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AN ANALYSIS OF THE SUPREME COURT'S RESOLUTION OF THE EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT CITIZEN SUIT DEBATE

Krista Green*

The Emergency Planning and Community Right-To-Know Act (EPCRA) mandates that companies using and storing certain hazardous chemicals file reports with specified local and state groups, disclosing the quantity, type, and location of those chemicals. Those groups utilize the reports to draft an emergency plan to deal with hazardous chemical releases. EPCRA permits citizens to sue the owners or operators of facilities which fail to file the requisite reports. In interpreting the citizen suit provision, the courts have struggled with whether to permit suits to continue if the alleged violator has cured the violation, by filing the reports, prior to the commencement of the suit. The United States Supreme Court recently resolved a split among the circuit courts of appeals on the issue of “historical” violations in EPCRA citizen suits, holding that plaintiffs alleging only historical violations under EPCRA lacked standing to sue. This Comment argues that the Supreme Court's disposal of the historical violation issue through standing doctrine is potentially far-reaching in consequence and therefore misguided. Nonetheless, due to the policies underlying EPCRA and its current construction, this Comment agrees with the result, if not the rationale, of the Court, and asserts that citizens should not be permitted to sue under EPCRA if they allege only historical violations.

INTRODUCTION

The Emergency Planning and Community Right-To-Know Act\(^1\) (EPCRA), like most environmental protection statutes, developed as a response to the potential for environmental disaster. In our industrialized world, the use, manufacture, and storage of toxic chemicals has become commonplace. Communities surrounding such industrialized areas have always faced the threat of chemical spills. Before 1986, those communities were often in the dark about exactly what types and quantities of chemicals were in their midst.\(^2\) The informational void meant communities could not adequately prepare and plan for emergency responses in the event of a spill or release.

On December 3, 1984, the industrialized world realized the danger inherent in environmental ignorance.\(^3\) Lethal methyl isocyanate gas was released from the Union Carbide pesticide plant in Bhopal, India.\(^4\) The spill was to become one of the worst environmental disasters in history, causing the deaths of over 6,000 people and injuring 100,000 more.\(^5\) As the public searched for someone to blame, government officials quickly realized that the lack of an adequate emergency plan contributed to the extent of the disaster.\(^6\) When the alarms sounded at the Bhopal plant, people actually ran \textit{towards} the contaminated plant to investigate.\(^7\)

The need for emergency planning was underscored by a second Union Carbide accident. Following the Bhopal incident by only nine months, the Union Carbide plant in Institute, West Virginia released a potentially deadly amount of a dangerous pesticide.\(^8\) No one was seriously injured, but the incident spurred Congress to take steps to

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\(^2\) Bruce Selcraig, \textit{What You Don't Know Can Hurt You}, SIERRA, Jan.-Feb. 1997, at 38. Jon Holtzman, vice-president for the Chemical Manufacturers Association, explained how companies treated citizen inquiries regarding chemical use and storage prior to 1986: “We stonewalled them and didn’t give them the time of day.” \textit{See id.}


\(^4\) \textit{See id.} at 3–4. The immediate cause of the spill has not been definitively proven. It is suspected that the accidental introduction of water into the methyl isocyanate holding tank provoked a chemical reaction which caused the leak. Union Carbide maintains that the leak was caused by sabotage. \textit{See id.} at 8–11.

\(^5\) \textit{See Selcraig, supra} note 2, at 38.

\(^6\) \textit{See CASSELS, supra} note 3, at 12–13.

\(^7\) \textit{See Selcraig, supra} note 2, at 38.

\(^8\) \textit{See id.}
avoid or mitigate future disasters. In 1985, the Environmental Protection Agency (EPA) commissioned a study on the risks of chemical releases, identifying over 6,900 chemical spill accidents in five years which were responsible for 135 deaths and over 1,400 injuries. The Emergency Planning and Community Right-To-Know Act was enacted less than a year later, in 1986. EPCRA has two purposes: to enhance the public's knowledge about dangerous chemicals located in the community, and to establish national, state and local emergency response plans. Section 11046, an important provision of the statute, established that EPCRA could be enforced not only by an action of the EPA but also by private citizen suits. The citizen suit provision has engendered some controversy, with debates arising over the proper scope of section 11046.

This Comment examines the citizen suit provision of EPCRA. Section I discusses the development of EPCRA and the current structure of the statute. Section II examines case law pertaining to citizen suits generally. Section III discusses the various judicial approaches to the issue of whether EPCRA citizen suits are permitted to continue once the alleged violator has complied with the statute prior to the commencement of the suit. Section IV reviews the Supreme Court's "resolution" of the citizen suit debate on historical violations in Steel Co. v. Citizens for a Better Environment. Finally, Section V analyzes the effect of the Steel Co. case on suits for historical violations, and argues that the text of the statute and the public policies underlying it mitigate against permitting citizen suits alleging only historical violations.

10 See Draft EPA Study Counts 6,900 Releases of Acutely Toxic Chemicals in Five Years, 16 ENV'T REP. (BNA) 1022 (Oct. 11, 1985).
14 Compare Citizens for a Better Env't v. Steel Co., 90 F.3d 1237, 1241–42 (7th Cir. 1996) (interpreting § 11046 as permitting citizen suits for wholly past violations) with Atlantic States Legal Found., Inc. v. United Musical Instruments, 61 F.3d 473, 475 (6th Cir. 1995) (holding that § 11046 does not permit such suits).
15 Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1008 (1998). For the purpose of differentiating the two opinions, this Comment will refer to the Seventh Circuit's opinion as Citizens, and to the Supreme Court's reversal of that decision as Steel Co.
I. THE HISTORY AND COMPONENTS OF EPCRA

By congressional standards, the enactment of EPCRA was extremely rapid, although it engendered some opposition and debate during enactment.\(^{16}\) The Bhopal and West Virginia incidents had heightened public awareness about the lack of easily accessible information regarding the use, storage, and manufacture of chemicals; Congress' response was to pass EPCRA "as a means of filling this informational void and improving emergency response capabilities."\(^{17}\)

Originally, the provisions which became EPCRA were part of the Superfund Amendments and Reauthorization Act (SARA).\(^{18}\) However, the legislative history indicates that Congress adopted the title "Emergency Planning and Community Right-To-Know Act" in the Conference Report, and that EPCRA was intended to be a free-standing environmental statute.\(^{19}\) The resulting statute has two primary functions. The "right-to-know" component mandates the disclosure of the presence and release of certain toxic chemicals to the EPA, with the agency, in turn, making this information available to the public.\(^{20}\) The "emergency planning" component requires the establishment of national, state, and local commissions to prepare emergency response plans in the event of a chemical release.\(^{21}\) The following subsections explore each provision of the statute in greater detail.

