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# Hazardous Chemical Reporting Under EPCRA: The Seventh Circuit Eliminates the “Better Late Than Never” Excuse from Citizen Suits

## I. INTRODUCTION

In 1986, Congress passed into law the Superfund Amendments and Reauthorization Act (“SARA”).<sup>1</sup> Under Title III of SARA, Congress enacted an immense environmental regulatory program called the Emergency Planning and Community Right-to-Know Act (“EPCRA” or the “Act”).<sup>2</sup> EPCRA’s purpose was to fill an informational void concerning the use of toxic and hazardous chemicals and to improve emergency response capabilities in the event of an accidental release of such chemicals that might endanger the general public.<sup>3</sup>

Ten years later, in July of 1996, the Seventh Circuit Court of Appeals examined one of EPCRA’s most important, yet still widely unfamiliar,<sup>4</sup> provisions. This provision allows for legal remedies by private citizens—also known as citizen suits.<sup>5</sup> In *Citizens for a Better Environment v. Steel Co.*,<sup>6</sup> a Seventh Circuit panel examined for the first time EPCRA’s citizen suit provision which authorizes private citizens to pursue civil remedies against those in violation of the Act.<sup>7</sup> The court addressed whether EPCRA permits private citizen plaintiffs to sue violators based on wholly past violations—violations that no longer exist by the time the civil action is brought.<sup>8</sup> Overturning the

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1. Pub. L. No. 99-499, §§ 101-213, 100 Stat. 1613 (1986).

2. Emergency Planning and Community Right-to-Know Act (“EPCRA”) §§ 300-330, 42 U.S.C. §§ 11001-11050 (1994). Although originally incorporated into SARA, EPCRA was introduced as a separate bill and now exists as a free-standing law. *See* A. L. Laboratories, Inc. v. EPA, 826 F.2d 1123, 1124-25 (D.C. Cir. 1987).

3. *See* H.R. CONF. REP. NO. 99-962 (1986) [hereinafter *House Conference Report*], discussed more fully *infra* note 308.

4. *See infra* note 31 and accompanying text.

5. *See* EPCRA § 326, 42 U.S.C. § 11046 (1994). The “citizen suit” is a remedy designed to supplement governmental regulatory enforcement by enlisting the aid of ordinary citizens as “private attorneys general.” *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1077 (2d ed. 1996); *see also* *Sierra Club v. Morton*, 405 U.S. 727, 737-38 (1972) (stating that a citizen acts as a “private attorney general” when he or she “seek[s] judicial review of agency action”).

6. 90 F.3d 1237 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (Feb. 24, 1997).

7. *See id.* at 1238. The panel consisted of Circuit Judges Eschbach, Evans, and Rovner. *See id.*

8. *See id.* at 1242. The Seventh Circuit phrased the issue before it as “whether

only interpretation existing at the time concerning EPCRA's citizen suit provision, the Seventh Circuit held that EPCRA permits private citizens to recover for violations of its reporting requirements, even when those violations are purely historical.<sup>9</sup>

Just one year earlier, however, in *Atlantic States Legal Foundation v. United Musical Instruments, U.S.A., Inc.*,<sup>10</sup> the Sixth Circuit held just the opposite. The Sixth Circuit concluded that EPCRA's citizen suit provision prohibits private citizens from recovering for historical violations of the Act's reporting requirements.<sup>11</sup> Thus, despite being just the second occasion that a federal appeals court has ruled on the allowance of citizen suits for historical violations under EPCRA,<sup>12</sup> the Seventh Circuit's holding in *Citizens for a Better Environment* contradicted the only other existing ruling.<sup>13</sup> As a result, a conflict has emerged over the proper construction of EPCRA's citizen suit provision, leaving considerable doubt as to which is the correct interpretation. Such doubt shall be short-lived, however, due to the Supreme Court's grant of certiorari in order to bring this citizen suit conflict to resolution.<sup>14</sup>

This Comment will address the dynamics of this conflict and will evaluate the enforcement authority granted to private citizens under EPCRA. The Comment will begin with a statutory overview of EPCRA,<sup>15</sup> focusing on the Act's goals and objectives.<sup>16</sup> This overview will also examine the Act's critical provisions, dividing the examination among the Act's reporting<sup>17</sup> and enforcement<sup>18</sup> provisions. The Comment will then review the origins of the citizen

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citizens may seek penalties against EPCRA violators who [comply with the Act's requirements] after the statutory deadline, after receiving notice of intent to sue, but before a complaint may be filed in the district court." *Id.*

9. *See id.* at 1244-45. Throughout this Comment, the term "historical violations" will be used to describe violations of regulatory laws which the alleged violator has cured or rectified by the time a civil suit is filed.

10. 61 F.3d 473 (6th Cir. 1995), *reh'g denied en banc*, 1995 U.S. App. LEXIS 30933 (6th Cir. Oct. 16, 1995).

11. *See id.* at 475. The Sixth Circuit concluded that "EPCRA does not allow citizen suits for past violations that have been cured by the date the action commences." *Id.*

12. *See Citizens for a Better Env't*, 90 F.3d at 1245.

13. *See supra* text accompanying note 11; *Citizens for a Better Env't*, 90 F.3d at 1242 n.1.

14. *See Steel Co. v. Citizens for a Better Env't*, 117 S. Ct. 1079 (Feb. 24, 1997) (granting certiorari).

15. *See infra* Part II.A.

16. *See infra* Part II.A.1.

17. *See infra* Part II.A.2.

18. *See infra* Part II.A.3.

suit as a means of environmental regulatory enforcement,<sup>19</sup> exploring how the United States Supreme Court has treated such legislation.<sup>20</sup> This background will provide the perspective for a discussion of citizen suits under EPCRA<sup>21</sup> and the conflicting interpretations of the Sixth and Seventh Circuits.<sup>22</sup> After a detailed analysis of this conflict,<sup>23</sup> the Comment will endorse the Seventh Circuit's broader interpretation as the more rational and effective approach.<sup>24</sup> The Comment will propose that permitting citizen suits for historical violations of EPCRA will produce more meaningful enforcement results and will undoubtedly lead to benefits above and beyond the Act's stated objectives.<sup>25</sup>

## II. BACKGROUND

The mid-1980's saw increased attention on the presence and use of toxic chemicals in or near populated communities and residential developments.<sup>26</sup> This attention was the direct result of numerous catastrophes involving hazardous chemicals, the most significant being the 1984 Union Carbide disaster in Bhopal, India, which killed over 2,500 people and injured countless others.<sup>27</sup> The United States alone experienced almost 7,000 accidents involving chemicals in the five years preceding the enactment of EPCRA.<sup>28</sup>

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19. See *infra* Part II.B.1.

20. See *infra* Part II.B.2.

21. See *infra* Part III.A.1.

22. See *infra* Parts III.A.2-3.

23. See *infra* Part IV.

24. See *infra* Part V.

25. See *infra* Part V.

26. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1238 (7th Cir. 1996), cert. granted, 117 S. Ct. 1079 (Feb. 24, 1997). See also Jayne S.A. Pritchard, Comment, *A Closer Look at Title III of SARA: Emergency Planning and Community Right-To-Know Act of 1986*, 6 PACE ENVTL. L. REV. 203, 203-06 (1988).

27. See PERCIVAL ET AL., *supra* note 5, at 647; Pritchard, *supra* note 26, at 203-04; see also Robert W. Shavelson, *EPCRA, Citizen Suits and the Sixth Circuit's Assault of the Public's Right-To-Know*, 2 ALB. L. ENVTL. OUTLOOK 29 (Fall 1995) (crediting the tragic release of cyanide gas from the Union Carbide plant in India with prompting EPCRA's enactment); David J. Abell, *Emergency Planning and Community Right to Know: The Toxics Release Inventory*, 47 SMU. L. REV. 581 n.3 (1994) (stating that Congress enacted EPCRA in response to the Union Carbide disaster in Bhopal, India) (citing Pritchard, *supra* note 26, at 202-04).

28. See *Draft EPA Study Counts 6,900 Releases of Acutely Toxic Chemicals in Five Years*, 16 Env't Rep. (BNA) No. 24, at 1022 (Oct. 11, 1985); 135 CONG. REC. S4152, S4163 (daily ed. Apr. 18, 1989) (statement of Sen. Lautenberg). One year after Bhopal, another release of toxic chemicals from a Union Carbide Plant occurred in Institute, West Virginia. The leak injured 150 people, and a subsequent investigation revealed numerous deficiencies in the emergency plans and preparations for such an incident. See

A high level of uncertainty regarding the handling, use, and release of toxic chemicals by facilities in the United States prompted legislators to devise a scheme for the collection, maintenance, and dissemination of such information vital for public safety.<sup>29</sup> In an attempt to quell fears of future disasters of Bhopal's magnitude, Congress passed EPCRA as a means of filling informational voids about the presence of such chemicals, and improving emergency response capabilities in the event that such a crisis occurs in the United States.<sup>30</sup>

### A. A Statutory Overview of EPCRA

Although implemented over ten years ago, EPCRA remains one of the lesser-known environmental statutes.<sup>31</sup> Even many industrial corporations that are subject to its reporting requirements remain unaware of EPCRA's existence.<sup>32</sup> Despite evidence of its obscurity, EPCRA looms as one of the most significant and far-reaching environmental statutes ever implemented.<sup>33</sup> In fact, EPCRA quite possibly comprises the largest regulatory scheme ever enacted by Congress.<sup>34</sup>

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Eric M. Falkenberry, *The Emergency Planning and Community Right-To-Know Act: A Tool For Toxic Release Reduction in the 90's*, 3 BUFF. ENVTL. L.J. 1, 3-4 (1995) (citing Casey Bukro, *Carbide Plant Leaks*, CHI. TRIB., Aug. 12, 1985, § 1, at 1).

29. See Abell, *supra* note 27, at 581 n.3 (citing *Carbide May Speed Controls, Right-To-Know Emergency Response Rules*, 1 TOXICS L. REP. (BNA) No. 16, at 635 (Aug. 16, 1985)); *Bhopal Update: India, U.S. Still Grapple With Effects*, CHEMICAL & ENGINEERING NEWS, Jan 21, 1985, at 4; see also Pritchard, *supra* note 27, at 204-05, noting that:

[A]s a result of these concerns, pressure was brought to bear on federal agencies thought to have authority over such accidental releases of chemicals at industrial facilities. However no agency had clear authority over releases such as those which occurred in Bhopal and West Virginia . . . . A nationwide need existed for emergency planning to help prevent accidental releases, not merely plan for cleanup once a release occurs, and to facilitate timely and effective emergency response.

*Id.*

30. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1238 (7th Cir. 1996), *cert granted*, 117 S. Ct. 1079 (Feb. 24, 1997).

31. See *id.* The *Citizens for a Better Environment* court estimated that only about 20 federal cases had arisen under EPCRA since its enactment in 1986. See *id.*

32. See *id.* (citing General Accounting Office, Report to Congress, *Toxic Chemicals—EPA's Toxic Release Inventory Is Useful But Can Be Improved* (June 1991)).

33. See Shavelson, *supra* note 26, at 29.

34. See Abell, *supra* note 27, at 581 (citing *Enforcement: EPCRA Business Potential Substantial for Defense Attorneys, EPA Official Says*, 16 CHEM. REG. REP. (BNA) No. 25, at 1122 (Sept. 18, 1992)).

Simply put, EPCRA is an informational statute.<sup>35</sup> A unique element of EPCRA is its purpose of protecting public health and safety through information disclosure, rather than through the more traditional “command-and-control” or “end-of-pipe” methods of environmental regulation.<sup>36</sup> Generally, EPCRA has been characterized as addressing response rather than prevention.<sup>37</sup> However, while passing the Act in order to ensure effective local response in the event of a chemical emergency, Congress included disclosure requirements that emphasize the free flow of information concerning toxic chemicals.<sup>38</sup> So far, this information has proven surprisingly useful and has led to some unexpected results.<sup>39</sup> 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.<sup>40</sup>

### 1. EPCRA’s Goals and Objectives

EPCRA has two principal objectives: “emergency planning” and the community’s “right to know.”<sup>41</sup> First, EPCRA’s “emergency planning” goals are designed to facilitate emergency plans for local response in the event of a release<sup>42</sup> of hazardous chemicals into the environment, thereby endangering the community.<sup>43</sup> Second, EPCRA’s “right to know” component gives the general public access to vital information concerning the presence and use of hazardous

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35. See Shavelson, *supra* note 26, at 30.

36. See *id.* Such other methods of regulation look to set limits on the amounts of pollution allowed to be discharged, whereas EPCRA “merely requires facilities to report the amounts and types of chemicals stored at or released from their plants.” *Id.*

37. See Steven J. Christiansen and Stephen H. Urquhart, *The Emergency Planning and Community Right To Know Act of 1986: Analysis and Update*, 6 B.Y.U. J. PUB. L. 235, 236 (1992).

38. See EPCRA §§ 304, 311-313, 42 U.S.C. §§ 11004, 11021-11023 (1994).

39. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1238-39 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (Feb. 24, 1997). It has been noted that “Congress anticipated that the availability of information about . . . toxic chemicals would enable the public to put substantial pressure on companies to reduce emissions. [EPCRA] appears to be having precisely this impact.” PERCIVAL ET AL., *supra* note 5, at 649.

40. See Christiansen and Urquhart, *supra* note 37, at 246, 251.

41. See EPCRA §§ 304, 311-313.

42. EPCRA defines the term “release” as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers and other closed receptacles) of any hazardous chemical, extremely hazardous substance, or toxic chemical.” EPCRA § 329(8), 42 U.S.C. § 11049(8) (1994).

43. See Christiansen and Urquhart, *supra* note 37, at 236.

substances<sup>44</sup> within the community.<sup>45</sup>

To facilitate "emergency planning," Congress designed EPCRA to provide a "blueprint" for effective local response in the event of a serious toxic emergency.<sup>46</sup> EPCRA calls for the establishment of emergency planning bodies and the development of local emergency response plans.<sup>47</sup> Further, each state is required to establish a State Emergency Response Commission ("SERC") comprised of representatives appointed by the governor of each state.<sup>48</sup> The SERC, in turn, must appoint local emergency planning committees ("LEPCs") to formulate response plans at district levels.<sup>49</sup> The LEPCs are to be comprised of various representatives from the public and private sectors.<sup>50</sup> Each LEPC is responsible for the collection and dissemination of data on hazardous chemicals and the establishment of safety precautions and procedures (called comprehensive emergency response plans) to follow in the event of an emergency.<sup>51</sup>

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44. The term hazardous substances will be used throughout this Comment to refer to chemicals that present varying degrees of danger to humans when exposed. EPCRA's right-to-know provisions differ according to whether such substances are classified as "hazardous," "extremely hazardous," or "toxic." The term "hazardous chemical," defined in United States Code section 11021(e), is given the same meaning that it is given in Title 29 of the Code of Federal Regulations, 29 C.F.R. § 1910.1200(c) (1996), with exceptions provided for certain food, cosmetic, agricultural, and medical substances. See EPCRA § 311(e), 42 U.S.C. § 11021(e) (1994). Section 11002(a) of the United States Code defines the term "extremely hazardous substance" as any substance that has been listed as such by the Environmental Protection Agency ("EPA") or which requires notification under section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9603(a) (1994). See EPCRA § 302(a), 42 U.S.C. § 11002(a). The term "listed toxic chemical" means any chemical so designated by the Senate Committee on Environment and Public Works. See EPCRA § 313(c), 42 U.S.C. § 11023(c).

