environmental well-being.176 This process helps to protect the well-being of both the environment and the community, which is consistent with EPCRA’s goal of promoting the dissemination of information to enable people to make informed choices regarding where to work, live and play.177

Prohibiting suits for wholly past violations would preclude citizens from fully effectuating the intent of EPCRA.178 Through an examination of the language, case law and policies supporting and surrounding EPCRA, one may logically conclude that EPCRA’s citizen suit provision was designed to permit citizen suits for wholly past violations.179 Citizen suits have been described as “creat[ing] a limited cause of action in private citizens to abate and deter a nuisance — the pollution of the nation’s environmental resources.”180 Our technological reality is that we do not understand the full effects of environmental pollutants and hazardous chemicals and, therefore, cannot invent proper management systems.181 In the in-

176. See Christiansen & Urquhart, supra note 85, at 259 (stressing that citizens and EPA are both actively and seriously pursuing enforcement and stating, “[f]ines for failing to comply with the Act are climbing every year, as are the number of enforcement actions brought by the EPA under EPCRA”). For a discussion of the policy supporting EPCRA’s creation, see supra notes 40-52, 137-62 and accompanying text.

177. See Amicus Brief of Natural Resources Defense Council, Inc., at 1-2, Steel Co. (No. 96-643) (explaining their members’ interest in outcome of this case by highlighting that their members use information under EPCRA’s reporting requirements to develop plans and make decisions regarding where to live and to recreate).

178. See Scott, supra note 6, at 238-41 (suggesting that Congress or EPA could establish enforcement structure to encourage environmental activists to work for compliance with EPCRA via citizen suits, but discourage frivolous suits designed purely to pursue possibility of recovering attorneys’ fees). Citizen suits are also important because “[g]iving the right to sue for wholly past violations exclusively to the EPA overburdens the agency and ensures that some noncompliant facilities will escape punishment.” Id. at 259.

179. For a discussion of courts that considered whether citizens may maintain suits for wholly past violations under EPCRA, see supra notes 17-39, 68-124 and accompanying text.

180. Hecker, supra note 62, at 31. One commentator emphasized that citizens suits neither reduce nor transfer governmental powers of enforcement, but instead allow a private cause of action for those citizens meeting the statutorily prescribed standing requirements. See id. Because the executive branch has not delegated any of its enforcement power to citizens, but has merely created a mechanism for citizens to act on their own behalf, courts have uniformly concluded that citizen suit provisions are constitutional. See id.

181. See Al Gore, Natural Disasters Should Serve as a Wake-Up Call, STAR TRIBUNE, Apr. 27, 1997, at 19A (commenting “[b]usiness must develop the right technologies for the next century. . . . [a]nd every one of us must make environmental protection a part of our daily lives”). Mr. Gore noted, “we must remember that global climate change is a problem without immediate or easy solutions.” Id. (emphasis added). Vice-President Gore also discussed the challenge environmen-
terim, until environmental reality and technological reality are on the same plane, it is necessary to promote and enforce environmental protection legislation to prepare for the changing world of the future. Because this promotion and enforcement includes allowing broad interpretations of environmental legislation such as EPCRA, citizen suits for wholly past violations are a viable and valuable weapon in the war against environmental destruction. The mandate now falls on Congress to provide these rugged soldiers with "actionable" legs on which to stand. By amending EPCRA, Congress will allow citizen soldiers to march forward in strategic harmony in an effort to win the war against pollution.

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tal protection poses and the need to inform people about toxic chemicals in their neighborhoods so that they can protect them. See id. Further, he stated that environmental technologies is a growth area "already worth $400 billion each year." Id.

The student author offers the following conclusions. As the Supreme Court articulated, the standing issue forces a more critical look at EPCRA. In order to rectify the standing problems, a legislative response is necessary — either by modifying the sixty-day notice requirement or by modifying the statute to explicitly grant jurisdiction to federal courts for hearing allegations of wholly past violations under EPCRA. Further, a review of the consistency between an environmental organization's purpose and the purpose of suing for wholly past violations needs to be examined. Since the two purposes of the environmental organization and the purpose of suing for wholly past violations are both aimed at protecting the environment, the redressability requirement must be examined so that a constitutionally identifiable injury and remedy are specified and written into the amended version of EPCRA. The value of this information mandates that Congress not sit idly, waiting for another chemical disaster before it acts to remedy the current shortcomings in the law.