A number of commentators have lauded the success of EPCRA.\(^{22}\) Some have also noted the secondary effects of the statute in reducing pollution and toxic releases; as one article stated, "the public release

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\(^{16}\) See Selcraig, supra note 2, at 43. In fact, a coalition comprised of the chemical industry, a key House subcommittee and even several EPA officials sought to defeat the bill. Though killed in subcommittee, EPCRA had a second chance at life when parliamentary procedure enabled the entire House to vote on the bill. It passed the House by a close margin, and was eventually signed into law by President Ronald Reagan. See id.; see also Sidney M. Wolf, Fear and Loathing about the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Act, 11 J. LAND USE & ENVTL. L. 217, 220 n.7 (1996) (stating that the House included, by only a one vote margin, chemicals that cause chronic health effects).

\(^{17}\) Citizens, 90 F.3d at 1238.


\(^{19}\) See H.R. CONF. REP. No. 99-962, at 1 (1986). It was originally intended that the emergency planning and community right-to-know sections would amend the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1980). See id.; see also A.L. Labs. v. EPA, 826 F.2d 1123, 1125 (D.C. Cir. 1987) (stating that EPCRA was a separate, independent and free-standing environmental statute).


\(^{21}\) See id. §§ 11001-11005.

\(^{22}\) See Wolf, supra note 16, at 220 (calling EPCRA "one of the most significant pieces of environmental legislation in decades").
of information about discharge of toxic chemicals has by itself spurred competition to reduce releases, quite independently of any governmental regulation."23 However, EPCRA remains a somewhat obscure statute, lacking the popular name recognition of such environmental legislation as the Clean Water Act (CWA), Clean Air Act (CAA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).24 The lack of knowledge about EPCRA even within chemical-utilizing industries makes citizen involvement in fostering compliance with the reporting requirements especially crucial to the statute's success.25

A. Emergency Planning and Notification

EPCRA's first provision mandates the establishment of state and local planning bodies responsible for planning and coordinating emergency responses in the event of a toxic chemical release.26 The governor of each state is responsible for establishing a "state emergency response commission," or SERC, composed of persons with "technical expertise in the emergency response field."27 The state commissions also serve as a clearinghouse for information collected pursuant to EPCRA and requested by the public.28

SERCs are required "to designate emergency planning districts in order to facilitate preparation and implementation of emergency plans."29 SERCs also create "local emergency planning committees," or LEPCs, which must include members of law enforcement, firefighters, health personnel, media representatives, members of

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25 See Wolf, supra note 16, at 220.
26 See 42 U.S.C. § 11001; see also James M. Kuszaj, The EPCRA Compliance Manual at 32 (Section of Natural Resources, Energy, and Environmental Law, American Bar Association, 1997).
28 See id. Section 11001(a) also requires the appointment of a "coordinator" for such information, and the establishment of procedures for processing information requests from the public. See id. For the types of information authorized for release to the public, see discussion infra involving section 11044 of EPCRA. See infra notes 110–11 and accompanying text.
29 42 U.S.C. § 11001(b).
community groups, and owners and operators of facilities subject to EPCRA reporting requirements.\textsuperscript{30} The functions of the LEPCs are: (1) developing emergency response plans for chemical emergencies; (2) receiving certain reports and notifications required by EPCRA; and (3) making such reports available to the public.\textsuperscript{31} The state commissions oversee the local committees and the emergency planning districts.\textsuperscript{32} The coordination of all three bodies is necessary to the formation of emergency response plans and to the dissemination of information to the communities potentially affected by chemical releases.\textsuperscript{33}

One critical function of the state commissions is receiving information regarding chemical use and storage from owners and operators of facilities subject to EPCRA.\textsuperscript{34} The Administrator of the EPA is required, under EPCRA, to promulgate a list of "extremely hazardous substances" (EHS).\textsuperscript{35} Inclusion of a substance or class of chemicals on the EHS list is based on factors such as the toxicity, reactivity, volatility, dispersability, combustibility, or flammability of the particular substance or class.\textsuperscript{36} The Administrator also sets the "threshold planning quantity" (TPQ) for each substance, which represents the amount of an EHS list substance which can be present at a facility without posing a hazard to the surrounding community in the event of an accidental release.\textsuperscript{37} Any facility with an EHS present in excess of the TPQ is required to notify the SERC of the presence and amount of the substance; the SERC then notifies the EPA.\textsuperscript{38} Thus, a facility reporting the presence of an EHS list substance is not required to reduce or eliminate the chemical, but merely has a duty to inform the public (through the SERCs) about the presence of these dangerous chemicals for emergency planning purposes.

The content of the EHS list has been the subject of litigation. In \textit{A.L. Laboratories v. EPA}, the Court of Appeals for the District of Columbia considered a petition to remove the substance bacitracin from the EHS list.\textsuperscript{39} Although the court concluded that it lacked

\textsuperscript{30} See id. §11001(c). "Interested persons," if dissatisfied, may petition the SERC to modify the membership of a LEPC. See id. §11001(d).
\textsuperscript{31} See KUSZAJ, \textit{supra} note 26, at 15.
\textsuperscript{33} See id. §11003.
\textsuperscript{34} See id. §11002(c).
\textsuperscript{35} See id. §11002(a)(2).
\textsuperscript{36} See id. §11002(a)(4).
\textsuperscript{37} See 42 U.S.C. §11002(a)(3).
\textsuperscript{38} See id. §11002(c), (d).
\textsuperscript{39} 826 F.2d 1123, 1124 (D.C. Cir. 1987).
jurisdiction to hear the case given the lack of a jurisdiction-conferring provision in the statute, the same court in a subsequent case reversed its position and considered the appropriateness of an EHS classification according to the "arbitrary or capricious" standard. In Huls America v. Browner, the D.C. Circuit examined a challenge to the EPA's inclusion of isophorone diisocyanate (IPDI) on the EHS list based on its toxicity alone. Acknowledging the EPA's authority to revise the EHS list, the court analyzed the agency's actions according to the United States Supreme Court's Chevron v. Natural Resources Defense Council interpretation of the arbitrary or capricious standard. First evaluating whether the EPA's construction of EPCRA was permissible, the district court in Huls concluded that the EPA need not consider all of the factors mentioned in the statute—such as volatility and reactivity in addition to toxicity—while contemplating revisions to the EHS list, but could evaluate a substance based solely on its toxicity. While the Huls court found some deficiencies in the EPA's evidence regarding IPDI's physical and chemical properties, detecting "less than ideal clarity," it nonetheless accepted the EPA's listing of the substance as extremely hazardous based on the narrow standard of review established in Chevron. According to the court, this permissive approach to the agency's classification was consistent with the purpose of the planning component of EPCRA; the failure to include a substance on the EHS list placed that chemical outside the purview of the statute, thereby frustrating local emergency planning should the chemical in fact be dangerous.