45. See Abell, *supra* note 27, at 586.

46. See *id.* at 583.

47. EPCRA §§ 301, 303, 42 U.S.C. §§ 11001, 11003 (1994).

48. See *id.* § 301(a).

49. See *id.* § 301(b).

50. See *id.* § 301(c). Personnel from the following fourteen groups are required to be represented: elected State and local officials; law enforcement, firefighting, first aid, civil defense, public health, local hospital, environmental, and transportation personnel; members of the broadcast and print media; community groups; and owners and operators of facilities liable for compliance under EPCRA. See *id.*

51. See EPCRA § 303, 42 U.S.C. § 11003 (1994). As part of each comprehensive emergency response plan, the Act requires LIPC's to identify the facilities within their district that are subject to the Act's reporting requirements and any others which present a risk due to their nature or proximity. See *id.* § 303(c)(1). Each plan must set forth methods and procedures, including evacuation plans, to follow in the event of a hazardous chemical release, and must provide "procedures providing reliable, effective, and timely notification by the facility . . . that a release has occurred." See *id.* § 303(c)(2)-(9).

In order to protect the community's "right to know," EPCRA stimulates the flow of information to the general public about the use of chemicals within the community.<sup>52</sup> EPCRA establishes an elaborate reporting scheme for businesses and industries that handle toxic or otherwise hazardous chemicals.<sup>53</sup> The reporting scheme requires each subject facility to file a panoply of forms with its respective SERC, LEPC, and fire department ("Local Committees"), revealing precise data on the identity, location, and quantity of any hazardous chemicals being handled on site.<sup>54</sup> As a result of these reporting provisions, EPCRA's "right-to-know" component produces mind-boggling volumes of data used to build public concern and political consensus concerning regulation of such toxic substances.<sup>55</sup>

## 2. EPCRA's Reporting Provisions

Both of EPCRA's statutory objectives, "emergency planning" and the "right-to-know," are embodied within its scheme of reporting requirements.<sup>56</sup> The goal of improved emergency planning is

52. See *House Conference Report, supra* note 3, discussed more fully *infra* note 308.

53. EPCRA's most pertinent reporting requirements provide:

Sec. 11021. Material safety data sheets.

(a) Basic requirement. (1) Submission of MSDS or list. The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under [OSHA and its regulations] shall submit a material safety data sheet for each such chemical, or a list of such chemicals . . . to each of the following: (A) The appropriate local emergency planning committee (B) The State emergency response commission (C) The fire department with jurisdiction over the facility.

Sec. 11022. Emergency and hazardous chemical inventory forms.

(a) Basic Requirement. (1) The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under [OSHA and its regulations] shall prepare and submit an emergency and hazardous chemical inventory form . . . (2) . . . on or before March 1, 1988 and annually thereafter on March 1 . . . [containing data for] . . . the preceding calendar year.

Sec. 11023. Toxic chemical release forms.

(a) Basic Requirement. (1) The owner or operator of a facility subject to the requirements of this section shall complete a toxic chemical release form . . . for each toxic chemical listed under subsection (c) of this section that was manufactured, processed, or otherwise used in quantities exceeding the toxic chemical threshold quantity . . . during the preceding calendar year at such facility. Such form shall be submitted . . . on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.

EPCRA §§ 321-323, 42 U.S.C. §§ 11021-11023 (1994).

54. See EPCRA §§ 311-312, 42 U.S.C. §§ 11021-11022 (1994).

55. See Christiansen and Urquhart, *supra* note 37, at 236.

56. EPCRA §§ 304, 311-313, 42 U.S.C. §§ 11004, 11021-11023 (1994) (detailing



enhanced by provisions that require the immediate notification of local authorities in the event of a release into the environment of a "reportable quantity"<sup>57</sup> of an extremely hazardous substance or a listed toxic chemical.<sup>58</sup> The public's right-to-know is protected by three provisions which require public disclosure of extensive information on the presence, disposition, and health effects, of any hazardous chemical used by subject facilities within the community.<sup>59</sup> These latter three provisions generate a deluge of information and data which EPCRA requires be made available to the general public.<sup>60</sup>

Every facility that is subject to EPCRA's reporting criteria must notify its respective SERC and LEPC of its qualification under the Act.<sup>61</sup> Subject facilities include any facility<sup>62</sup> that produces, uses or

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EPCRA's reporting requirements).

57. EPCRA directed the EPA to establish threshold quantities for each extremely hazardous substance it lists in the regulations. Any release occurring in an amount at or exceeding such quantity constitutes a reportable quantity subject to EPCRA's emergency notification requirements. *See* EPCRA §§ 302, 304, 42 U.S.C. §§ 11002, 11004 (1994).

58. *See* EPCRA § 304(b)-(c), 42 U.S.C. § 11004(b)-(c). The importance to public safety of EPCRA's emergency planning-related reporting requirements can best be illustrated by a recent example. On March 29, 1995, the toxic chemicals muriatic and hydrochloric acid were spilled from a railroad tank car in Denver, Colorado, necessitating the evacuation of approximately 200 residents of the area. *See* *Neighbors For a Toxic Free Community v. Vulcan Materials Co.*, 964 F. Supp. 1448 (D. Colo. 1997). The two chemicals are listed as "toxic substances" by the EPA, and any release of such substances into the environment is therefore subject to EPCRA's reporting requirements. The company responsible for the release, however, did not notify the proper authorities until four and one-half hours after it had discovered the spill, which was not neutralized until over 24 hours later. A consumer group subsequently brought suit, alleging several violations of EPCRA's release reporting requirements. The suit alleged that defendants had failed to provide the proper authorities with immediate notice of the spill, and failed "to submit a follow-up emergency notice after the spill, i.e., . . . failed to report as soon as practicable on the chemical[s] involved and the health risks associated with [the chemicals]." *Id.*

59. *See* EPCRA §§ 311-313, 42 U.S.C. §§ 11021-11023.

60. *See* EPCRA § 324, 42 U.S.C. § 11044 (1994). This section provides that the information "shall be made available to the general public . . . during normal working hours at the location or locations designated," and that "[each LEPC] shall annually publish a notice in local newspapers that the . . . forms have been submitted, [and that] members of the public who wish to review . . . may do so at the location designated." *Id.* § 324(a)-(b). *See also* Christiansen and Urquhart, *supra* note 37, at 242 n.38 (emphasizing that Congress made it clear throughout the Act that information gathered under EPCRA must be made readily available to the general public in order to advance the statute's goals).

61. *See* EPCRA § 303(d), 42 U.S.C. § 11003(d) (1994) (explaining that the facilities notify the LEPC and then "after completion of an emergency planning district" the LEPC submits information to the SERC).

62. The term "facility" is defined by the Act to mean "all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous

stores hazardous chemicals at or above threshold amounts, with certain limited exceptions provided.<sup>63</sup> In general, the owner and operator of such a facility must report to its respective Local Committee any listed chemicals being used or handled on-site.<sup>64</sup> The gathered information must include specific data on the type, quantity, location, and disposition of such chemicals.<sup>65</sup> In addition, EPCRA requires that each subject facility prepare and submit annual inventories identifying what listed toxic chemicals it handled throughout the preceding year.<sup>66</sup>

Section 311 of EPCRA operates in conjunction with the Occupational Safety and Health Act of 1970 ("OSHA").<sup>67</sup> Under section 311, all OSHA-regulated facilities<sup>68</sup> must file with their respective Local Committees either the Material Safety Data Sheets ("MSDS") prepared according to OSHA for each hazardous chemical handled, or a detailed list ("List") of such chemicals.<sup>69</sup> These reporting requirements generate enormous amounts of data. In order to limit the inundation of data somewhat, EPCRA requires the Environmental Protection Agency ("EPA") to study and establish reporting thresholds according to the degree of dangers presented by such hazardous chemicals.<sup>70</sup>

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or adjacent sites and which are owned or operated by the same person." EPCRA § 329(4), 42 U.S.C. § 11049(4) (1994).

63. See EPCRA §§ 304(d), 327, 329(4), 42 U.S.C. §§ 11004(d), 11047, 11049(4) (1994); see also 52 Fed. Reg. 13,378, 13,384 (1987). Even federal agencies are required to report under EPCRA due to an executive order signed by President Clinton on August 3, 1993. See Abell, *supra* note 27, at 587 (citing Exec. Order No. 12,856, 58 Fed. Reg. 41,981 (1993)).

64. See EPCRA § 311(a)(1), 42 U.S.C. § 11021(a)(1) (1994).

65. See Christiansen and Urquhart, *supra* note 37, at 242.

66. See EPCRA § 312, 42 U.S.C. § 11022 (1994).

67. See EPCRA § 311; Occupational Health and Safety Act ("OSHA") of 1970, 29 U.S.C. §§ 651-666 (1994).

68. At the time of EPCRA's enactment, OSHA's requirements applied only to manufacturing facilities; however, these requirements were extended to all employers when the OSHA regulations were revised in 1987. See 52 Fed. Reg. 31,852 (1987). This expansion increased to several million the amount of facilities subject to EPCRA's reporting requirements under sections 311 and 312. See Christiansen and Urquhart, *supra* note 37, at 242.

69. See EPCRA § 311, 42 U.S.C. § 11021. For specific guidelines for determining which chemicals should be classified as "hazardous" by OSHA, see 29 C.F.R. § 1910.1200 (1996).

If a facility chooses not to submit its MSDSs under EPCRA, it must instead provide a List of such chemicals setting forth information similar to what MSDSs contain, such as chemical names and their hazardous components, and grouped according to categories of health and physical hazards established in OSHA. See EPCRA § 311(a)(2)(A).

70. See *id.* § 311(b). These reporting thresholds were designed to "strike the best balance between the amount and value of information generated by the public, on the

In addition to the MSDS requirements of section 311, OSHA-regulated facilities must also compile and submit annual data inventories on their handling of hazardous chemicals.<sup>71</sup> Section 312 requires each facility to file with its local committees annual inventory forms furnishing information on the location and amount of hazardous chemicals handled by the facility in the preceeding year.<sup>72</sup> At the request of local officials, however, a facility must also provide additional information, should a more detailed picture of the chemicals handled by a particular facility be necessary.<sup>73</sup> Facilities required to submit such additional information must also permit on-site inspections by local fire department officials if deemed necessary.<sup>74</sup>

Section 313 of EPCRA contains the Act's most noteworthy reporting provision.<sup>75</sup> This section enables the EPA and state officials to monitor directly the amounts of toxic chemicals released into the environment by a given facility.<sup>76</sup> Section 313 requires facilities to file annual reports reflecting all releases of any toxic chemicals during the preceding year.<sup>77</sup> The section provides that facilities with ten or more full-time employees are required to report their total annual releases of each of more than 600 toxic chemicals in quantities that exceed the thresholds established by the EPA.<sup>78</sup> If a facility releases a listed toxic

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one hand, and the cost to state and local planning bodies and facilities managing and providing the information, on the other." Christiansen and Urquhart, *supra* note 37, at 243.

71. See EPCRA § 312(b).

72. See *id.* § 312. Information reported on the annual inventory forms is referred to as "Tier I information" and requires only approximated data in the form of estimated quantities and general locations of the hazardous chemicals on site. See *id.* § 312(d)(1)(B)(i)-(iii).

73. See *id.* § 312(d)(2). This information is referred to as "Tier II information" and requires more specific data on the type of chemical, its location, and its manner of storage at the facility in question. See *id.* § 312(d)(2)(A)-(F). Once obtained by local authorities, this information must be made available to the general public, although limited exceptions permit the withholding of certain information at the facility owner's request. See *id.* § 312(e)(3)(B).

74. See *id.* § 312(f).

75. See PERCIVAL ET AL., *supra* note 5, at 649 (labeling section 313 as perhaps EPCRA's most significant new requirement); see also Abell, *supra* note 27, at 586 (stating that section 313 is EPCRA's most "publicized and controversial" provision) (citing Kevin J. Finto, *Regulation By Information Through EPCRA*, NAT. RESOURCES & ENV'T., at 13, 46 (1990)); Shavelson, *supra* note 26, at 31-32 (stating that section 313 is arguably EPCRA's most important provision).

76. See EPCRA § 313, 42 U.S.C. § 11023 (1994); see also PERCIVAL ET AL., *supra* note 5, at 649.

77. See also PERCIVAL ET AL., *supra* note 5 at 649 (stating that section 313 requires annual reports of any toxic chemical releases).

78. See EPCRA § 313; see also PERCIVAL ET AL., *supra* note 5, at 649 (summarizing EPCRA's section 313 requirements).

chemical<sup>79</sup> in an amount that meets or exceeds the threshold amount,<sup>80</sup> that release must be reported through the submission of a toxic chemical release form ("Form R").<sup>81</sup> Form R requirements are comprehensive, applying to all types of chemical releases, in whatever form; and to all media, including landfill disposal, air emissions, wastewater discharges, as well as transfers to off-site storage or treatment facilities.<sup>82</sup>

By July 1 of each year, Form R reporting releases of any listed toxic chemical must be submitted to the EPA and state officials.<sup>83</sup> Once these reports are collected, EPCRA requires the EPA to maintain an inventory of data on such releases that is up-to-date and available to the general public.<sup>84</sup> The result is the Toxic Release Inventory ("TRI"),<sup>85</sup> an on-line computer database fully accessible to the public—the first of its kind ever mandated by a federal statute.<sup>86</sup>

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79. The toxic chemicals in Section 313 refer to those listed at "Toxic Chemicals." See 40 C.F.R. § 372.65 (1996). In November of 1994, 286 additional toxics were added by the EPA bringing the total number of chemicals whose release must be reported under EPCRA to 654. See EPA Addition of Certain Chemicals; Toxic Chemical Release Reporting; Community Right-to-Know; Final Rule, 59 Fed. Reg. 61,432 (1994).

80. See EPCRA § 313(f)(1). After various interim rulings, the EPA finally published a final rule effective August 27, 1990, which established reporting thresholds for all facilities. See Community Right-to-Know Reporting Requirements, 55 Fed. Reg. 30,632 (1990).

81. See EPCRA § 313. The Form R was created by the EPA as the means for uniform reporting of all toxic chemical releases. See 40 C.F.R. § 372.85 (1996). Each form requires the subject facility to provide the following items of information for each listed toxic chemical known to be present at the facility: (i) the chemical's category of use at the facility, (ii) an estimate (in ranges) of the maximum amount of the chemical present at any time during the preceeding calendar year, (iii) a description of the waste treatment or disposal methods employed and an estimate of the efficiency of such methods for each wastestream, and (iv) the annual quantity of the toxic chemical entering each environmental medium. See EPCRA § 313(g)(1)(C).

82. See Christiansen and Urquhart, *supra* note 37, at 245.

83. See EPCRA § 313(a).

84. See *id.* § 313(j).

85. The TRI database is available to the public through several outlets, including the "RTK NET," an acronym for the "Right-To-Know Network," an on-line computer service operated by OMB Watch and The Unison Institute in Washington D.C., see Gary D. Bass & Alair MacLean, *Enhancing the Public's Right-To-Know About Environmental Issues*, 4 VILL. ENVTL. L.J. 287, 295 n.52 (1993) (defining OMB Watch as a "non-profit group that advocates for the public's right-to-know and greater government accountability"), and the National Library of Medicine's "TOXNET" System, see *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1239 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (Feb. 24, 1997), which can transmit such information to the public via modem transmission. Citizens can also order computer diskettes containing TRI information from the EPA and other sources. See Shavelson, *supra* note 26, at 30. Of course, TRI database information is also available to citizens in hard copy form under freedom of information laws. See *id.*

86. See Bass and MacLean, *supra* note 85, at 294. Unfortunately, it was not until two

Although Form R requirements apply only to facilities which handle toxic chemicals in threshold amounts,<sup>87</sup> the scope of section 313 is still very broad.<sup>88</sup> For certain listed toxic chemicals, any release, no matter how small, by a facility handling such chemicals must be reported.<sup>89</sup> Thus, unlike EPCRA's other reporting provisions, section 313 imposes no threshold amount for imposing its release reporting requirements. Revisions to the listed toxic chemicals, their threshold amounts, and the subject facility criteria, are made at the discretion of the EPA.<sup>90</sup>

The TRI database contains an extraordinary amount of numerical data.<sup>91</sup> Before such data can be ready for dissemination to the public, it must be analyzed by the EPA.<sup>92</sup> The data provided on each chemical must be thoroughly examined for characteristics of toxicity, exposure, degradation, and other factors in order to assist communication with energy planning.<sup>93</sup> Such information can then be accessed and used by a variety of organizations, including industry, government, and public interest groups.<sup>94</sup> Further, the TRI database is supplemented by information obtained under other federal regulatory programs.<sup>95</sup>

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and one-half years after EPCRA's passage that the EPA finally opened telecommunications lines to the database. *See id.* at 296.

87. *See* EPCRA § 313(a).

88. *See* Abell, *supra* note 27, at 586. With the exception of certain exempted facilities, generally every facility employing ten or more full-time employees, or engaging in general manufacturing is required to report releases of any listed toxic chemical used or handled in excess of the threshold quantity. *See* EPCRA § 313(b)(1)(A), (f)(1). However, it should be noted that several major sources of pollution are among those facilities exempted from section 313, including dry cleaners, public utilities, landfills, incinerators, and gas stations. *See* Abell, *supra* note 27, at 587.

89. *See* Christiansen and Urquhart, *supra* note 37, at 245.

90. *See* EPCRA § 302(a)(3), 42 U.S.C. § 11002(a)(3) (1994); *see* EPCRA § 313(b), (d), (f), 42 U.S.C. § 11023(b), (d), (f) (1994). Although such revisions are discretionary, EPCRA requires that chemical characteristics such as toxicity, reactivity, volatility, dispersability, combustibility, and flammability must be taken into consideration by the EPA when making such revisions. *See* EPCRA § 302(a)(4).

91. *See* Christiansen and Urquhart, *supra* note 37, at 251.

92. *See id.*

93. *See id.*

94. *See id.* at 246. Christiansen and Urquhart describe the TRI data as "a benchmark for new regulatory programs, as well as a catalyst for pollution prevention activities." *Id.*; *see also* EPA, TOXICS IN THE COMMUNITY: NATIONAL AND LOCAL PERSPECTIVES 251 (1991).

95. *See* Christiansen and Urquhart, *supra* note 37, at 250 (citing the Toxic Substances Control Act, Pub. L. No. 99-519, 3(c)(1), 100 Stat. 2989 (codified at 15 U.S.C. 2601-2671 (1988)); the Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. No. 92-516, § 2, 86 Stat. 998 (codified at 7 U.S.C. 136-136Y (1988))).

### 3. EPCRA's Enforcement Provisions

To assist in accomplishing EPCRA's objectives, Congress provided a wide variety of mechanisms for enforcement of EPCRA's reporting provisions.<sup>96</sup> First, Congress authorized the EPA to enforce EPCRA compliance through civil or administrative procedures<sup>97</sup> and even went so far as to allow the EPA to impose criminal penalties.<sup>98</sup> Local SERCs and LEPCs have been given the authority to enforce EPCRA through declaratory or injunctive actions.<sup>99</sup> Finally, EPCRA section 326 permits citizens to sue the EPA if the EPA fails to comply with its non-discretionary obligations under the Act.<sup>100</sup>

Penalties imposed under EPCRA are set to deter non-compliance and to ensure timely and accurate reporting by facilities.<sup>101</sup> A violating facility can be subject to maximum penalties of \$25,000 per day for the first violation.<sup>102</sup> Repeated daily violations of EPCRA's reporting requirements may constitute separate violations; therefore, the failure to comply can result in substantial penalties.<sup>103</sup> Repeated violations of EPCRA can subject a facility to fines of up to \$75,000 per day.<sup>104</sup> These penalties are made payable to the United States Treasury.<sup>105</sup> Although private litigants bringing suit under EPCRA do not receive "bounties" from successful citizen suits,<sup>106</sup> they may recover the costs of litigation, including reasonable attorneys fees and any further costs as determined by the court.<sup>107</sup>

### 4. EPCRA's Citizen Suit Provision

In addition to the remedies enforceable by the EPA, state officials, and Local Committees, EPCRA grants enforcement authority to the ordinary private citizen.<sup>108</sup> EPCRA permits private citizens to initiate,

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96. *See Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1240 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (Feb. 24, 1997).

97. *See* EPCRA § 325, 42 U.S.C. § 11045 (1994).

98. *See id.*

99. *See* EPCRA § 326, 42 U.S.C. § 11046 (1994).

100. *See id.* § 326(a)(1)(B).

101. *See* EPCRA § 325, 42 U.S.C. § 11045 (1994).

102. *See id.* § 325(b), (c). The failure to properly submit a Form R will subject a facility to a maximum penalty of \$25,000 per day; failure to properly submit an MSDS will subject a facility to a \$10,000 per day maximum penalty. *See id.*

103. *See id.* § 325(c)(3).

104. *See id.* § 325(b)(2).

105. *See id.* § 325.

106. *See Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1139 (E.D. Pa. 1993).

107. *See* EPCRA § 326(f), 42 U.S.C. § 11046(f) (1994).

108. *See id.* § 326.

on their own behalf, civil proceedings against an owner or operator of a facility who fails to comply with the Act's reporting requirements.<sup>109</sup> EPCRA's citizen suit provision provides:

[A]ny person may commence a civil action on his own behalf against the following: (A) An owner or operator of a facility for failure to do any of the following: (i) Submit a follow-up emergency notice under section 11004(c) of this title. (ii) Submit a material safety data sheet or a list under section 11021(a) of this title. (iii) Complete and submit an inventory form under section 11022(a) of this title . . . (iv) Complete and submit a toxic chemical release form under section 11023(a) of this title . . . .<sup>110</sup>

In addition, this provision expressly grants jurisdiction to private citizens in the district courts "to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement."<sup>111</sup>

A variety of EPCRA violations can give rise to a private cause of action, including the failure to: (1) submit an emergency notice of a chemical release under section 304; (2) submit MSDSs or on-site chemicals lists under section 311(a); (3) file an annual chemical inventory form under section 312; or (4) file a Form R under section 313(a).<sup>112</sup> EPCRA's citizen suit provision employs private parties to aid in enforcing compliance with EPCRA's reporting and notification requirements.<sup>113</sup>

Like most other federal environmental laws, EPCRA prohibits citizen suits where the EPA or another governmental enforcement authority is already involved.<sup>114</sup> Section 326(e) prohibits private civil actions from taking place where "the Administrator has commenced and is diligently prosecuting the same matter in a criminal or judicial proceeding."<sup>115</sup> The intent of this restriction on citizen enforcement is to prevent citizen suits from interfering with the enforcement discretion

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109. *See id.*

110. *Id.*

111. *Id.* § 326(c).

112. *See id.*

113. *See id.*

114. *See id.* § 326(e).

115. *Id.* In its entirety, section 326(e) provides:

(e) No action may be commenced under subsection (a) of this section against an owner or operator of a facility if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this chapter with respect to the violation of requirement.

*Id.*

exercised by federal and state authorities.<sup>116</sup>

In addition, citizens intending to bring suit in federal court under EPCRA are required to provide the EPA, state officials, and the alleged violator with notice of their intent to file suit at least sixty-days before commencing any action.<sup>117</sup> Any governmental enforcement occurring during this sixty-day notice period will extinguish the citizen's right to bring suit under EPCRA.<sup>118</sup> If such authorities fail to take action within the sixty-day notice period, the Act allows private citizens to pursue civil remedies in the district courts against the alleged violator. However, should the EPA or State choose not to pursue an action against an alleged violator within the sixty-day notice period, either authority may still intervene at any time during the course of an on-going action "as a matter of right."<sup>119</sup>

Strict compliance with notice provisions such as EPCRA's has been held by the Supreme Court to be a mandatory prerequisite or condition precedent to citizen suit jurisdiction in the federal courts.<sup>120</sup> EPCRA's sixty-day notice requirement serves two essential functions. First, it enables state and federal authorities, as primary enforcers of the Act's requirements, to investigate the matter and intervene if necessary. Second, sixty-days notice gives the alleged violator time to comply with the Act's requirements.<sup>121</sup>

A recent case helps illustrate how EPCRA's sixty-day notice requirement can come in conflict with its provision for citizen enforcement. In the case of *Don't Waste Arizona, Inc. v. McLane Foods*,<sup>122</sup> a citizen organization ("DWA") brought suit against McLane Foods ("McLane") for EPCRA violations during the years of 1993 and

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116. See PERCIVAL ET AL., *supra* note 5, at 1091.

117. See EPCRA § 326(d), 42 U.S.C. § 11046(d).

118. See *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, 950 F. Supp. 972, 975 (D. Ariz. 1997). *Contra Neighbors for a Toxic Free Community v. Vulcan Materials*, 964 F. Supp. 1448 (D. Colo. 1997). In *Vulcan Materials*, the court held that plaintiff's citizen suit was not barred by the EPA's intervention in the matter because the consent agreement reached between the EPA and the defendant concerned only CERCLA violations and made no mention of the EPCRA violations which plaintiff's suit alleged. See *id.* For a more detailed discussion of *Vulcan Materials*, see *supra* note 58.

119. EPCRA § 326(h)(1), 42 U.S.C. § 11046(h)(1).

120. See, e.g., *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) (holding that citizen suit was precluded by petitioner's failure to satisfy the plain language of the Resource Conservation and Recovery Act of 1976 detailing a 60-day notice requirement and notification of both state officials and the EPA of its intent to sue an alleged violator).

121. See *id.* at 29 (citing *Gwaltney, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987)); see *infra* Part II.B.2 (discussing more fully the *Gwaltney, Ltd.* case).

122. 950 F. Supp. 972 (D. Ariz. 1997).



1994.<sup>123</sup> McLane, a food preparer and distributor used large quantities of ammonia as a coolant for its spiral freezer.<sup>124</sup> Because McLane kept more than 500 pounds of ammonia on its site, which had been classified as an extremely hazardous substance for purposes of EPCRA reporting, McLane was required to file annual reports with its Local Committees pursuant to EPCRA section 312.<sup>125</sup>

McLane failed to file the required reports, and on April 28, 1995, DWA notified the EPA Administrator, the Arizona Department of Quality, and McLane of its intent to sue as required by EPCRA section 326.<sup>126</sup> Subsequently on May 12, 1995, McLane filed its reports for the years 1993 and 1994, indicating that 4500 pounds of ammonia had been handled on site during each of those calendar years.<sup>127</sup> Because no action was taken by state or federal officials within the notice period, on August 28, 1995, DWA filed its complaint in the district court seeking injunctive relief, civil penalties, and attorney's fees and costs.<sup>128</sup> McLane challenged the suit, arguing that the recent cure of its non-compliance deprived DWA of its cause of action and the court of its jurisdiction over the citizen suit.<sup>129</sup> The court, concurring with the Seventh Circuit's analysis, held that a citizen suit can be based on a wholly past violation.<sup>130</sup>

### B. *Citizen Suits Prior to Citizens for a Better Environment*

Thus, it is EPCRA's sixty-day notice provision which directly gives rise to the current conflict among the circuit courts over whether citizen suits can be permitted based only on historical violations.<sup>131</sup> With the Seventh Circuit's ruling in *Citizens for a Better Environment*, the grant of jurisdictional authority conferred to private citizens under EPCRA appears to encompass actions for purely historical violations.<sup>132</sup> However, prior to *Citizens for a Better Environment*, the vitality of citizen enforcement provisions (arising out of EPCRA and many other environmental statutes) had been left in doubt by a number of rulings

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123. *See id.* at 973.

124. *See id.* at 972-73.

125. *See id.* at 973.

126. *See id.* *See also* EPCRA § 326(d)(1), 42 U.S.C. § 11046(d)(1) (1994).

127. *See Don't Waste Arizona*, 950 F. Supp. at 973.

128. *See id.*

129. *See id.*

130. *See infra* notes 286-91 and accompanying text.

131. *See supra* Part II.A.4; *see also infra* Part III.

132. *See Citizens for a Better Env't*, 90 F.3d at 1237; *see infra* Part III.A.3 (discussing *Citizens for a Better Env't* more fully).

which appeared to restrict their reach.<sup>133</sup> To determine what impact the *Citizens for a Better Environment* holding will have on the enforcement authority of private citizens under EPCRA, it is necessary to review how citizen suit provisions have evolved in environmental legislation and to examine how courts have construed such provisions in the past.

### 1. The Origins of Citizen Suits

Nearly every major piece of environmental legislation contains citizen suit provisions similar to those in EPCRA.<sup>134</sup> While differing in precise language, citizen suit provisions generally authorize any person to commence an action in the district court against a violator of a particular statute, provided that there is also a failure of a governmental or administrative body to pursue the alleged violation.<sup>135</sup> Professor Joseph Sax is credited with developing the concept of the citizen suit more than twenty-five years ago.<sup>136</sup> Motivated by the threat to environmental laws posed by budgetary and political limitations on government enforcement, Sax advocated granting private citizens the authority to enforce such laws.<sup>137</sup> In light of the limited resources with which state and local governments are left to fulfill legislative mandates, citizen suits serve an essential function of supplementing

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133. See, e.g., *Atlantic States Legal Found. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995), *reh'g denied en banc*, 1995 U.S. App. LEXIS 30933 (6th Cir. Oct. 16, 1995); see *infra* Part III.A.2 (discussing *United Musical Instruments Inc.* more fully).

134. See, e.g., and compare Endangered Species Act § 11, 16 U.S.C. § 1540(g) (1994); Toxic Substances Control Act § 18, 15 U.S.C. § 2619 (1994); Federal Water Pollution Control Act of 1972 (the "Clean Water Act") § 505, 33 U.S.C. § 1365 (1994); Safe Drinking Water Act § 1449, 42 U.S.C. § 300j-8 (1994), *amended by* 42 U.S.C. § 300j-8 (1996); Resource Conservation and Recovery Act of 1976 ("RCRA") § 7002, 42 U.S.C. § 6972 (1984), *amended by* 42 U.S.C. § 6972 (1994); Clean Air Act of 1970 (the "Clean Air Act") § 304, 42 U.S.C. § 7604 (1994); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") § 310, 42 U.S.C. § 9659 (1994); (containing citizen suit provisions), *with* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136-136y (1994) (omitting a provision for citizen suits).