40 See id. at 1125. The court concluded that because EPCRA is a free-standing statute, jurisdiction could not lie as a function of a CERCLA provision. See id.
42 See id.
43 See id. at 447; see also 42 U.S.C. § 11002(a)(4).
44 See Huls America, 83 F.3d at 450 (discussing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)). If Congress' intent is unclear regarding the precise question of statutory interpretation decided by an agency, then a court reviewing such a decision only inquires whether "the agency's answer is based on a permissible construction of the statute." See Chevron, 467 U.S. at 842-43.
45 See Huls America, 83 F.3d at 450.
46 See id. at 454.
47 See id. at 451. The court drew attention to the fact that the TPQ for a substance also plays a role in the EPA's evaluation. If the risk that a release of the substance will result in off-site exposure is low, then the TPQ will correspondingly be much higher. Despite the low risk, the substance still warrants inclusion on the EHS list if the possible effects of such an exposure (though unlikely) are serious. See id.
Armed with information about the presence of EHS list chemicals in the community, the SERCs and LEPCs are required to formulate an emergency response plan.\(^{48}\) Section 11003(c) of EPCRA requires that the following information be included in the emergency response plan: (1) identification of facilities where EHS list chemicals are present, and routes used to transport such substances; (2) procedures to be followed by owners and operators of such facilities and by medical personnel in the event of a release of an EHS; (3) designation of a community emergency coordinator; (4) procedures for providing prompt notice of a release to the public and to key personnel; (5) methods for determining the occurrence of a release, and the population affected by the release; (6) descriptions of emergency equipment and facilities in the community, and identification of the persons responsible at each facility for such equipment; (7) evacuation plans and alternative traffic routes; (8) training programs for medical and emergency planning personnel;\(^ {49}\) and (9) methods and schedules for exercising the emergency plan.\(^ {50}\) The statute also requires the LEPCs to provide a copy of the emergency plan to the SERC,\(^ {51}\) and it requires the owners or operators of facilities subject to EPCRA to designate a facility representative to coordinate implementation of the emergency plan with the LEPC.\(^ {52}\) In addition, the national response team provides guidance documents for assistance in formulating the local plan, while regional response teams are responsible for evaluating those plans.\(^ {53}\)

The final aspect of the statute's planning component involves emergency notification.\(^ {54}\) If an EHS is released, the facility must notify the community emergency coordinator and the affected LEPCs.\(^ {55} \) The facility owner must disclose the circumstances surrounding the release, including the chemicals involved, the amounts released, the area impacted, and other relevant information.\(^ {56}\) Following this notice,

\(^ {48}\) See 42 U.S.C. § 11003.
\(^ {49}\) See id. § 11005(a). Section 11005 also requires that federal officials provide training for federal, state, and local personnel in "hazard mitigation, emergency preparedness, fire prevention and control, disaster response, long-term disaster recovery, national security, technological and natural hazards, and emergency processes." Federal funds are authorized to support state and local training. See id.
\(^ {50}\) See id. § 11003(c)(1)-(9).
\(^ {51}\) See id. § 11003(c).
\(^ {52}\) See id. § 11003(c).
\(^ {53}\) See 42 U.S.C. § 11003(f), (g).
\(^ {54}\) See id. § 11004.
\(^ {55}\) See id. § 11004(b).
\(^ {56}\) See id. The statute requires notice of a release if notice is also required under CERCLA,
the owner or operator of the facility must also provide written notice to the LEPCs of the release, along with a statement regarding any action taken to mitigate the effects of the release, health risks associated with exposure to the substance, and advice regarding medical attention to exposed individuals. The statute does not require notification, however, when the release "results in exposure to persons solely within the site or sites on which the facility is located." Release notification is a crucial part of the emergency plan, representing the first step in managing and alleviating the effects of an accidental release.

B. Reporting Requirements

In addition to contingency planning, EPCRA establishes reporting requirements for facilities using, manufacturing, or storing certain types of chemicals. Three principal reports must be filed with the EPA: (1) material safety data sheets; (2) chemical inventory forms; and (3) toxic chemical release forms. These reports provide the foundation for community right-to-know information.

42 U.S.C. § 9603(a). If notice is not required by CERCLA, the owner of the facility is still required to report the release if it is not a "federally permitted release," i.e., pursuant to federal permit, under CERCLA, § 9601(10), and if the release is in an amount in excess of a quantity (the "reportable quantity" or RQ) determined by the EPA. See 42 U.S.C. § 11004(a)(2). Thus, release of some EHS list chemicals are not subject to reporting requirements under CERCLA but still require notification under EPCRA. As a result, facilities must be aware of and comply with both CERCLA and EPCRA reporting requirements. See Paul Hagen, Update on the Emergency Planning and Community Right-to-Know Act, 73, 79-84 (1996).

See 42 U.S.C. § 11004(c).

See id. § 11004(a)(4) (exempted releases); see also 40 C.F.R. § 355.40(2)(1) (1998) (stating the exemption applies to "any release which results in exposure to persons solely within the boundaries of the facility").

See 42 U.S.C §§ 11021-11023.

See id. § 11021.

See id. § 11022.

See id. § 11023.

See id. §§ 11021-11023. There has been only one challenge to the general validity of the reporting requirements. In Gossner Foods, Inc. v. EPA, 918 F. Supp. 359, 361-62 (D. Utah 1996), an entity which was subject to the reporting requirements of EPCRA charged that the reporting requirements conflicted with the mandates of the Paperwork Reduction Act (PRA), 42 U.S.C. § 3512. The court rejected the challenge to EPCRA, stating that the PRA applies only to agencies and is inapplicable to information explicitly imposed by congressional statute. See Gossner Foods, 918 F. Supp. at 360-62.
1. Material Safety Data Sheets

The first reporting requirement for facilities covered by EPCRA involves material safety data sheets (MSDSs), as designated in the Occupational Health and Safety Act (OSHA). OSHA requires a MSDS for "hazardous chemicals" defined as "any chemical which is a physical hazard or health hazard." If a facility is required under OSHA to submit MSDSs for hazardous chemicals on its premises, EPCRA requires a one-time submission of the sheets by the facility to the LEPC, the SERC, and the local fire department. In lieu of providing an MSDS, a facility can comply with EPCRA by providing a list of hazardous chemicals stored or used on-site to the SERC and LEPC. This list must include the name of each chemical along with its hazardous components.