135. See Beverly McQueary Smith, *Recent Developments in Citizens' Suits Under Selected Federal Environmental Statutes*, C981 A.L.I.A.B.A. COURSE OF STUDY MATERIALS (Feb. 16-18, 1995), *available in* LEXIS, Cle Library, ALI-ABA File.

136. See e.g., Shavelson, *supra* note 26, at 29 (noting that "[C]ongress borrowed a novel concept from a Michigan law drafted by Professor Joseph Sax, and included it in the 1970 Clean Air Act."); see also Peter H. Lehner, *The Efficiency of Citizen Suits*, 2 ALB. L. ENVTL. OUTLOOK 4 (1995).

137. See JOSEPH SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971).

governmental enforcement.<sup>138</sup>

Congress recognized the logical utility of such a concept and incorporated the first federal environmental citizen suit provision into the Clean Air Act of 1970 ("Clean Air Act").<sup>139</sup> Under this provision, private citizens have the authority to pursue private civil remedies against violators of the act's air pollution laws—whether the alleged violators are other private parties or the EPA itself.<sup>140</sup> This permits private citizens to act as "private attorneys general"<sup>141</sup> to enforce a federal environmental law and to become more involved than ever before.<sup>142</sup> Grants of private enforcement authority have subsequently been incorporated into environmental statutes by Congress for more than twenty years.<sup>143</sup>

## 2. *Gwaltney, Ltd.*: The Supreme Court's View of Citizen Suits

Despite apparent widespread Congressional acceptance of the concept,<sup>144</sup> the Supreme Court adopted a narrow interpretation of citizen suit legislation on its only occasion for review. In *Gwaltney, Ltd. v. Chesapeake Bay Foundation, Inc.*,<sup>145</sup> the Supreme Court granted certiorari to resolve a split among circuits almost identical to the one that is the subject of this Comment: the circuits were in disagreement over whether historical violations gave rise to a cause of action under the citizen suit provision of the Clean Water Act.<sup>146</sup> In

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138. See, e.g., Shavelson, *supra* note 26, at 29. Shavelson asserts that "[i]n the late 1960's, it became painfully clear that government regulation and voluntary industry compliance alone were not sufficient to protect the environment." *Id.*

139. See 42 U.S.C. § 7604 (1994).

140. See *id.* The citizen suit provisions of the Clean Air Act confer enforcement authority through two types of suits: it permits (1) citizens to sue dischargers of pollution in violation of the Clean Air Act's source-specific limitations, and (2) suits against the EPA for failing to carry-out its administrative obligations as required under the act. See Lehner, *supra* note 136, at 4-5.

The Clean Air Act's legislative history indicates that by including a citizen suit provision, Congress intended to "strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) (citing 116 CONG. REC. S32927 (1970) (statement of Sen. Muskie)).

141. Shavelson, *supra* note 26, at 29.

142. See *id.*

143. See *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1137 n.4 (E.D. Pa. 1993); see *supra* note 134 (listing congressional acts containing citizen suit provisions).

144. See *supra* note 134 (listing congressional acts containing citizen suit provisions).

145. 484 U.S. 49 (1987).

146. Federal Water Pollution Control Act Amendments of 1987 ("Clean Water Act") § 505(a), 33 U.S.C. § 1365(a) (1987) (amending the Federal Water Pollution Control Act

*Gwaltney, Ltd.*, the Court held that a suit brought for “wholly past violations” was not sufficient to confer federal jurisdiction.<sup>147</sup> According to the Court, the Clean Water Act authorizes citizens to seek civil remedies “only in a suit brought to enjoin or otherwise abate an on-going violation.”<sup>148</sup>

*Gwaltney, Ltd.* involved a citizen suit for declaratory and injunctive relief brought against a facility for violating the effluent limitations of its NPDES permit.<sup>149</sup> The facility, a meat-packing plant that had repeatedly violated discharge limitations for seven different pollutants, moved for dismissal on jurisdictional grounds because the complaint lacked any allegation that the facility was “in violation” of its permit when the action was filed.<sup>150</sup> The Clean Water Act provides that in the absence of federal or state enforcement, private citizens can pursue civil remedies against anyone “alleged to be in violation of” the act’s provisions.<sup>151</sup> The district court denied the motion and held that the language—“to be in violation”—could reasonably mean either prior unlawful conduct or conduct that continues into the present.<sup>152</sup> The Fourth Circuit affirmed, giving rise to a three-way conflict among the circuits<sup>153</sup> over the scope of citizen enforcement authority conferred by

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of 1972 (“Clean Water Act”) § 505(a), 33 U.S.C. § 1365(a) (1972)).

147. *Gwaltney, Ltd.*, 484 U.S. at 56.

148. *Id.* at 59. In support of its holding, the Court stated, “[o]ur reading . . . is bolstered by the language and structure of the rest of the citizen suit provisions . . . . These provisions together make plain that the interest of the citizen-plaintiff is primarily forward-looking.” *Id.*

149. *See id.* at 49. NPDES stands for National Pollutant Discharge Elimination System—a state-issued permit program authorized under the Clean Water Act § 402, 33 U.S.C. § 1342 (1994) (authorizing states to issue wastewater discharge permits through their own Clean Water Act permit programs, as long as those programs comply with federal standards).

150. *See Gwaltney, Ltd.*, 484 U.S. at 54. Although a violation did not exist at the time the complaint was filed, the Court noted that, “[b]etween 1981 and 1984, petitioner repeatedly violated conditions of the permit by exceeding effluent limitations.” *Id.* at 53. The Clean Water Act provides that private citizens may commence civil actions against any person “alleged to be in violation of” the conditions of an NPDES permit. 33 U.S.C. § 1365(a)(1) (1988).

151. *Id.*

152. *See Chesapeake Bay Found. v. Gwaltney, Ltd.*, 611 F. Supp. 1542, 1547 (E.D. Va. 1985), *aff’d*, 791 F.2d 304 (4th Cir. 1986), *vacated*, 484 U.S. 49 (1987). According to the District Court: “[t]he words ‘to be in violation’ may reasonably be read as comprehending unlawful conduct that occurred solely prior to the filing of the lawsuit as well as unlawful conduct that continues into the present.” *Id.* The District Court also found, in the alternative, that claimants had satisfied the jurisdictional requirements of the Act because they alleged in good faith that violations of the facility’s NPDES permit were persisting at the time of suit. *See id.* at 1549 n.8.

153. By affirming the district court’s ruling, the Fourth Circuit expressly rejected the Fifth Circuit approach adopted in *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d

the Clean Water Act (similar to the currently existing conflict surrounding citizen suits under EPCRA).<sup>154</sup>

As a result of this conflict, the Supreme Court in *Gwaltney, Ltd.* determined whether the Clean Water Act's citizen suit provision grants jurisdiction for anything other than on-going violations.<sup>155</sup> The Court concluded that the jurisdictional authority for citizen suits under the Clean Water Act is "primarily forward-looking."<sup>156</sup> Because EPCRA permits administrative actions for on-going as well as historical violations, citizen actions must be limited to only prospective relief.<sup>157</sup> The Court reasoned that Congress intended the citizen suit to be used exclusively as a device for enforcing compliance, rather than as an additional provision for civil penalties.<sup>158</sup> The *Gwaltney, Ltd.* Court analyzed both the act's plain language and its intended purpose to arrive at this narrow interpretation of citizen suits under the Clean Water Act.

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392 (5th Cir. 1985). See *Gwaltney, Ltd.*, 791 F.2d at 312. Meanwhile, the First Circuit had also been asked to examine section 505(a) of the Clean Water Act. See *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986). Adopting neither position, the First Circuit had held that jurisdiction lies when "the citizen-plaintiff fairly alleges a continuing likelihood" that violations will again occur. *Id.*

154. The First Circuit's approach precluded citizen suits for wholly past violations, but permitted them when there existed a pattern of intermittent violations even if there was no violation at the time suit was filed. See *Gwaltney, Ltd.*, 484 U.S. at 56 (citing *Pawtuxet Cove Marina, Inc.*, 807 F.2d at 1094). Such an approach falls squarely between the positions taken by the Sixth and Seventh Circuits in the present conflict over EPCRA § 326. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (Feb. 24, 1997); *Atlantic States Legal Found. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995), *reh'g denied en banc*, 1995 U.S. App. LEXIS 30933 (6th Cir. Oct. 16, 1995).

155. See *Gwaltney, Ltd.*, 484 U.S. at 52.

156. *Id.* at 59. In acknowledging ambiguity regarding the interpretation of the phrase "to be in violation," the Court stated, "[t]he prospective orientation of th[e] phrase ['in violation'] could not have escaped Congress' attention." *Id.* at 57.

157. See *id.* at 58-59. The Court added that:

Congress had used identical language in the citizen suit provisions of several other environmental statutes that authorize only prospective relief [listing such statutes]. Moreover, Congress has demonstrated in yet other statutory provisions that it knows how to avoid this prospective implication.

*Id.* at 57.

158. See *id.* at 58-59. Despite an incorporation by reference of similar language which granted authority for civil enforcement of historical violations by the EPA, the Court rejected such a grant of authority to private citizens. Citing *Tull v. United States*, 481 U.S. 412 (1987), the Court held that injunctive relief and civil penalties are separately authorized, and therefore, the Clean Water Act's provision permitting civil actions by the EPA Administrator for past violations could not be likewise applied to its injunctive citizen suit provisions. See *id.*

In its analysis of the language, the Court viewed Congress' "undeviating use of the present tense" in the Clean Water Act as evidence that the grant of authority for citizen suits was intended to address only present or future non-compliance.<sup>159</sup> According to the Court, the syntax used by Congress in this provision demonstrates that the citizen suit was not meant to address violations that had been corrected by the time the suit was filed.<sup>160</sup> This language provided the Court with "a striking indicia of the prospective orientation" of the Clean Water Act's citizen suit provision.<sup>161</sup> Furthermore, the Clean Water Act contains no explicit reference to historical violations—something that Congress has included in statutory language when desired.<sup>162</sup> Because Congress did not specifically allow for citizen plaintiffs to sue for wholly past violations, the Court reasoned that Congress intended to authorize only prospective relief.<sup>163</sup>

The *Gwaltney, Ltd.* Court also relied on legislative history to support its finding that the Clean Water Act does not permit citizen suits for historical violations.<sup>164</sup> It concluded that the citizen suit "is meant to supplement rather than supplant" governmental enforcement.<sup>165</sup> In support of this conclusion, the Court drew from evidence in House and Senate Reports that the Clean Water Act's citizen suit provisions were closely linked to those of the Clean Air Act,<sup>166</sup> which were exclusively injunctive remedies, authorizing only prospective relief.<sup>167</sup> The similarities in the language of the two statutes suggest that Congress intended both statutes' citizen enforcement provisions to be analogous.<sup>168</sup>

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159. *See id.* at 59.

160. *See id.*

161. *Id.* According to the Court, this conclusion was supported by the "pervasive use of the present tense" throughout the relevant section. *Id.*

162. *See id.* at 57 n.2 (citing 42 U.S.C. § 6972 (1984) (amending the Solid Waste Disposal Act, 42 U.S.C. § 6972(a)(1)(B) (1978))).

163. *See id.* The *Gwaltney, Ltd.*, Court noted that Congress could have phrased its grant of enforcement authority in language which looked to the past, i.e., "to have violated." *Id.*

164. *See id.* at 61.

165. *Id.* at 60.

166. *See* 42 U.S.C. § 7604 (1994).

167. *See Gwaltney, Ltd.*, 484 U.S. at 57 (citing H.R. REP. NO. 92-911, at 133). The court stated that the "[Clean Water Act] Section 505 closely follows the concepts utilized in section 304 of the Clean Air Act." *Id.* at 62.

168. *See id.* The Court considered the language—"to be in violation"—to be a term of art used intentionally by Congress to permit citizen involvement only where no government action takes place. *Id.*

Furthermore, to support its view of citizen suits as purely a supplement to government enforcement, the *Gwaltney, Ltd.* Court pointed to the Clean Water Act's notice provisions.<sup>169</sup> The Clean Water Act includes notice provisions similar to those in EPCRA, requiring a citizen plaintiff to provide sixty-days notice of an intent to sue.<sup>170</sup> The Court viewed the concept of notice as logically inconsistent with allowing a citizen suit for past violations.<sup>171</sup> The purpose of a notice period, in the Court's view, is to obviate the need for citizen enforcement if the alleged violator brings itself into compliance.<sup>172</sup> Allowing remedies to private citizens for historical violations would undermine what Congress envisioned to be only a supplementary role for the citizen suit under the Clean Water Act.<sup>173</sup> According to the Court, the nature of this role would become troublesome should citizens be permitted to sue for wholly past violations when a facility has cured its non-compliance.<sup>174</sup>

The *Gwaltney, Ltd.* holding substantially restricts the enforcement authority of citizen plaintiffs under the Clean Water Act.<sup>175</sup> With the

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169. *See id.* at 60-61.

170. *See* 33 U.S.C. § 1365(b)(1)(A) (1994). As support that citizen suits were permitted only to enforce compliance and not for civil penalties for past violations, the Court noted that private actions are barred where the EPA or state has already initiated some action requiring compliance. *See Gwaltney, Ltd.*, 484 U.S. at 60 n.3, (citing 33 U.S.C. § 1365(b)(1)(B)).

171. *See Gwaltney, Ltd.*, 484 U.S. at 59-60 ("Any other conclusion would render incomprehensible [the Clean Water Act's] notice provision . . ."). Because the notice provision includes a remedy for deficiency, the Court reasoned that Congress' rationale for the provision was not to penalize the company: "[i]f we assume . . . that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous." *Id.* at 60.

172. *See id.* According to the Court, "[i]t follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance and thus likewise render unnecessary a citizen suit." *Id.*

173. *See id.* The Court believed that adoption of a broader interpretation would create "a disturbing anomaly" stating:

Suppose that the Administrator identified a violator of the Act and issued a compliance order . . . [but] agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of state enforcement authorities.

*Id.* at 60-61.

174. *See id.* at 61. The court reasoned that "[This] 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." *Id.*

175. *See id.* at 56.

Supreme Court's decision that the Clean Water Act only authorizes citizens to seek civil penalties in suits brought to "enjoin or otherwise abate an ongoing violation,"<sup>176</sup> an initial precedent was set for what effect was to be given private remedies in environmental statutes.<sup>177</sup> While a narrow reading of citizen suits under the Clean Water Act resulted, at least one court has applied the *Gwaltney* analysis to justify a strict interpretation of citizen suits under other environmental statutes.<sup>178</sup>

### III. DISCUSSION

#### A. Citizen Suits Under EPCRA Prior to *Citizens for a Better Environment*

EPCRA was drafted almost one year after the *Gwaltney, Ltd.* ruling and in the wake of its tapered view of citizen enforcement. However, in drafting EPCRA's citizen suit provision, Congress utilized language that differs distinctly from that used in the Clean Water Act.<sup>179</sup> While the citizen suit provision narrowed in *Gwaltney, Ltd.* authorizes citizen actions against those "alleged to be in violation," EPCRA's citizen suit provision permits such suits against a person "for the failure to comply" with the Act's requirements. Some commentators have found this syntactical distinction significant,<sup>180</sup> and the district courts examining the issue have also distinguished EPCRA's language from the Clean Water Act and *Gwaltney, Ltd.*<sup>181</sup>

#### 1. District Court Treatment of Citizen Suits Under EPCRA

The dynamics of the debate which EPCRA's enforcement provisions have engendered can be illustrated by examining the

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176. *Id.* at 59.

177. See *Hallstrom v. Tillamook County*, 493 U.S. 20, 32 (1989); *Atlantic States Legal Found. v. Eastman Kodak Co.*, 809 F. Supp. 1040, 1044 (W.D.N.Y. 1992), *aff'd*, 12 F.3d 353 (2d Cir. 1993), *amended by* 1993 U.S. App. LEXIS 35911 (2d Cir. Dec. 14, 1993) (holding that the discharge of unlisted pollutants is not unlawful under the Clean Water Act).

178. See, e.g., *Hallstrom*, 493 U.S. at 29 (using similar reasoning in an analysis of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972 (1994)); *Atlantic States Legal Found. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995), *reh'g denied en banc*, 1995 U.S. App. LEXIS 30933 (6th Cir. Oct. 16, 1995) (applying *Gwaltney* analysis to citizen suit provisions of EPCRA).

179. See EPCRA § 326, 42 U.S.C. § 11046 (1994).

180. See, e.g., *Abell*, *supra* note 27, at 599 (recognizing that "[b]y contrast, it appears that citizens may maintain a suit under EPCRA for past violations that are not continuing"); *Pritchard*, *supra* note 27, at 242.

181. See *infra* Part III.A.1.



decisions of several district courts, all of which agree that citizens can sue violators for wholly past violations. The decisions came down prior to the Sixth Circuit's decision in *United Musical Instruments*.

In *Atlantic States Legal Foundation v. Whiting Roll-Up Door Manufacturing*,<sup>182</sup> a United States District Court in New York held that EPCRA reporting violations that had already been corrected could still constitute grounds for a private civil action.<sup>183</sup> In a case of first impression, the *Whiting Roll-Up Door Manufacturing* court engaged in a thorough examination of EPCRA's provisions, its legislative intent, and the goals behind its enactment.<sup>184</sup> EPCRA's plain language and well-documented legislative purpose compelled the *Whiting Roll-Up Door Manufacturing* court to hold that EPCRA authorizes civil actions brought by private citizens for "reporting violations which are not continuing at the time the lawsuit is filed."<sup>185</sup> The court concluded that barring citizen suits once reporting has occurred would impede EPCRA's intended goals of effective emergency response planning and public safety.<sup>186</sup>

First, the *Whiting Roll-Up Door Manufacturing* court found that, when logically viewed together, the language contained in EPCRA's reporting, enforcement, and civil penalty provisions compelled the conclusion that EPCRA confers federal jurisdiction over citizen lawsuits for past violations.<sup>187</sup> The court noted that because EPCRA's reporting provisions establish mandatory dates for initial compliance, such dates must be considered to constitute "requirements" for purposes of EPCRA's civil penalty provision.<sup>188</sup>

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182. 772 F. Supp. 745 (W.D.N.Y. 1991).

183. *See id.* at 749. In *Whiting Roll-Up Door Manufacturing*, a citizens' environmental organization notified an industrial door manufacturing facility of its intent to file a civil suit for violations of EPCRA reporting requirements. *See id.* The plaintiff's notice letter alleged that defendant had "failed to accurately complete and submit" the required MSDS, inventory, and toxic chemical release forms for the years 1987-1989 pursuant to EPCRA sections 311, 312, 313. *See id.* Following inaction by the EPA within sixty days, during which the facility filed numerous overdue forms with designated agencies, the plaintiff commenced its suit seeking civil penalties for defendant's failure to comply with EPCRA's required reporting dates. *See id.*

184. *See id.* In holding that the Act does authorize citizen suits, the court stated, "[t]his court must decide this narrow issue: Does EPCRA authorize citizen suits for reporting violations which are not continuing at the time the lawsuit is filed . . . . This Court must conclude in the affirmative." *Id.*

185. *Id.* at 753.

186. *See id.* at 751.

187. *See id.*

188. *See id.* at 750. As the court stated:

[T]he compliance dates constitute requirements of the reporting provisions; the unequivocal language of §§ 311-313 requires initial reporting on dates

Second, the *Whiting Roll-Up Door Manufacturing* court took into consideration the legislative history's numerous references to the protection of the public health and environment.<sup>189</sup> The court's opinion closely observed the two fundamental objectives sought by Congress through enactment of EPCRA: public access to information on hazardous chemicals and the use of such information for local emergency response planning and control.<sup>190</sup> In the court's assessment, EPCRA's facilitation of awareness and safety hinges upon an industry's timely compliance with the reporting requirements.<sup>191</sup> Thus, the *Whiting Roll-Up Door Manufacturing* court reasoned that EPCRA's success and development would be critically undercut by the failure to enforce the statutorily mandated dates of initial compliance.<sup>192</sup>

Several months later, the Northern District Court of California followed this reasoning in *Williams v. Leybold Technologies, Inc.*<sup>193</sup> The *Williams* court described *Whiting Roll-Up Door Manufacturing*'s reasoning as "sound and fully applicable" because EPCRA's plain language does not expressly require continuing violations at the time of suit.<sup>194</sup> The court also considered EPCRA's dual-purpose legislative intent,<sup>195</sup> and found that its language and history support the

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certain . . . . [T]his court cannot reconcile the defendant's interpretation with EPCRA's civil penalty provision which authorizes civil penalties against "[a]ny person who . . . violates any requirement . . ." of EPCRA's reporting provisions.

*Id.*

189. *See id.*

190. *See id.* at 751. The court added, "[t]he relative achievement of these objectives, then, depends on accurate and current information." *Id.*

191. *See id.* (noting that "[t]he required filing of the MSDS pursuant to § 311 is obviously a critical first step to achieving the intent of EPCRA").

192. *See id.* Stating that "[t]o overlook EPCRA's reporting deadlines would subvert the objectives of EPCRA." *Id.*

193. 784 F. Supp. 765 (N.D. Cal. 1992).

194. *See id.* at 768. The court decided that *Whiting Roll-Up Door Manufacturing* could be applied even though the case before it involved a change in the federal reporting requirements. *See id.* In *Williams*, a former employee sought civil penalties, attorney's fees and costs against a facility for its failure to report the use of nickel and nickel compounds in its manufacturing operations from 1986 to 1990 as required by EPCRA. *See id.* In July of 1990, however, the United States EPA increased the threshold reporting limits under section 11021(a)(1) for nickel and other hazardous substances to levels above those being reported by the facility at the time. *See* 42 U.S.C. § 11021(a)(1) (1994). Even though under the amendments the facility was no longer liable under EPCRA, the court permitted the citizen plaintiff's suit for past violations because the statutory requirements of proper notice had been satisfied and EPA officials chose not to prosecute the action. *See Williams*, 784 F. Supp. at 768.

195. *See id.* at 768 (citing H.R. CONF. REP. NO. 99-962 (1986)). *See also supra* Part III.A.1.

conclusion that historical violations should not be barred from citizen enforcement.<sup>196</sup>

One year later, a Pennsylvania district court, in *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*,<sup>197</sup> also followed this reasoning, adding further credibility to this interpretation. The *Delaware Valley Toxics Coalition* court upheld EPCRA's citizen suit provision against various constitutional challenges.<sup>198</sup> In the process, it determined that the eventual filing of the required forms did not make up for violations occurring previously over a long period.<sup>199</sup> Accordingly, the court concluded that EPCRA's notice requirements were not at odds with the concept of citizen suits for wholly past violations.<sup>200</sup> In addition, the *Delaware Valley Toxics Coalition* court easily distinguished the *Gwaltney, Ltd.* ruling on the basis of clear differences in language between EPCRA and the Clean Water Act.<sup>201</sup>

## 2. *United Musical Instruments*: The Sixth Circuit's View of Citizen Suits Under EPCRA

As noted previously, prior to the Seventh Circuit's decision in *Citizens for a Better Environment*, only one other federal appeals court had addressed historical violations under EPCRA.<sup>202</sup> The Sixth Circuit examined this issue in 1995 in *United Musical Instruments U.S.A., Inc. v. Atlantic States Legal Foundation*.<sup>203</sup> In *United Musical Instruments*, the right of private enforcement under EPCRA was narrowed under the influence of the Clean Water Act and the

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196. *See Williams*; 784 F. Supp. at 768. The court stated that "[t]ogether, the legislative history and the plain language of the statute compel the conclusion that past violations are not exempt from EPCRA's citizen suit provisions." *Id.*

197. 813 F. Supp. 1132 (E.D. Pa. 1993).

198. *See id.* at 1136. In *Delaware Valley Toxics Coalition*, a decorative foil manufacturer was sued by two non-profit environmental organizations for its failure to submit annual reports of toxic chemical releases (Form Rs). All of the reports were eventually filed, although not until after plaintiffs had submitted to the manufacturer their 60-day intent-to-sue letter. *See id.*

199. *See id.* at 1141. According to the court, "[a]lthough filing ends the statutory violation, it does not necessarily cause the immediate cessation of any injury caused by the violation." *Id.*

200. *See id.* (noting that Congress has included notice provisions in environmental statutes, for example in the Clean Air Act, 42 U.S.C. § 7604 (1994), even when past violations are contemplated).

201. *See id.*

202. *See* 90 F.3d 1237, 1238 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (Feb. 24, 1997).

203. 61 F.3d 473 (6th Cir. 1995), *reh'g denied en banc*, 1995 U.S. App. LEXIS 30933 (6th Cir. Oct. 16, 1995).

rationale used by the Supreme Court in *Gwaltney, Ltd.*<sup>204</sup> Although the aforementioned district court decisions had all found EPCRA's citizen suit provision distinguishable from that contained in the Clean Water Act,<sup>205</sup> the Sixth Circuit arrived at a different conclusion.<sup>206</sup> Rather than following the example of the district courts, the Sixth Circuit chose to extend the Supreme Court's holding in *Gwaltney, Ltd.* beyond the Clean Water Act and apply it in the context of EPCRA's own citizen suit provision.<sup>207</sup>

In *United Musical Instruments*, the manufacturer United Musical Instruments, U.S.A., Inc. ("United Musical") had failed to comply with EPCRA's Form R submission requirements for toxic chemicals which had been released from its production facility during the years 1987-1990.<sup>208</sup> In 1992, a not-for-profit corporation, Atlantic States Legal Foundation ("ASLF"), notified United Musical of its intent to sue for these violations of EPCRA's reporting requirements.<sup>209</sup> One year later, after the EPA had failed to pursue an enforcement action of its own against United Musical,<sup>210</sup> ASLF filed a complaint in federal court seeking declaratory and injunctive relief, civil penalties, and attorney's fees.<sup>211</sup> In the interim, however, United Musical had submitted the required forms upon receiving notice of ASLF's intent to sue.<sup>212</sup> United Musical subsequently moved for dismissal which the court granted on statute of limitations grounds, and ASLF appealed.<sup>213</sup>

On appeal, the Sixth Circuit upheld the district court's dismissal but on different grounds.<sup>214</sup> The court concluded that EPCRA's citizen

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204. *See id.* at 477.

205. *See id.* at 476-77. *See also supra* notes 182-200 and accompanying text.

206. *See United Musical Instruments*, 61 F.3d at 478.

207. *See id.* at 477. The court concluded that the Supreme Court's decision in *Gwaltney, Ltd.* could be appropriately applied to EPCRA: "[w]e consider the conclusion in *Gwaltney* about the significance of the Clean Water Act's notice requirement equally applicable to EPCRA . . . . [T]he discussion in the *Gwaltney* opinion concerning the supplemental role of citizen suits applies in the EPCRA context as well." *Id.*

208. *See id.* at 475; *see also* EPCRA § 313, 42 U.S.C. § 11023 (1994).

209. *See United Musical Instruments*, 61 F.3d at 474.

210. *See* EPCRA § 326(e), 42 U.S.C. § 11046(e).

211. *See United Musical Instruments*, 61 F.3d at 474.

212. *See id.*

213. *See id.* at 474-75. In dismissing the suit, the district court held that it was time-barred. *See id.* at 475. It reached this as a result of applying the most closely analogous statute of limitations under state law (in this case, Ohio), which has been held proper in cases where Congress did not expressly provide a statute of limitations. *See id.* at 475 n.2 (citations omitted). Consequently, the parties never raised, and the district court never reached, the historical violations issue. *See id.*

214. *See id.* at 475. The Sixth Circuit based its ruling on the historical violations issue, which was not addressed in the district court, but had been first raised by United

suit provision contemplates only prospective relief—that is, relief only for continuing or on-going violations and not for non-compliance that has been cured by the eventual filing of the overdue forms.<sup>215</sup> Unavailingly, ASLF argued in support of a more liberal interpretation of EPCRA's citizen suit provision.<sup>216</sup> Its appeal focused on the contention that the *Gwaltney, Ltd.* analysis was inapplicable because EPCRA's language is distinguishable from that of the Clean Water Act.<sup>217</sup> Based on the district court decisions which had held accordingly, ASLF had legitimate authority in support of this position.<sup>218</sup> ASLF argued, as several other courts had already concluded, that EPCRA's authorization of citizen suits "for [the] failure to do" could be interpreted differently than the Clean Water Act's provision permitting such suits where a party was alleged "to be in violation."<sup>219</sup>

The Sixth Circuit rejected this argument, labeling it "a rather hypertechnical parsing of the language of the statute."<sup>220</sup> The court concluded instead that Congress intended for citizen suits under EPCRA to be limited to continuing violations.<sup>221</sup> Like in *Gwaltney, Ltd.*, this reasoning was based on EPCRA's sixty-day notice provision, which would be 'rendered superfluous' if citizen suits were

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Musical in its response brief on appeal. *See id.* at 474-75.

215. *See id.* at 475.

216. *See id.* at 476-77. Although ASLF did address the historical violations issue in its reply brief to the Sixth Circuit, the court noted that the brief fell seven pages short of its permissible length and stated that it was not persuaded by ASLF's contention that space constraints prevented "full briefing" of the issue. *See id.* at 475 n.3. Whether this had any effect on the court's determination of the issue is not clear.

217. *See id.* at 476.

218. *See* Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132 (E.D. Pa. 1993); Williams v. Leybold Technologies, Inc., 784 F. Supp. 765 (N.D. Cal. 1992); Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg., 772 F. Supp. 745 (W.D.N.Y. 1991); *see also supra* Part III.A.1.

219. *See United Musical Instruments*, 61 F.3d at 476.

220. *Id.* at 477. In labeling the argument "hypertechnical parsing," the Sixth Circuit was responding to a finding by the district court in *Whiting Roll-Up Door Manufacturing, Corp.* that "[t]he natural reading of the EPCRA provision at least would seem to include past acts of non-compliance, while a natural reading of the Clean Water Act provision, as the Supreme Court has held, indicates that the statute contemplates only prospective relief." *Id.* at 476-77 (quoting *Whiting Roll-Up Door Mfg.*, 772 F. Supp. at 752). The court apparently concluded that slight differences in the way Congress phrased EPCRA's citizen suit provision were inconclusive at best. *See id.* (quoting the Supreme Court's statement in *Gwaltney, Ltd.* that "[c]ongress could have phrased its requirements in language that looked to the past . . . , but did not choose this readily available option." *Gwaltney, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987)).