The EPCRA reporting requirements for hazardous chemicals are somewhat narrower than those of OSHA. First, EPCRA grants the EPA the authority to set minimum thresholds for hazardous chemicals below which no facility is required to report. Also, certain categories of chemical compositions are exempted from the definition of "hazardous chemicals." The following are specifically excluded from the reporting requirement: (1) foods and drugs regulated by the Food and Drug Administration; (2) solids in manufactured items; (3) consumer products; (4) laboratory chemicals; and (5) agricultural chemicals such as fertilizers. Upon the request of any person, the LEPC will furnish a copy of the MSDS or list of hazardous chemicals as required by the statute.
2. Chemical Inventory Forms

The second reporting requirement under EPCRA is chemical inventory reporting. Emergency and hazardous chemical inventory forms encompass the same hazardous chemicals for which OSHA requires MSDSs. Each March 1, a facility subject to EPCRA must submit to the LEPC, the SERC, and the local fire department the amounts and locations of each chemical. There are two types of inventory forms, Tier I and Tier II. All facilities with the hazardous chemicals present on site must provide Tier I information, which includes the following: (1) an estimate of the maximum amount of hazardous chemicals present at the facility during the preceding year; (2) an estimate of the average daily amount of hazardous chemicals present at the facility; and (3) the general location of each hazardous chemical. Tier I information is submitted by categories of chemicals, rather than for individual chemicals.

Tier II information includes more particularized data than Tier I, and requires a brief description of the manner of storage of each individual hazardous chemical as well as the chemical's specific location in the facility. Tier II information, however, need only be provided upon request to SERCs, LEPCs, local fire departments, or government officials, in lieu of the Tier I form. Tier II information may be provided to the public if such information is requested in writing and is in the possession of the LEPCs or SERC. Any Tier II information which is not in the possession of the LEPCs or SERC and which pertains to a hazardous chemical stored in a facility in an amount less than 10,000 pounds will only be provided upon a showing of "general need for the information."
3. Toxic Release Forms

The most important and controversial of EPCRA's reporting requirements is the toxic chemical release form (Form R). This requires annual reporting to the EPA of any off-site transfers or releases of listed "toxic chemicals." The information collected under this provision is compiled into the Toxic Release Inventory (TRI), and TRI data is made accessible to the public. Form R includes the name and business of the facility, a certification by a management official of the facility attesting to its accuracy and completeness, the maximum amount of each toxic chemical used, stored, or processed at the facility, the waste treatment or disposal methods for the chemical employed, and the annual quantity of the toxic chemical entering each environmental medium (i.e., air, water, etc.). Facilities must complete and submit to the EPA and to a designated state official a Form R for each TRI chemical listed in the statute which was manufactured, processed, or used in quantities exceeding the toxic chemical release threshold quantity during the preceding year. The threshold quantity for reporting toxic chemicals used at a facility is 10,000 pounds of the chemical, while chemicals imported, manufactured or processed at the facility have a higher reporting threshold of 25,000 pounds. Facilities are subject to the TRI reporting requirement if they have ten or more employees, are in specified Industrial Classification Codes, and have used, processed, or manufactured the included toxic chemicals in excess of the threshold reporting quantities during the preceding calendar year.

86 See generally KUSZAJ, supra note 26, at 176-352.
87 See Selcraig, supra note 2, at 94 (discussing attempts by some members of Congress to cut the list of TRI chemicals).
89 See id. § 11023(a).
90 See id. § 11023(j) (requiring the EPA to establish and maintain a national toxic chemical inventory based on data submitted to the Administrator under this section).
91 See id. § 11023(g).
92 See id. § 11023(a). Form R must be submitted by July 1 for the preceding calendar year. See id.
93 See 42 U.S.C. § 11023(f). Originally, the threshold quantity for manufacturing or processing chemicals was 75,000 pounds, which was lowered to 50,000 pounds on July 1, 1989, and to 25,000 pounds in 1990. See id. In Atlantic States Legal Found. v. Buffalo Envelope, a user of toxic chemicals challenged on Fifth Amendment due process grounds the different threshold for users versus the threshold applied to manufacturers and processors, but the court found that this distinction was rationally related to a legitimate government purpose. See 823 F. Supp. 1065, 1076 (W.D.N.Y. 1993).
94 See KUSZAJ, supra note 26, at 177 (referring to Standard Industrial Codes 20-39).
95 See 42 U.S.C. § 11023(b)(1)(A). In Kaw Valley, Inc. v. Environmental Protection Agency,
As originally enacted, the TRI list of covered chemicals included 309 individual chemicals and twenty categories of chemicals.\(^{96}\) Until 1994, the total number of chemicals included on the list rose by only four,\(^{97}\) but in 1994 the EPA added 286 chemicals pursuant to its rulemaking authority.\(^{98}\) The text of the statute provides guidelines for adding new chemicals to the TRI list.\(^{99}\) A chemical may be added if: (1) it is known to cause significant, adverse, acute human health effects;\(^{100}\) (2) it is known or predicted to cause cancer, reproductive dysfunctions, neurological disorders, inheritable genetic mutations, or other chronic health effects;\(^{101}\) or (3) because of its toxicity, persistence in the environment, or tendency to bioaccumulate, it has a significant adverse effect on the environment.\(^{102}\)

The addition of chemicals to the TRI list has produced some controversy, and has prompted unsuccessful attempts by some members of the United States Congress to legislatively reduce the number of chemicals included.\(^{103}\) Moreover, the chemical industry has not succeeded in getting chemicals de-listed through litigation either.\(^{104}\) In *Troy Corporation v. Browner*, various chemical companies and associations brought suit to invalidate the most recent spate of EPA rulemaking, which culminated in the addition of 286 chemicals to the TRI list.\(^{105}\) The United States Court of Appeals for the District of Columbia upheld almost all of the EPA’s additions, finding that the EPA’s refusal to “de-list”\(^{106}\) the chemicals was not arbitrary or capricious, and that the procedures utilized were reasonable.\(^{107}\) However,

844 F. Supp. 705 (D. Kan. 1994), the district court upheld the EPA’s definition of an “employee” under EPCRA as a person performing 2,000 hours per year of full-time equivalent employment. See 40 C.F.R. § 372.3 (1998).

\(^{96}\) See 42 U.S.C. § 11023(c); see also *Troy Corp. v. Browner*, 120 F.3d 277, 280 (D.C. Cir. 1997).

\(^{97}\) See *Troy*, 120 F.3d at 281.

\(^{98}\) Section 11023(d) of EPCRA authorizes the EPA to revise the list. See *Troy*, 120 F.3d at 281.

\(^{99}\) See 42 U.S.C. § 11023(d)(2). The EPA determines whether the statutory criteria are evident in a particular substance, based on “generally accepted scientific principles or laboratory tests, or appropriately designed and conducted epidemiological or other population studies.” *Id.* § 11023(d)(2)(C). Deletions from the list are judged on the basis of the absence of the same criteria applied to additions. *See id.* § 11023(d)(3).

\(^{100}\) See *id.* § 11023(d)(2)(A).

\(^{101}\) See *id.* § 11023(d)(2)(B).

\(^{102}\) See *id.* § 11023(d)(2)(C).

\(^{103}\) See Selcraig, *supra* note 2, at 94.

\(^{104}\) See, e.g., *Troy Corp. v. Browner*, 120 F.3d 277, 280, 293 (D.C. Cir. 1997) (refusing to de-list all but 2 of 286 chemicals added by the EPA in 1994).

\(^{105}\) See *id.*

\(^{106}\) See 42 U.S.C. § 11023(e) (specifying the petition procedure for requesting a chemical’s deletion from or addition to the TRI list).

\(^{107}\) See *Troy*, 120 F.3d at 287.
the court did find that the EPA acted arbitrarily and capriciously with respect to two individual chemicals added, because it departed from EPA precedent with respect to one,\textsuperscript{108} and did not comply with EPA regulations regarding scientific studies with respect to the other.\textsuperscript{109}

4. Notice to the Public

One other EPCRA provision regarding both the emergency plans and reporting forms warrants comment. Section 11044 of the statute requires that each emergency plan, MSDS, inventory form, TRI form, and follow-up emergency notice be made available to the general public.\textsuperscript{110} Additionally, the same section requires that each LEPC publish annually a notice to the community in the local paper that such items have been filed by facilities in the area.\textsuperscript{111}

C. Enforcement Provisions

Like a host of other environmental statutes, EPCRA has a dual-prong enforcement mechanism.\textsuperscript{112} First, the Administrator of the EPA can initiate administrative or judicial proceedings against the owner or operator of a facility to remedy noncompliance with EPCRA.\textsuperscript{113} Second, any person may initiate a civil suit against a non-complying facility, in effect acting as a "private attorney general."\textsuperscript{114} This section will explore both aspects of the statutory enforcement mechanism.\textsuperscript{115} The main EPA enforcement provision in EPCRA establishes civil penalties for emergency planning violations,\textsuperscript{116} civil and administrative penalties for reporting violations,\textsuperscript{117} and civil, administrative, and criminal penalties for emergency notification violations.\textsuperscript{118} The widest range of remedies available for emergency notification violations suggests that Congress was most worried about this type of noncompli-

\textsuperscript{108} See id. at 291.
\textsuperscript{109} See id. at 293.
\textsuperscript{110} See 42 U.S.C. § 11044(a).
\textsuperscript{111} See id. § 11044(b).
\textsuperscript{112} See, e.g., Clean Air Act, 42 U.S.C. §§ 7401–7642 (1994).
\textsuperscript{113} See 42 U.S.C. § 11045.
\textsuperscript{114} See id. § 11046.
\textsuperscript{115} See 42 U.S.C. §§ 11041–11043, 11047–11049. Other miscellaneous provisions of EPCRA fall outside the scope of this Comment. They address, briefly, the following subjects: the relationship of EPCRA with other laws (§ 11041); trade secrets (§ 11042); information providing to health care officials (§ 11043); transportation exemptions (§ 11047); regulations (§ 11048); and definitions (§ 11049). See id.
\textsuperscript{116} See id. § 11045(a).
\textsuperscript{117} See id. § 11045(c).
\textsuperscript{118} See id. § 11045(b).
ance. Nonetheless, a facility's failure to notify the appropriate authorities of the presence of an extremely hazardous substance in excess of the threshold planning quantity, or its failure to cooperate with emergency planning, may result in a civil penalty of up to $25,000 for each day of noncompliance if requested by the EPA and imposed by a federal court.\(^{119}\) Civil and administrative penalties for emergency notification and reporting violations carry the same potential fine.\(^{120}\) Criminal penalties of up to a $25,000 fine and two years in prison may be imposed on individuals who "knowingly and willfully" fail to provide emergency notification as required by section 11004.\(^{121}\) The various avenues of enforcement available to the EPA create flexibility, allowing the EPA to pursue harsher penalties in court where warranted.

The second enforcement mechanism of EPCRA is the citizen suit provision.\(^{122}\) This provision authorizes any individual to sue the owner or operator of a facility for the failure to:

(i) submit a follow-up emergency notice under section 11004(c) . . . ;
(ii) submit a material safety data sheet or a list under section 11021(a) . . . ;
(iii) complete and submit an inventory form under section 11022(a) . . . containing Tier I information as described in section 11022(d)(1) . . . unless such requirement does not apply . . . ; or (iv) complete and submit a toxic chemical release form under section 11023(a).\(^{123}\)

There are several additional, important provisions relative to citizen suits. First, the federal courts have jurisdiction over EPCRA citizen suits.\(^{124}\) Second, no action may be commenced against a facility unless the plaintiff has provided sixty days notice of his or her intent to sue to the EPA Administrator, the state, and the violator.\(^{126}\) Third, a citizen suit may not proceed against a violator if the EPA has decided to pursue enforcement itself in administrative or court pro-

\(^{119}\) See id. § 11045(a).

\(^{120}\) See 42 U.S.C. § 11045(b) and (c).

\(^{121}\) See id. § 11045(b)(4).

\(^{122}\) See id. § 11046.

\(^{123}\) Id. § 11046(a)(1)(A). The citizen suit provision also entitles citizens to sue the Administrator for failure to make available information provided to him or her pursuant to EPCRA or to publish certain forms. See id. § 11046(a)(1)(B) and (C). Citizens may sue the state governor, SERC, or LEPCs for failure to respond to a request for information. See id. § 11046(a)(1)(D).

\(^{124}\) See id. § 11046(c).

\(^{125}\) See 42 U.S.C. § 11046(d)(1). This provision becomes important in the context of the debate regarding historical violations. See infra notes 246–64 and accompanying text.
ceedings. Fourth, any monetary penalties imposed by the court are paid to the Treasury, not to the individual plaintiffs. Finally, the substantially prevailing party may be awarded “costs of litigation (including reasonable attorney and expert witness fees) ... whenever the court determines such an award is appropriate.” These provisions become critical to interpreting the intent and meaning of the citizen suit provision in EPCRA.