221. *See United Musical Instruments*, 61 F.3d at 477.

permitted for historical violations.<sup>222</sup> The court also rejected ASLF's argument that subsequent action by Congress had undercut the persuasiveness of the *Gwaltney, Ltd.* holding.<sup>223</sup> ASLF asserted that congressional amendments to the Clean Air Act<sup>224</sup> made after *Gwaltney, Ltd.*, explicitly permitting such suits for past violations, suggested that Congress intended a result different from what *Gwaltney, Ltd.* held.<sup>225</sup> This argument, however, failed to persuade the court, which elected to follow *Gwaltney, Ltd.* in the absence of "explicit congressional language mandating" to the contrary.<sup>226</sup>

Further, like the *Gwaltney, Ltd.* Court, the Sixth Circuit discerned that citizen suits were meant to play only a supplementary role in EPCRA's enforcement.<sup>227</sup> The presence of section 326(e), which prohibits citizen remedies in cases where the EPA has commenced an enforcement action, persuaded the court that "Congress envisioned citizen suits as primarily a means to enforce EPCRA when a violation continues because the EPA has failed to enforce the Act."<sup>228</sup> The court reasoned that EPCRA's scheme left discretion wholly with the EPA to determine which violators should be pursued.<sup>229</sup>

In addition, according to the Sixth Circuit, EPCRA's citizen suit provision emphasizes completion and submission of the forms rather than the timeliness of their submission.<sup>230</sup> The court reasoned that once the forms containing the required information are filed, EPCRA's

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222. *See id.* The court's decision to apply *Gwaltney, Ltd.* was based on EPCRA's sixty-day notice provision, which mirrored its counterpart in the Clean Water Act. *See supra* notes 204-06. The court stated, "[a]llowing citizen suits for past violations would render superfluous EPCRA's requirement of sixty-days notice to the alleged violator." *United Musical Instruments*, 61 F.3d at 477.

223. *See id.*

224. *See* 42 U.S.C. § 7604(a) (1988 & Supp. V 1993). This provision now authorizes citizen suits against any person "who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of" the act's requirements. *Id.*

225. *See United Musical Instruments*, 61 F.3d at 477; *see also infra* notes 267-72 and accompanying text.

226. *Id.* at 477 (noting that it could be argued with equal force that, by failing also to amend EPCRA, Congress intended that citizen suits be limited under that statute).

227. *See id.* *See also supra* notes 167-68 and accompanying text.

228. *United Musical Instruments*, 61 F.3d at 477.

229. *See id.* The court stated, "[a]lthough civil penalties for purely historical violations may be appropriate in some cases, the congressional scheme leaves to the EPA, with its broad perspective on the entire spectrum of enforcement and compliance, discretion to determine those violators whose conduct warrants such penalties." *Id.*

230. *See id.* at 475. Section 326(a)(1)(A)(iv) of EPCRA authorizes citizen civil actions for the failure to "complete and submit a toxic chemical release form [Form R] under section 11023(a). . . ." EPCRA § 326(a)(1)(A)(iv), 42 U.S.C. § 1104(a)(1)(A)(iv) (1994).

purpose is achieved and citizen enforcement becomes unnecessary.<sup>231</sup> The court added, “[w]e see no basis upon which one must conclude that Congress, when contemplating citizen enforcement suits, intended such a late submission to be the equivalent of a complete failure to submit the information.”<sup>232</sup>

Thus, it was primarily on the basis of EPCRA’s structure and language that the Sixth Circuit determined that civil penalties for purely historical reporting violations may not be sought by citizen plaintiffs under EPCRA.<sup>233</sup> In reaching this determination, the Sixth Circuit essentially reiterated the Supreme Court’s rationale in *Gwaltney, Ltd.* regarding the Clean Water Act to EPCRA.<sup>234</sup> The court concluded that Congress intentionally limited citizen suits by subordinating them to suits brought by the EPA, or other governmental bodies.<sup>235</sup>

### 3. *Citizens for a Better Environment*: The Seventh Circuit’s View of Citizen Suits Under EPCRA

Even though *United Musical Instruments* had created a precedent for appellate review of the scope of citizen suits under EPCRA, the Seventh Circuit in *Citizens for a Better Environment v. Steel Co.*<sup>236</sup> elected to follow a different line of reasoning, giving rise to the current conflict between circuits which this Comment addresses.<sup>237</sup> In *Citizens for a Better Environment*, the Seventh Circuit rejected the *Gwaltney, Ltd.* analogy employed by the court in *United Musical Instruments*, electing to adopt the district court holdings<sup>238</sup> that had permitted civil remedies despite the fact that the alleged non-

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231. See *United Musical Instruments*, 61 F.3d at 477.

232. *Id.* at 475.

233. See *id.* at 478. Although it was presented with an issue of first impression, the court essentially reiterated the Supreme Court’s reasoning in *Gwaltney, Ltd.* concerning the Clean Water Act and applied that reasoning to EPCRA. See *id.* at 475-78. The court undertook only a cursory examination of EPCRA’s provisions and never actually took into consideration the Act’s goals and objectives. See *id.* As a result, its analysis was dominantly confined to the Act’s language and structure: “In sum, 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.” *Id.* at 478.

234. See *id.* at 477.

235. See *id.* at 478.

236. See *Citizens for a Better Env’t v. Steel Co.*, 90 F.3d 1237, 1243 (7th Cir. 1996), cert. granted, 117 S. Ct. 1079 (Feb. 24, 1997).

237. See generally *supra* Part I.

238. See *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132 (E.D. Pa. 1993); *Williams v. Leybold Technologies, Inc.*, 784 F. Supp. 765 (N.D. Cal. 1992); *Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg.*, 772 F. Supp. 745 (W.D.N.Y. 1991); see also *supra* Part II.A.1 (discussing more fully these district court cases).

compliance had been cured by the time a citizen suit was filed.<sup>239</sup>

In March of 1995, a not-for-profit organization called Citizens for a Better Environment ("Citizens") notified a Chicago steel manufacturer, the Illinois EPA, and other authorities of its intent to sue the steel manufacturer over multiple violations of EPCRA's reporting requirements.<sup>240</sup> Citizens had uncovered what amounted to more than 70,000 possible EPCRA violations by The Steel Company ("Steel Company"), a regular user of toxic chemicals that had not submitted a single inventory or toxic release form since EPCRA's enactment in 1986.<sup>241</sup> Upon notification of Citizens' intent to sue, Steel Company filed numerous overdue forms with various designated agencies, thereby bringing itself into compliance with EPCRA's reporting requirements.<sup>242</sup> However, despite the extent of Steel Company's alleged non-compliance, no proceedings of any kind, enforcement or otherwise, were initiated by the EPA within the sixty-day notice period.<sup>243</sup> Citizens, therefore, filed a complaint in the district court on August 7, 1995.<sup>244</sup>

Persuaded by the precedent set in *United Musical Instruments*, the district court adopted the rationale employed by the Sixth Circuit and dismissed Citizens' suit for lack of jurisdiction because Steel Company's overdue filing had rendered the alleged violations purely historical.<sup>245</sup> Relying almost exclusively on *United Musical Instruments*, the district court held that because the required forms had been completed and submitted by the time Citizens' complaint was filed, the non-compliance had been cured rendering Citizens' suit unauthorized by the Act.<sup>246</sup>

Whereas the district court chose to apply the Sixth Circuit's holding, the Seventh Circuit on appeal reached a different legal conclusion.<sup>247</sup> The court resisted the Sixth Circuit's application of *Gwaltney, Ltd.'s*

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239. *See id.*; *see also supra* notes 182-201 and accompanying text.

240. *See Citizens for a Better Env't*, 90 F.3d at 1241.

241. *See id.* at 1241.

242. *See id.*

243. *See id.*

244. *See id.*

245. *See Citizens For a Better Env't v. Steel Co.*, No. 95 C 4534, 1995 WL 758122 (N.D. Ill. Dec. 21, 1995) (granting Steel Co.'s motion to dismiss).

246. *See Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1242 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (Feb. 24, 1997). On appeal, however, the Seventh Circuit noted that "[t]his reliance was not misplaced . . . [as *United Musical Instruments*] . . . is also the only appellate court decision addressing the central question of this case." *Id.*

247. *See supra* note 215 and accompanying text; *Citizens for a Better Env't*, 90 F.3d at 1242, 1245.



holding to the EPCRA provisions, choosing instead to apply only its “interpretive methodology.”<sup>248</sup> Unlike the *United Musical Instruments* court, the Seventh Circuit deemed it more significant that every other district court which examined the issue had distinguished it from *Gwaltney, Ltd.*’s reading of the Clean Water Act.<sup>249</sup> Although it acknowledged that *United Musical Instruments* was virtually indistinguishable factually from the case before it, the Seventh Circuit still found that EPCRA’s citizen suit provision is not limited to on-going or continuing violations.<sup>250</sup>

Beginning with an analysis of the statutory language, the Seventh Circuit court undertook its own syntactical analysis of EPCRA’s enforcement provisions, closely scrutinizing the Sixth Circuit’s prior analysis.<sup>251</sup> First, the *Citizens for a Better Environment* court reasoned that the “failure to do” something could refer to a failure in the past or in the present.<sup>252</sup> Thus, it concluded that EPCRA’s section 326 grant of private enforcement authority incorporated no temporal limitation.<sup>253</sup> Second, the *Citizens for a Better Environment* court, unlike the Sixth Circuit, recognized that the essential element of timeliness must also be considered in determining compliance with the requirements of the Act.<sup>254</sup> The Seventh Circuit interpreted EPCRA’s citizen suit provision to “authoriz[e] 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.”<sup>255</sup> The court determined that Congress intended to incorporate the required elements of the Act’s reporting requirements without having to engage in a duplicative listing of the timing elements of another section.<sup>256</sup> Timely compliance is one of EPCRA’s important elements, according to the court,<sup>257</sup> and therefore, the statute’s compliance dates should likewise be included in any analysis

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248. See *Citizens for a Better Env't*, 90 F.3d at 1242, 1245.

249. See *Citizens for a Better Env't*, 90 F.3d at 1242. This meant that the court would examine EPCRA using the same criteria as that set forth by the Supreme Court in *Gwaltney, Ltd.*, but without necessarily adopting its holding. See *id.*

250. See *id.* at 1243.

251. See *id.* at 1243-44.

252. See *id.* at 1243. See also EPCRA § 326, 42 U.S.C. § 11046 (1994).

253. See *Citizens for a Better Env't*, 90 F.3d at 1243.

254. See *id.*

255. *Id.*

256. See *id.* (noting the compliance date requirements of EPCRA §§ 312-313).

257. See *id.* The court cited EPCRA’s legislative history which makes clear Congress’ goal to provide “essential” information to the public in a timely fashion. See *id.* at 1243 n.2.

of its citizen enforcement provisions.<sup>258</sup>

Continuing to follow *Gwaltney, Ltd.*'s "interpretive methodology," the *Citizens for a Better Environment* court turned next to an examination of EPCRA's language as a whole.<sup>259</sup> Unlike the Clean Water Act's citizen suit language, which might be viewed as undeviating from the present tense,<sup>260</sup> the court deemed it significant that EPCRA's language is "not likewise cast in the present tense."<sup>261</sup> To illustrate, the court cited language from EPCRA's citizen suit provision which is, in fact, cast in the past tense, referring to EPCRA section 326(b)(1).<sup>262</sup> According to the court, EPCRA's varying language is neutral enough to indicate either a forward-looking or a backward-looking application.<sup>263</sup> The Seventh Circuit interpreted its more neutral language as a suggestion that Congress intended EPCRA's provision to differ from the present tense language used in the Clean Water Act.<sup>264</sup> The absence of explicit restrictions on private suits coupled with language specifically referring to past violations persuaded the *Citizens for a Better Environment* court that Congress intended no such limitation under EPCRA.<sup>265</sup> Therefore, after examining the language in its entirety (as the *Gwaltney, Ltd.* Court had done), the Seventh Circuit determined that EPCRA permits a cause of action even for violations that have been cured by the time the citizen plaintiff's suit is filed.<sup>266</sup>

In addition to language, the Seventh Circuit looked to Congressional intent as an indicator of the scope of authority to be afforded citizen suits under EPCRA.<sup>267</sup> Like the court in *United Musical Instruments*,

258. *See id.* at 1243. *See also* 132 CONG. REC. H9593 (Oct. 8, 1986) (statement of Rep. Sikorski).

259. *See Citizens for a Better Env't*, 90 F.3d at 1243.

260. *See id.* at 1244 (citing *Gwaltney, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987)).

261. *Id.* at 1244. Like the *Gwaltney, Ltd.* Court, the Seventh Circuit reasoned that Congress knew precisely how to require allegations of an on-going violation when it intended to do so. *See id.* *See also Gwaltney, Ltd.*, 484 U.S. at 58-59.

262. *See Citizens for a Better Env't*, 90 F.3d at 1244. *See also* EPCRA § 326, 42 U.S.C. 11046(b)(1) (1994), which provides that citizen suits "shall be brought in the district court in which the alleged violation occurred." *Id.*

263. *See Citizens for a Better Env't*, 90 F.3d at 1244. The court pointed out that "[n]owhere does EPCRA contain the 'is occurring' language of the [Clean Water Act] to indicate that citizens must allege an on-going violation." *Id.*

264. *See id.* at 1244.

265. *See id.*

266. *See id.*

267. *See id.* at 1243 n.2 (citing Senate Committee on Environment and Public Works, Superfund Improvement Act of 1985, S. REP. No. 99-11, at 14-15 (1985) (noting that the goal of EPCRA is to make essential information widely available and in

the *Citizens for a Better Environment* court took into consideration the amendments made by Congress to the language of the Clean Air Act, expressly permitting citizens civil remedies for repeated historical violations.<sup>268</sup> In *Gwaltney, Ltd.*, the Supreme Court relied on the premise that the Clean Water Act's sixty-day notice provision is irreconcilable with permitting citizen suits for past violations.<sup>269</sup> In concluding that the statute's notice provision intends to permit violators the opportunity to bring themselves into compliance, the Supreme Court reasoned that the EPA's enforcement authority would, therefore, be encroached upon should citizens be allowed to bring suit after violations had been cured.<sup>270</sup> Although this premise may have been validated by later decisions under the Clean Water Act,<sup>271</sup> the Seventh Circuit viewed the reasoning as outdated and inapplicable to EPCRA, especially considering the subsequent amendments made by Congress to the Clean Air Act.<sup>272</sup>

The Seventh Circuit's examination of congressional action in the context of EPCRA's disparate language enabled it to interpret the legislature's intent differently than the *United Musical Instruments* court, and therefore, reach a different understanding of EPCRA's notice provision.<sup>273</sup> It recognized that permitting citizen suits even where a violator has cured its past compliance would not inhibit the Act's notice provision.<sup>274</sup> The purpose served by notice was to mitigate non-compliance, because each day of violation by a facility carries additional penalties.<sup>275</sup> Notice also preserves the EPA's discretionary enforcement power by giving the agency the first and foremost opportunity to respond.<sup>276</sup> Thus, the court reasoned that leaving the notice provision as it was conveyed an intent that EPCRA's notice provision serve a different function than its counterparts in other environmental statutes.<sup>277</sup>

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a timely fashion)).

268. *See id.* at 1244; *see also* 42 U.S.C. § 7604(a)(1) (1994).

269. *See Gwaltney, Ltd.*, 484 U.S. at 59-60.

270. *See id.* at 60.; *see also supra* notes 155-59 and accompanying text.

271. *See Atlantic States Legal Found. v. Eastman Kodak Co.*, 809 F. Supp. 1040 (W.D.N.Y. 1992), *aff'd*, 12 F.3d 353 (2d Cir. 1994).

272. *See Citizens for a Better Env't*, 90 F.3d at 1244. "This line of reasoning is no longer as compelling as it was when *Gwaltney* was decided." *Id.*

273. *See id.*

274. *See id.*

275. *See id.* "[N]otice gives the violator the opportunity to limit exposure by filing late reports." *Id.*

276. *See also* EPCRA §§ 325, 326(d)(1)-(2), (e), 42 U.S.C. §§ 11045, 11046(d)(1)-(2), (e) (1994).

277. *See Citizens for a Better Env't*, 90 F.3d at 1244.

In addition to support from language and intent, the Seventh Circuit's opinion in *Citizens for a Better Environment* looked past EPCRA's specific provisions and guidelines, and assessed the practical meaning and effect of the Act as a whole.<sup>278</sup> Most significantly, the *Citizens for a Better Environment* court concluded that a proper interpretation of EPCRA's citizen enforcement provisions must be reconciled with the objectives and purpose underlying EPCRA's reporting requirements.<sup>279</sup> EPCRA creates a structure of "incentives" for private citizens to assist with the investigation and enforcement of its reporting requirements, incurring substantial costs in the process.<sup>280</sup> Recognizing the need for such incentives, the court paid close attention to the protection of these "incentives:"

EPCRA creates a structure that encourages private citizens to invest the resources necessary to uncover violations of the Act by allowing courts to award the costs of enforcement to prevailing or substantially prevailing parties . . . . If citizen suits could be fully prevented by 'completing and submitting' forms, however late, citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information. Put simply, if citizens can't sue, they can't recover the costs of their efforts.<sup>281</sup>

According to the Seventh Circuit, the scenario engendered by such an interpretation of EPCRA citizen enforcement would be contrary to Congressional intent.<sup>282</sup> Because the primary incentive for citizen enforcement activity lies in the ability to recover such costs through private litigation, the court concluded that such incentives would be undermined by a decision that restricted citizen actions to continuing violations.<sup>283</sup>

### B. Supreme Court Review

On February 24, 1997, the Supreme Court granted certiorari to review the Seventh Circuit's decision in *Citizens for a Better Environment*.<sup>284</sup> While the Sixth and Seventh Circuits remain the only two appeals courts to have decided the legality of citizen suits for

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278. See *id.* at 1244-45.

279. See *id.*

280. See generally Lehner, *supra* note 136, at 6-8.

281. *Citizens for a Better Env't*, 90 F.3d at 1244.

282. See *id.* at 1245 (explaining that such a scenario "is impossible to reconcile with the clearly expressed intent of Congress, or with the very existence of the citizen enforcement provision").

283. See *id.* at 1244-45.

284. *Steel Co. v. Citizens for a Better Env't*, 117 S. Ct. 1079 (Feb. 24, 1997).

historical violations under EPCRA, the Supreme Court's grant of certiorari acknowledges and attests to the significance of the existing debate and its impact on EPCRA's immense regulatory program. On appeal to the Supreme Court, the United States has submitted an amicus brief on behalf of Citizens as respondent to allow citizen suits under EPCRA for historical violations.<sup>285</sup>

In addition, subsequent district court decisions have also unanimously adopted the reasoning of the Seventh Circuit in *Citizens for a Better Environment*.<sup>286</sup> In *Don't Waste Arizona, Inc.*,<sup>287</sup> for example, the court squarely rejected the *Gwaltney, Ltd.* rationale (adopted by the Sixth Circuit) in favor of the *Citizens for a Better Environment* court's interpretation of citizen suits under EPCRA.<sup>288</sup> The court concluded that the Seventh Circuit's conclusion "embraced the better reasoned approach to statutory construction."<sup>289</sup> The court also took issue with the Sixth Circuit's application of the *Gwaltney, Ltd.* holding to EPCRA stating, "the *Gwaltney* Court's conclusion, heavily relied upon by the [*United Musical Instruments*] court, is at least questionable in light of Congress' 1990 amendments to the Clean Air Act."<sup>290</sup> The *Don't Waste Arizona, Inc.* court concluded that Congress did not likewise amend the citizen suit provision of EPCRA because its language already permitted such suits for historical violations.<sup>291</sup>

#### IV. ANALYSIS

Ten years after EPCRA's enactment in 1986, the Seventh Circuit has rejuvenated EPCRA's citizen suit provision with its holding in *Citizens for a Better Environment*. The *Citizens for a Better Environment* opinion reflects a conscious effort by the court to examine EPCRA's enforcement provisions as a whole, not only in the context of the case before it, but with an eye toward the Act's purpose,

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285. See Brief of United States as Amicus Curiae in Support of Respondent, 1997 WL 218638 (No. 96-643) (May 7, 1997).

286. See *Neighbors for a Toxic Free Community v. Vulcan Materials*, 964 F. Supp. 1448 (D. Colo. 1997); *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, 950 F. Supp. 972 (D. Ariz. Jan. 8, 1997); *Idaho Sporting Congress v. Computrol, Inc.*, 952 F. Supp. 690 (D. Idaho Dec. 17, 1996). See also *supra* note 118.

287. See *supra* notes 122-26 and accompanying text.

288. See *Don't Waste Arizona, Inc.*, 950 F. Supp. at 976.

289. *Id.* The court explained that "[a]nalysis of the plain language of the statute and the policies driving the enactment of EPCRA compels th[is] conclusion." *Id.*

290. *Id.* See also *supra* notes 220- 23 and accompanying text.

291. See *Don't Waste Arizona, Inc.*, 950 F. Supp. at 976.

goals, and practical application.<sup>292</sup> From a practical standpoint, the *Citizens for a Better Environment* court, along with other courts, found that EPCRA's objectives are better served by a liberal reading of its citizen suit provision.<sup>293</sup> These courts have concluded that the failure to submit accurate and timely reports under EPCRA constitutes a violation, whether subsequently remedied or not, that should be subject to the enforcement authority of private citizens.<sup>294</sup>

#### A. *Interpreting EPCRA's Language*

Although EPCRA's provisions dividing enforcement among various groups contain discrepancies in language, the Seventh Circuit was correct to note that the differences indicate only an attempt at brevity.<sup>295</sup> In contrast to its grant of authority to private citizens, EPCRA authorizes the EPA to take action against "any person . . . who violates any requirement" of EPCRA and to pursue "any civil penalty for which a person is liable."<sup>296</sup>

The Sixth Circuit viewed the distinctions in language between EPCRA's citizen enforcement provision and its EPA enforcement provision as determinative—an indicator that Congress intended for citizen suits to be limited to on-going violations.<sup>297</sup> Ironically, in doing so, it engaged in its own form of "hypertechnical parsing"<sup>298</sup> by pointing out such syntactical differences in the grants of authority to

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292. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1238 (7th Cir. 1996), cert. granted, 117 S. Ct. 1079 (Feb. 24, 1997) (noting that "some discussion of the Act's history and goals may therefore be in order to put this case in context").

293. See *id.* at 1244-45.

294. See *Don't Waste Arizona, Inc.*, 950 F. Supp. at 979 (discussing policy reasons why timely reporting is an essential element of EPCRA reporting).

295. See *Citizens for a Better Env't*, 90 F.3d at 1242. While the *United Musical Instruments* court's interpretation neglected to account for such incorporations of other EPCRA sections, the Seventh Circuit recognized that "the most natural reading of the use of 'under' is 'in accordance with the requirements of that section.'" *Id.*

296. See EPCRA § 325(c)(1)-(4), 42 U.S.C. § 11045(c)(1)-(4) (1994).

297. See *Atlantic States Legal Found. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 475 (6th Cir. 1995), reh'g denied en banc, 1995 U.S. App. LEXIS 30933 (6th Cir. Oct. 16, 1995). According to the Sixth Circuit:

This language suggests that only the failure to complete and submit the required forms can provide the basis for a citizen suit. While among the provisions of [§ 313(a)] is the requirement that the form be filed by July 1 for the preceding calendar year, the citizen suit provision speaks only of the completion and filing of the form. The form is completed and filed even when it is not timely filed.

*Id.*

298. See *supra* note 220 and accompanying text.

citizen plaintiffs and the EPA.<sup>299</sup> Moreover, the Sixth Circuit also reasoned that because EPCRA's citizen suit provision fails to repeat the compliance date requirements set forth in its 'right-to-know' reporting provisions,<sup>300</sup> the issue of timeliness could provide no basis for citizen suit authority.<sup>301</sup> However, one need only observe the citizen suit provision's explicit reference to such other sections to realize that a facility's late submission of the forms would constitute "a failure" to satisfy the requirements of that section; timeliness is an essential element of compliance with the reporting requirements.<sup>302</sup>

In contrast, the Seventh Circuit and other courts have properly recognized that EPCRA's use of the word "under" constitutes a method of incorporating the elements of respective sections of the Act into its citizen suit provision.<sup>303</sup> Each referenced section commands a specific deadline for which compliance is mandatory.<sup>304</sup> The *Citizens for a Better Environment* opinion emphasized that EPCRA's compliance dates "are not guidelines or suggestions; they are essential elements of provisions citizens have authority to enforce."<sup>305</sup> In drafting EPCRA's provisions, Congress likewise emphasized that speed and accuracy would be essential elements of EPCRA's requirements and necessary to achieve its goals of public safety.<sup>306</sup>

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299. See *United Musical Instruments*, 61 F.3d at 475.

300. See, e.g., EPCRA § 313(a), 42 U.S.C. § 11023 (1994).

301. See *United Musical Instruments*, 61 F.3d at 475. The court reasoned that "[i]f Congress had intended to authorize citizen suits for any violation . . . —such as a late submission—it could easily have done so." *Id.*

302. See EPCRA § 326(a)(1)(A), 42 U.S.C. § 11046 (a)(1)(A) (1994) (listing, by reference only to various sections of the Act, the types of violations for which a citizen suit can be brought).

303. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1243 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (Feb. 24, 1997); *Don't Waste Arizona, Inc. v. McLane Foods, Inc.*, 950 F. Supp. at 978; *Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg.*, 772 F. Supp. 745, 750 (W.D.N.Y. 1991).

304. See, e.g., EPCRA § 312, 42 U.S.C. § 11022 (1994) (requiring annual submissions by March 1 of each year); EPCRA § 313, 42 U.S.C. § 11023 (requiring Form R submissions by July 1 of each year).

305. See *Citizens for a Better Env't*, 90 F.3d at 1243.

306. See, e.g., H.R. REP. NO. 99-253, pt. 1, at 111 (1985) (emphasizing that "once the material safety data sheets are developed, it is crucial that they be made available to the public in the quickest, most efficient way possible"); 132 CONG. REC. H29747 (Oct. 8, 1986) (statement of Rep. Sikorski) (stating that "[d]isclosure of hazardous waste emissions . . . must be swift and complete. The requirements for disclosure . . . must be strictly and strenuously enforced").

*B. Interpreting EPCRA's Legislative History and Intent*

EPCRA reporting plays an integral role in the Act's objective of providing timely and accurate information about the presence of toxic and hazardous chemicals to concerned citizens.<sup>307</sup> In the preamble to EPCRA's legislative conference report, Congress expressly sets forth the dual purpose behind EPCRA's enactment.<sup>308</sup> Congress' intent to establish information awareness and availability regarding hazardous chemicals is promoted through its "right-to-know" reporting provisions,<sup>309</sup> while its intent to develop emergency response plans and procedures are promoted through the Act's mandatory release notification requirements.<sup>310</sup>

Although nowhere within EPCRA is there an expressed objective of pollution reduction, the impetus for such a goal is provided simply by requiring facility owners and operators to account for and become precisely aware of what they are handling, using, and releasing into the environment.<sup>311</sup> In declining to implement new controls on the use or release of toxic chemicals, Congress anticipated that the increased availability of information on such chemicals would enable public involvement toward that same end.<sup>312</sup>

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307. See Shavelson, *supra* note 26, at 32.

308. See *House Conference Report*, *supra* note 3, at 281. The report states: "The Senate Amendment and 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." *Id.*

309. See *supra* Part II.A.2.

310. See *supra* Part II.A.2; see also *Whiting Roll-Up Door Mfg.*, 772 F. Supp. at 751 (stating that "Congress designed the concept of the emergency response plan, which necessarily depends on accurate and current information, as a public safety measure in case of a hazardous chemical release"); Abell, *supra* note 27, at 584 (stating that "[t]he local comprehensive emergency plan is essential to a community's effective response to a serious toxic release . . . . [C]hemical information provided by a community's manufacturing facilities allows for [the accurate] assessment of hazards and the [effective] coordination of police, fire, government and health officials in anticipation of future toxic emergencies").

311. See EPCRA § 313, 42 U.S.C. § 11023(h) (1994). Congress intended EPCRA's toxic release reporting "to inform persons about releases of toxic chemicals to the environment; to assist governmental agencies, researchers, and other persons in the conduct of research and data gathering; to aid in the development of appropriate regulations, guidelines, and standards; and for other similar purposes." *Id.*

312. See *PERCIVAL ET AL.*, *supra* note 5, at 647, 649.



C. *Effectiveness of EPCRA and the TRI*

To date, EPCRA appears to be very effective, with many viewing the Act as a dramatic success.<sup>313</sup> Information obtained through EPCRA has impacted public policy decisions and played a key role in the formation of federal and state environmental programs.<sup>314</sup> At least two commentators have predicted as a “virtual certainty” that such uses of EPCRA data will continue well into the future.<sup>315</sup> Reports issued by the EPA following EPCRA’s enactment have indicated an increase in the public’s environmental awareness and concern about the use of toxic chemicals.<sup>316</sup> Such an enhanced awareness will likely lead to new and improved uses of EPCRA information as well as further expansion of right-to-know legislation.<sup>317</sup>

Although its goals and potential benefits are commendable, commentators have noted that EPCRA is not without its problems.<sup>318</sup> However, EPCRA has demonstrated so far that it possesses the capability of realizing benefits well beyond its intended objectives.<sup>319</sup> EPCRA’s public reporting requirements have forced manufacturers and other industries to confront the economic and environmental significance of their use of toxic chemicals.<sup>320</sup>

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313. *See id.* at 652.

314. *See* Abell, *supra* note 27, at 602 (citing the Pollution Prevention Act, 42 U.S.C. §§ 13101-13109 (1994)); *see also* Christiansen and Urquhart, *supra* note 37, at 259 (referencing the hazardous air pollutant provisions of the Clean Air Act). Other federal programs using TRI data to establish priority criteria include the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9659 (1994) and the Resource Conservation and Recovery Act of 1976 (“RCRA”), 42 U.S.C. § 6972 (1994). *See also* U.S. EPA, Office of Toxic Substances, TOXICS IN THE COMMUNITY NATIONAL AND LOCAL PERSPECTIVES: THE 1989 TOXICS RELEASE INVENTORY REPORT 5-8 (1991) (discussing role of the TRI in the Pollution Prevention Act of 1990).