II. Cases Interpreting the Citizen Suit Provision

The courts have addressed the citizen suit provision in only a few cases. The first cases to evaluate the constitutionality of the provision all concluded that section 11046 is constitutional. In Atlantic States Legal Foundation v. Buffalo Envelope, an environmental protection group filed a citizen suit against the defendant corporation for failing to comply with EPCRA’s reporting requirement. The defendant sought to have the suit dismissed, alleging that the citizen suit provision violated the principle of separation of powers and the Appointments Clause of the United States Constitution by granting to private individuals powers that are vested exclusively in the executive branch. Beginning with the notion that the separation of powers doctrine applies to inter-branch relationships within the federal government, the federal district court concluded that the doctrine did not apply when Congress vested enforcement power in private individuals. A constitutional concern only arises, according to the court, when Congress reserves to itself the power to control or supervise the enforcement of the rights it created. In addition, the court noted that the citizen suit provision of the Clean Water Act had been

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126 See 42 U.S.C. § 11046(e).
127 See Citizens for a Better Env’t v. Steel Co., 90 F.3d 1237, 1241 (7th Cir. 1996).
129 See generally Section II infra (discussing the proper interpretation of the citizen suit provision of EPCRA).
130 See Citizens, 90 F.3d at 1238. Only about twenty cases have been filed in federal court under EPCRA. See id.
133 See id. at 1073.
134 See id.
135 See id. at 1073–74 (citing INS v. Chadha, 462 U.S. 919, 958 (1983)).
upheld, and asserted that the CWA's provision is very similar to EPCRA's.\textsuperscript{137}

The following subsections discuss specific interpretative issues addressed by the federal courts with respect to the citizen suit provision of EPCRA.

A. Notice Requirement

The Supreme Court has held, in the context of other environmental statutes with similar notice provisions, that compliance with the sixty-day notice requirement is a necessary prerequisite to the filing of a citizen suit.\textsuperscript{138} In the context of EPCRA, one district court has mandated that the notice provision be satisfied by each plaintiff in the suit.\textsuperscript{139} In \textit{Idaho Sporting Congress v. Computrol}, two environmental groups filed suit against the defendant for failure to comply with EPCRA.\textsuperscript{140} Land and Water Fund of the Rockies (LAW) complied with the notice requirement, but Idaho Sporting Congress (ISC) did not.\textsuperscript{141} ISC argued that LAW's pre-suit notice letter satisfied the notice requirement because the "notice requirement attaches to the lawsuit—not the plaintiff."\textsuperscript{142} In rejecting this argument, the court noted that one of the purposes of the notice provision—providing the parties with an opportunity to settle—could not be accomplished unless the defendant knew the identities of all of the plaintiffs.\textsuperscript{143} Thus, each plaintiff was independently required to satisfy the sixty-day notice requirement.\textsuperscript{144}


\textsuperscript{138} See infra notes 179--86 and accompanying text (discussing Hallstrom v. Tillamook County, 493 U.S. 20 (1989)).


\textsuperscript{140} See id.

\textsuperscript{141} See id. at 694.

\textsuperscript{142} See id. (citing Citizens for a Better Env't v. Union Oil Co., 861 F. Supp. 889, 913 (N.D. Cal. 1994), aff'd, 83 F.3d 1111 (9th Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 789 (1997)).

\textsuperscript{143} See \textit{Idaho Sporting Congress}, 952 F. Supp. at 695. The court in \textit{Idaho Sporting Congress} was also persuaded by the Supreme Court's reading of the notice provision in \textit{Hallstrom v. Tillamook County}, 493 U.S. 20 (1989), and the 9th Circuit's interpretation of \textit{Hallstrom} as requiring courts to "strictly construe" notice provisions. See generally \textit{Washington Trout v. McCain Foods, Inc}, 45 F.3d 1351 (9th Cir. 1995); see also notes 178--85 infra and accompanying text.

\textsuperscript{144} See \textit{Idaho Sporting Congress}, 952 F. Supp. at 694.
B. Standing

In the area of environmental law, the issue of standing with respect to citizen suits is a contentious one. In *Atlantic States Legal Found. v. Buffalo Envelope*, the defendant alleged that the plaintiff, an environmental protection organization, lacked standing to sue under EPCRA for violations of the reporting requirement. While the defendant characterized plaintiff's injury as "conjectural and abstract," the plaintiff alleged that the defendant had interfered with its members' "right to know" as protected by the statute. The court enumerated the various requirements for standing: the existence of a concrete and particularized injury, a nexus between the injury and the defendant's conduct, and the redressability of the injury by the requested relief. Noting that standing is always a prerequisite to a federal forum, the court determined that the plaintiff had standing to sue. Members of the plaintiff's organization (which included persons who were required to utilize EPCRA data for their jobs) had individually and collectively suffered injury by the defendant's failure to file the reports. Further, these injuries could be traced to the defendant's conduct and redressed by such remedies as an injunction and civil penalties. Thus, the plaintiff was allowed to pursue its claim.

C. Penalties for Noncompliance

In *Williams v. Leybold Technologies*, the defendant challenged the imposition of monetary penalties for its failure to file the requisite EPCRA reports, alleging that the fines (then at a maximum of $10,000 per day) were so punitive as to constitute a criminal penalty. Given

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147 See id. at 1067.
148 See id.
149 See Muskrat v. United States, 219 U.S. 346, 363 (1911) (holding that standing is required pursuant to Article III "case or controversy" requirement).
150 See Buffalo Envelope, 823 F. Supp at 1071.
151 See id. at 1070. One of the members of the Plaintiff organization served as the Commissioner of the Department of Emergency Services for Erie County and required EPCRA information in order to carry out his job; the Court deemed these facts sufficient to constitute "individualized injury." See id.
152 See id. at 1070.
153 See id. at 1072.
154 See id. at 1077.
Congress' clear intention to create a civil remedy and its authorization of criminal penalties for other reporting violations, the court determined that the fine was not so punitive as to transform a civil remedy into a criminal one.\textsuperscript{156}

\section*{D. Attorney's Fees in Citizen Suits}

In \textit{Atlantic States Legal Foundation v. Whiting Roll-Up Door}, where the parties ultimately agreed to a settlement, the court was left to determine only the issue of attorneys' fees.\textsuperscript{157} The court first examined the fees award provision of EPCRA, section 11046(f), which authorizes reasonable attorney and expert witness fees for the "substantially prevailing party."\textsuperscript{158} Though the parties had settled the case, the court found that the plaintiff was still entitled to fees because the settlement was most favorable to that party.\textsuperscript{159} In order to determine what the proper award should be, the court calculated the number of hours expended on the litigation multiplied by a reasonable hourly rate, taking into account such factors as the novelty or difficulty of the suit, the number of issues involved, the attorneys' standard rate, and awards in similar cases.\textsuperscript{160} However, the court ruled that investigations occurring prior to the intent-to-sue notification could not be included in the award.\textsuperscript{161} In awarding over $30,000 in fees to a plaintiff in a case which was ultimately settled, the court established that EPCRA's fee award provision can be a powerful weapon for citizens and environmental groups.\textsuperscript{162}