315. *See* Christiansen and Urquhart, *supra* note 37, at 259.

316. *See, e.g.,* Abell, *supra* note 27, at 586 (predicting that data obtained from EPCRA reporting assists in calculating toxic exposure levels, evaluating and developing existing or new regulatory approaches, illuminating particular environmental hazards, and promoting strategies for pollution prevention).

317. *See* Christiansen and Urquhart, *supra* note 37, at 259.

318. *See* Abell, *supra* note 27, at 586. Abell adds that “the quality of the data received by the EPA, the lack of health and environmental risk information, and inadequate Agency enforcement all cripple the TRI.” *Id.* at 588. In addition, EPCRA facilities have been faced with difficulties in determining whether they are subject to EPCRA’s reporting requirements due to the constant “state of flux” of the EPA’s lists of “hazardous” or “extremely hazardous” chemicals. *Id.* at 584.

319. *See* Citizens for a Better Env’t v. Steel Co., 90 F.3d 1237, 1238 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (Feb. 24, 1997) (referring to a reduction in toxic chemicals releases of nearly 43% since 1988).

320. *See* Abell, *supra* note 27, at 589. Abell adds, “[t]his is the underlying philosophy of EPCRA.” *Id.*

First, quantifying releases helps companies identify processes that can be made more environmentally efficient. Second, toxic waste reductions often result in lower production costs. Finally, reporting toxic releases to the public encourages firms to become more efficient in the face of public scrutiny.<sup>321</sup>

Therefore, as a result of EPCRA and the TRI, many companies have initiated voluntary programs aimed at toxic reduction.<sup>322</sup> Consequently, for each of the first four years that TRI reports were collected by the EPA, the total number of reported toxic emissions decreased.<sup>323</sup> For these reasons, the TRI has been labeled as an innovative environmental regulatory device.<sup>324</sup> Not only does the TRI collect and compile an extraordinary amount of information considered valuable by citizens, industry, and the government alike, but also it is able to sort this information in ways that are revolutionary.<sup>325</sup>

#### D. *The Importance of Citizen Enforcement of EPCRA*

EPCRA has affected industry behavior through information disclosure rather than expensive command-and-control legislation.<sup>326</sup> Because EPCRA does not regulate by command-and-control, its success hinges largely on the extent to which the general public uses the information obtained on the use of toxic and hazardous chemicals.<sup>327</sup> Neither EPCRA nor its enforcers can directly reduce or limit the amounts of hazardous chemicals being used or emitted into

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321. *Id.*

322. *See* PERCIVAL ET AL., *supra* note 5, at 650. For example, through EPCRA reporting, the Monsanto Corporation discovered that its 35 plants had released over 374 million pounds of toxic substances. *See id.* It vowed to reduce its toxic chemical emissions by 90% by the end of 1992. *See id.* By 1991, Monsanto had managed to reduce these omissions by a staggering 74%. *See* Abell, *supra* note 27, at 589. Abell notes that Monsanto Corporation's voluntary decrease of its toxic emissions, "represents the classic response intended by the drafters of EPCRA." *Id.*

323. *See* Bass & McLean, *supra* note 85, at 299.

324. *See, e.g.,* Abell, *supra* note 27, at 588. By providing information on pollution problems in the aggregate, "[t]he TRI represents an innovation when considering the traditionally fragmented and decentralized nature of the typical regulatory scheme." *Id.* at 606 n.60.

325. *See* Bass & McLean, *supra* note 85, at 296. The authors explain:

TRI information can be combined in a variety of ways to identify top polluters and polluting chemicals, detect geographic patterns of pollution, or analyze pollution coming into an incinerator, landfill, or sewer. The importance of TRI is hard to overestimate. Indeed its value has already been demonstrated repeatedly in influencing industry behavior, public policies, and public education.

*Id.*

326. *See* Shavelson, *supra* note 26, at 30.

327. *See* PERCIVAL ET AL., *supra* note 5, at 653.

the environment; EPCRA only provides a means of knowledge around which lobbying efforts can be sustained.

The power of citizens to sue under EPCRA, therefore, can only effect indirectly the amount of toxic and hazardous chemicals being emitted.<sup>328</sup> However, supporters of citizen suits, in general, argue that such provisions enable more thorough and equitable enforcement of environmental regulations, while at the same time, enhancing public participation in environmental decision-making.<sup>329</sup> Through the citizen suit provision, citizens are permitted to combat pollution and environmental degradation through cheaper and more enhanced means of enforcing environmental laws and regulations.<sup>330</sup> The *Citizens for a Better Environment* court noted the pertinent benefits that EPCRA's reporting requirements provide in the way of enhancing safety and welfare to the general public.<sup>331</sup> In addition, it addressed the potential ramifications if judicial determinations further erode the effectiveness of citizen enforcement.<sup>332</sup> The court reasoned:

the interpretation adopted by the Sixth Circuit . . . would largely shift the cost of EPCRA compliance from regulated industrial users to private citizens. Private citizens would have to absorb much of the cost of monitoring chemical use and keeping up to date on changes in EPCRA requirements, with little or no hope of recovering these costs through awards of litigation expenses.<sup>333</sup>

The *Citizens for a Better Environment* court also recognized that granting full enforcement authority to private citizens under EPCRA might actually decrease the amount of litigation over EPCRA's

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328. See Bass & McLean, *supra* note 85, at 296.

329. See Lehner, *supra* note 136, at 4.

330. See *supra* Part II.A.3.

331. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1238-39 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (Feb. 24, 1997) (noting that EPCRA information "has also been put to some creative uses and led to some unexpected results . . . . Some observers have found 'reason to believe that the public release of information about discharge of toxic chemicals has by itself spurred competition to reduce releases, quite independently of government regulation'" (quoting Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995))); see also Lehner, *supra* note 136, at 7. Lehner notes that:

from the environmental perspective, additional enforcement leading to fewer violations of environmental laws means a cleaner environment . . . . Overall, the cumulative impact of these cases is a clear signal to would-be violators: comply or be sued. This leads to greater deterrence and a higher general level of compliance.

*Id.* at 7.

332. See *Citizens for a Better Env't*, 90 F.3d at 1244-45.

333. *Id.*

reporting requirements.<sup>334</sup> According to the court, the likelihood of settlement increases when citizens are granted full enforcement authority under EPCRA.<sup>335</sup> The Seventh Circuit concluded that a violator of EPCRA is much less likely to persist in non-compliance where citizen enforcement acts as an effective supplement to EPA action.<sup>336</sup>

## V. PROPOSAL

### A. *EPCRA's Citizen Suit Provisions Must Have Muscle*

For private enforcement to be effective as a supplement to EPCRA's other enforcement mechanisms, private citizens must be empowered to sue for historical and ongoing violations alike. Properly viewed, Congress' intent in drafting EPCRA's enforcement provisions was to provide a variety of enforcement measures in order to enhance compliance.<sup>337</sup> Citizen suits enable the public to participate in the enforcement of EPCRA's requirements, which are designed to protect the public and ensure public participation in achieving its goals.<sup>338</sup> EPCRA's citizen suit provision furthers that purpose by providing private citizens with both the "right-to-know" and the "power to act."

Although the reasoning employed by the courts in *Gwaltney, Ltd.* and *United Musical Instruments* is logical, the Seventh Circuit is correct in recognizing the inherent practical difficulties in such a limiting interpretation of citizen suits.<sup>339</sup> A prospective limitation on citizen suit authority would only operate as a disincentive to industry compliance because such industries would realize that private enforcement was not really a threat.<sup>340</sup> A more literal reading of

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334. *See id.* at 1244. Reconciling the court's liberal view of citizen suits with EPCRA's notice provision, the court pointed out that, among other benefits, notice can actually conserve resources by giving violators the opportunity to limit their exposure to damages and the incentive to enter into settlement negotiations to avoid the potentially higher costs of litigation. *See id.*

335. *See id.*

336. *See id.*

337. *See id.* at 1240; *see also supra* Part II.A.3 (discussing *Citizens for a Better Env't* more fully).

338. *See supra* Part IV.D.

339. *See Citizens for a Better Env't*, 90 F.3d at 1244-45.

340. *See generally* Lehner, *supra* note 136, at 7. Lehner comments that:

A lenient pattern of enforcement tends to encourage companies to be lax in their compliance. When enforcement is weak, the cost to the company of complying with the law is worth less than taking a chance at not being caught. Therefore, many companies will choose a course of noncompliance rather than conducting business in a manner in which acceptable standards

EPCRA would add credibility to the provision's language, making compliance an industry imperative in the face of enforcement from both EPA and the general public. The latter interpretation seems more logical and practical in light of EPCRA's original rationale and stated purpose—to insulate the general public from toxics and other hazardous chemicals.<sup>341</sup>

EPCRA's enforcement and penalty provisions attempt to deter non-compliance by ensuring that proper reporting is always in a facility's best interest.<sup>342</sup> Allowing citizen civil actions against historical violators can further this objective of deterrence. The threat of liability for past violations makes non-compliant conduct irrational by exposing a violating facility through accountability to the general public. While violators are at all times accountable to state and administrative authorities, the incentives of political and financial influence over these authorities disappear where exposed to public scrutiny. Permitting citizens to sue for reporting violations, whenever they occur, eliminates the cost-benefit analysis a facility might be inclined to undertake in the absence of such citizen suits.

A proper reading of EPCRA's citizen suit provision, and any other similar environmental statute, must also take the Act's practical application and effect into consideration.<sup>343</sup> The Seventh Circuit properly observed EPCRA's practical effects and potential benefits when it examined its citizen suit enforcement provision.<sup>344</sup> The opportunities and incentives for settlement negotiations are raised where violators are faced with litigation from multiple sides.<sup>345</sup> Likewise, citizen plaintiffs would prefer to engender compliance through whatever vehicle, whether through its own settlement, or through a violator's settlement with EPA authorities. Promoting settlement frees up precious resources for the pursuit of other would-be violators.

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would otherwise develop . . . . [E]ven companies which would like to comply with the law may feel pressure to become violators in order to lower costs to compete with other, non-complying businesses. The increased enforcement provided by citizen suits changes these incentives . . . .

*Id.*

341. See generally *House Conference Report*, *supra* note 3 and discussed *supra* note 308.

342. See *supra* note 101 and accompanying text.

343. See *Citizens for a Better Env't*, 90 F.3d at 1244 (concluding that the specific language of EPCRA's citizen suit provision must be interpreted in a way that gives meaning to the entire provision as a whole).

344. See *supra* notes 331-33 and accompanying text.

345. See *id.*

*B. Public Awareness and Involvement Must Be Promoted*

The prohibitive costs of litigation, especially civil litigation involving large corporations, will prevent citizen suits under EPCRA from ever becoming a trend.<sup>346</sup> These costs are felt by both EPA and by private environmental organizations.<sup>347</sup> Congress' ability to recognize the need for multiple forms of enforcement is critical, given the realities of limited resources that both federal and state agencies and private non-profit groups face.

EPA is a government agency and, as a result, a political entity. Although EPA's enforcement of environmental regulations takes many forms, it only occasionally develops into civil actions against violators for a number of reasons. First, EPA has limited resources with which to enforce and litigate non-compliance. Second, the Agency's objectives range well beyond the simple enforcement of the regulatory standards to include programs and incentives aimed at pollution prevention. Finally, political agendas and philosophies on the environment can fluctuate within EPA just as within Congress. A consideration of these realities helps explain the limitations behind EPA's enforcement capabilities. Rather than place enforcement of EPCRA's immense regulatory requirements upon one administrative body, Congress established a variety of mechanisms for enforcement, dispersing authority among EPA, State, and private entities.<sup>348</sup> Considering that EPA's enforcement efforts are often financially, resourcefully, or politically limited, this strategy was both prudent and practical. Through supplemental enforcement, the citizen suit has and will continue to make efficient use of such limited enforcement resources.

Public interest organizations face similar dilemmas. Not-for-profit groups like ASLF and Citizens serve the public by creating awareness, representing constituencies, and voicing public opinion—services that would otherwise be unavailable. Because of the administrative and localized nature of most environmental legislation, direct public representation in the enactment and enforcement processes would be

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346. See Lehner, *supra* note 136, at 8 (noting that “the cost and difficulty to the public of bringing such cases will generally ensure that only the most substantial and harmful violators will be pursued”). At least one commentator has argued, however, that citizen suits “overenforce” the law, tending to be brought based on the size of potential penalties rather than the magnitude of environmental harm. *Id.* at 8-9 (citing Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339 (1990)).

347. See Lehner, *supra* note 136, at 6-8 (discussing the economic impact of citizen suits).

348. See *supra* Part II.A.3.

virtually non-existent.<sup>349</sup>

Laws that provide for citizen enforcement provide these organizations with a chance against the well-financed and always well-represented interests of industry. Such provisions allow organizations like Citizens and ASLF to recoup the costs of their monitoring and enforcement efforts.<sup>350</sup> While perhaps advancing a private agenda, environmental groups generally must promote the views of the individuals supporting their operation. Because of the scarcity of funds, these organizations often must form coalitions and corral resources, making their agenda even more representative of public opinion. Finally, it should be emphasized that the fees and penalties potentially collected from civil suits are paid to the United States Treasury, not to the budgets of non-profit organizations.<sup>351</sup> Assuming that these funds are utilized to advance the purposes and objectives which necessitated regulatory measures such as EPCRA in the first place, the process can be viewed as an effort to recycle the finite financial resources of environmental enforcement.

## VI. CONCLUSION

When the Supreme Court resumes the bench in October for the 1997-98 term, it will be faced with the task of pronouncing a rule defining the scope of citizen enforcement authority under EPCRA. This finding will have a tremendous effect on the success of EPCRA's environmental regulatory program. Considering the impact of the Supreme Court's ruling in *Gwaltney, Ltd.*, its finding in *Citizens for a Better Environment* could similarly be applied beyond the scope of EPCRA to other environmental statutes. Whatever the result, the ruling will bear tremendously on industry, agencies and public interest groups alike, as it will dictate the strength with which EPCRA's reporting requirements are enforced.

Prior to the Seventh Circuit's reversal in *Citizens for a Better Environment*, the authority for citizens' enforcement of federal environmental laws lay in jeopardy. The influence of appellate-level rulings like *Gwaltney, Ltd.* and *United Musical Instruments* eroded the environmental enforcement power of private citizens and citizen suits. These decisions precluded citizen suits for past violations no matter what the context, and, as a result, stripped away from the general

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349. See *Lehner supra* note 136, at 7 (discussing the value in enhanced public involvement in administrative rulemaking).

350. See *supra* notes 280-83 and accompanying text.

351. See *supra* notes 103-04 and accompanying text.

public the power of supplemental enforcement. But the Seventh Circuit's ruling in *Citizens for a Better Environment* appears to have rejuvenated this power, even if only temporarily.

While it remains to be seen which of these conflicting interpretations under EPCRA will prevail, *Citizens for a Better Environment* has revitalized the threat of private civil litigation against violators of EPCRA's reporting provisions. In light of the Act's admirable objectives and apparent benefits, EPCRA's supplemental enforcement provision regarding citizen suits should be given the proper leverage with which to achieve its intended effect.

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