\section*{III. Citizen Suits for Purely Historical Violations}

The most contentious issue surrounding the citizen suit provision involves suits for wholly past violations which have been cured prior to the filing of the suit.\textsuperscript{163} Before the \textit{Steel Co.} case was decided by the United States Supreme Court, the circuit courts of appeals had split

\begin{itemize}
  \item \textsuperscript{156} See id. at 769.
  \item \textsuperscript{157} See 1994 WL 236473, at *1 (W.D.N.Y. 1993).
  \item \textsuperscript{158} See id. at *1-2.
  \item \textsuperscript{159} See id.
  \item \textsuperscript{160} See id. The court even allowed attorney's fees for work done by in-house counsel and fees for monitoring compliance with the settlement agreement. Id. at *3.
  \item \textsuperscript{161} See id. at *3.
  \item \textsuperscript{162} See \textit{Whiting}, 1994 WL 236473, at *4.
  \item \textsuperscript{163} See, \textit{e.g.}, Citizens for a Better Env't v. Steel Co., 90 F.3d 1237, 1241-43 (7th Cir. 1996) (discussing the different rationales for permitting or denying citizen suits alleging only historical violations).
\end{itemize}
on the issue. The debate over whether to permit citizen suits to proceed once the violation has been cured arises largely as a result of litigation between environmental protection or consumer groups and private industry. The cases dealing with historical violations are few in number, but the results are important in shaping the future of citizen suits. In deciding the question, courts have looked to a variety of factors, such as the language of the statute and the policies behind its enactment, to determine whether EPCRA permits suits for historical violations.

A. The Origin of the Debate: Supreme Court Precedent

The controversy over historical violations began not with an EPCRA suit, but with two cases addressing the citizen suit provisions of the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA). In Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, the United States Supreme Court held that citizen suits for purely historical violations of the CWA were not permitted by the statute. In reaching this conclusion, the Court pursued several lines of reasoning. First, the Court examined the plain language of the statute, which permitted citizen suits against any person alleged "to be in violation of" the statute. While noting that the language was somewhat less than clear, the Court nevertheless concluded that the language implied a continuing or intermittent violation (such that the violation was likely to recur). Second, the

164 See id. at 1244 (interpreting § 11046 as permitting citizen suits for wholly past violations); Atlantic States Legal Found., Inc. v. United Musical Instruments, 61 F.3d 473, 478 (6th Cir. 1995) (holding that § 11046 does not permit such suits).
166 See Citizens, 90 F.3d at 1244.
167 A number of environmental groups maintain that disallowing citizen suits for historical violations will "effectively nullify the citizen suit provision of EPCRA." See Brief for Respondent at *19, 1997 WL 348462 (1997), Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998) (No. 96-643); see also Citizens, 90 F.3d at 1244-45 (stating that citizen suits must be allowed to proceed even after the violator cures so that citizens can recover the costs associated with the suit). This position assumes that citizens will not go through the costs associated with filing suit if they know that the suit will be dismissed once the violator cures. See id. at 1244-45.
171 See id. at 57-58.
172 See id. at 57. The Court's reading of the statute was influenced by the fact that Congress could have easily phrased the section differently if it meant to allow suits for historical violation, by using the construction "to have violated." The Court also focused on the continuous use of the present tense. Id. at 57, 59.
Court determined that this reading was consistent with congressional intent, noting that "Congress frequently characterized the citizen suit provisions as 'abatement' provisions or as injunctive measures."\(^{172}\) Also, the bar on citizen suits in the event of the EPA taking action against the violator presupposes that the citizen suit was intended to supplement, not supplant, governmental action.\(^{173}\) Moreover, allowing the citizen suit to proceed for historical violations could also negatively impact the EPA's dealmaking authority, interfering with agreements between the violator and the EPA to forgo civil penalties in exchange for some concession.\(^{174}\) The Court acknowledged that a citizen suit could proceed, despite the defendant's alleged curing of the violation, if the plaintiff alleges a continuing violation or a likelihood that the violation will recur.\(^{175}\)

In determining whether EPCRA permits suits for historical violations, the courts have looked to EPCRA's notice provision for guidance in divining the meaning of the statute.\(^{176}\) Thus, the Supreme Court's early pronouncements regarding the function of a similar notice provision in a different environmental statute would later prove instructive.\(^{177}\)

In *Hallstrom v. Tillamook County*, the Supreme Court evaluated the sixty-day notice provision in RCRA to determine whether notice was an absolute prerequisite to the filing of the suit.\(^{178}\) The plaintiff had failed to notify the EPA and relevant state agencies of his intent to sue.\(^{179}\) In holding that the sixty-day notice provision was a necessary precondition to a citizen suit, the Court rejected a more flexible approach whereby a suit could proceed even if the plaintiff did not comply with the notice provision, if there had been notice in fact or if the court stayed the proceedings for sixty days.\(^{180}\) *Hallstrom* discussed several reasons for the notice provision, stating that notice to the EPA and state agencies was required in order for the EPA to have

\(^{172}\) Id. at 61.

\(^{173}\) Id. at 60.

\(^{174}\) See Gwaltney, 484 U.S. at 60.

\(^{175}\) See id. at 64.

\(^{176}\) See notes 247–65 infra and accompanying text (discussing the effect of EPCRA's sixty-day notice requirement on citizen suits alleging historical violations).

\(^{177}\) See Hallstrom v. Tillamook County, 493 U.S. 20, 29 (1989); see also Atlantic States Legal Found. v. United Musical Instruments, 61 F.3d 473, 476 (6th Cir. 1995) (discussing *Hallstrom*).

\(^{178}\) See Hallstrom, 493 U.S. at 23.

\(^{179}\) See id. at 23–24.

\(^{180}\) See id. at 25. The flexible reading of the notice provision was adopted by the Third Circuit in *Proffitt v. Bristol Commrs*, 754 F.2d 504, 506 (1985).
time to decide if it wanted to pursue a remedy against the violator, thereby precluding the citizen suit.181 Notice to the violator, on the other hand, only made sense if the sixty-day period was intended to give the violator time to remedy the violation.182 The Hallstrom opinion cited Gwaltney, stating that the notice provision gives the alleged violator "an opportunity to bring itself into complete compliance with the Act and thus render unnecessary a citizen suit."183 The Court, as a result, dismissed the suit because the plaintiff failed to observe the notice provision.184 Thus, this case highlighted the functions of the notice provision. The federal courts would later follow or distinguish Hallstrom in discussing the functions of EPCRA's notice provision as it impacted suits alleging only historical violations.185

Since Gwaltney and Hallstrom, the courts have divided on whether to allow citizen suits for past violations of EPCRA which have been cured prior to the start of the suit.186 The first federal appeals court to consider the issue was the United States Court of Appeals for the Sixth Circuit, which, based on the reasoning in Gwaltney, refused to allow a citizen suit that alleged only historical violations.187 However, a majority of the courts to consider the citizen suit provision have sided with the Court of Appeals for the Seventh Circuit, which allowed an EPCRA citizen suit to proceed even though the violator had cured the violation. The Seventh Circuit, for reasons discussed in the following subsections, has distinguished Gwaltney on the basis of the phrasing of and policy behind EPCRA's citizen suit provision.188

The following subsections also separately address the effect of the notice provision, the standing analysis, the statutory language, the legislative history, and public policy on whether EPCRA permits suits.

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181 See 493 U.S. at 29.
182 See id.
183 See id. (citing Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 60 (1987)).
184 See id. at 33.
185 See notes 248–65 infra and accompanying text (discussing EPCRA's sixty-day notice provision and the effect of Hallstrom on the interpretation of such provisions).
186 See Citizens for a Better Env't v. Steel Co., 90 F.3d 1237, 1244 (7th Cir. 1996); Atlantic States Legal Found. v. United Musical Instruments, 61 F.3d 473, 478 (6th Cir. 1995).
187 See United Musical Instruments, 61 F.3d at 478.
for purely historical violations. This Section revisits the standing and notice issues generally presented in Section II, and reevaluates them with a focus on the issue of historical violations.

B. Statutory Language

The provision of EPCRA authorizing citizen suits permits any person to commence a civil action on his own behalf against an owner or operator of a facility for the failure to submit a follow-up emergency notice or MSDS, or to complete and submit a chemical inventory form or TRI Form R, as required under the relevant sections of EPCRA. While EPCRA's language may appear straightforward, certain ambiguities arise when applying this language to situations where the "failure to submit" the relevant forms has been remedied prior to the commencement of the suit. Defendants have moved for dismissal of such suits on the basis of lack of subject matter jurisdiction, arguing that EPCRA does not authorize suits for wholly past violations. In construing this language, the courts have purported to follow the "plain meaning" rule of statutory construction and have compared the language to other environmental statutes containing similar citizen suit provisions.

The first court to address the issue of statutory construction was the United States District Court for the Western District of New York in *Atlantic States Legal Foundation v. Whiting Roll-Up Door Manufacturing Corp.* Stating that "absent a clearly expressed legislative intention to the contrary, this Court must rely on the words of the statute," the district court concluded that plaintiffs could sue for historical violations because the defendant had not complied with the filing deadlines. The court looked to the enforcement provisions of EPCRA, which provided for civil penalties against any person who "violates any requirement[s]" under the statute. The court then

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189 See 42 U.S.C. § 11046(a)(1)(A) (1994 & Supp. 1997) (referencing § 11004(c) (follow-up emergency notice), § 11021(a) (material safety data sheet), § 11022 (inventory forms), and § 11023(a) (toxic chemical release forms)). Section 11046 also permits citizen suits against the Administrator, state governor, or SERC, for the failure to publish required materials or to otherwise comply with their duties under the statute. See id.

190 See, e.g., Whiting, 772 F. Supp. at 749.

191 See, e.g., Citizens, 90 F.3d at 1242.

192 See 772 F. Supp. at 749.

193 Id. at 750 (citing Consumer Product Safety Comm. v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

194 See id.

195 See id. (citing 42 U.S.C. § 11045(c)).
reasoned that the defendant had "violated the requirements" of the statute by not complying with the relevant filing deadlines. While focusing on the language of the enforcement provision, the court did not explore the language of the citizen suit provision in detail.

The Whiting court's reading of the statute is somewhat problematic, because by its nature, the enforcement provision only supplies a remedy after the violation has been established through adjudication. The enforcement provision does not purport to define what constitutes a violation; rather, it is the function of the citizen suit provision to define the violation. Nonetheless, the court in Williams v. Leybold Technologies, Inc. followed the reasoning in Whiting. The Williams court stated that "[t]he statute does not expressly require a continuing violation at the time of filing suit, but rather authorizes a suit against any person who failed to submit an MSDS by the applicable deadline." The court in Williams also distinguished the EPCRA citizen suit provision from the citizen suit provision of the Clean Water Act construed by the Supreme Court in Gwaltney. In the Clean Water Act, Congress used the present tense, allowing suits against persons alleged "to be in violation of" the statute and implying a continuing or current violation. The Williams court concluded that the different phrasing of the two statutes was dispositive, and that EPCRA clearly permitted suits for historical violations.

After Whiting and Williams, courts construing the statute scrutinized the "complete and submit" language of the citizen suit provision for guidance on whether suits were authorized for historical violations. The first federal appeals court to address the issue was the Sixth Circuit, in Atlantic States Legal Foundation v. United Musical Instruments. After surveying the reporting requirements of EP-

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196 Id.
197 See Whiting, 772 F. Supp. at 750.
200 Id. at 768.
201 Id. at n.2. For a discussion of Gwaltney, see notes 170-78 supra and accompanying text.
202 See id. at 768 n.2.
203 See id.
205 See 61 F.3d 473, 475 (6th Cir. 1995). This decision has engendered a great deal of criticism in legal journals and law reviews. See, e.g., Katarina K. Boer, Comment, United Musical Instruments v. The Steel Co.: The Conflict over the Safety of Our Communities and the Emergency Planning and Community Right-to-Know Act, 91 Nw. U. L. Rev. 1599 (1997); Denise Marie Lohmann, Note, The Uncertain Future of Citizen Suits Under EPCRA: Can
CRA and noting that the defendant had remedied its failure to file the necessary EPCRA reports (specifically the Form R) prior to the commencement of the suit, the court turned to the language of the citizen suit provision. The provision, the court stated, authorizes citizen suits for “failure to . . . complete and submit [Form Rs] under section 11023(a) of this title.” According to the court, the emphasis of the provision was on the completion and submission of the forms, and thus the form is “completed and filed even when it is not timely filed.” Based on this reasoning, the court concluded that the plain language of EPCRA did not contemplate citizen suits for wholly past violations.

The United Musical Instruments court’s reading of the citizen suit provision was flatly rejected by the United States Court of Appeals for the Seventh Circuit in Citizens for a Better Environment v. Steel Co. Rather than directly following United Musical Instruments and the holding in Gwaltney, the Seventh Circuit purported to follow the “interpretive methodology” of Gwaltney. The lesson of Gwaltney, according to the Seventh Circuit, was to read a statute according to its plain and natural meaning. Applying this rule, the court concluded that the language of EPCRA’s citizen suit provision differed from that of the Clean Water Act at issue in Gwaltney, and thus permitted a different interpretation.

Citing the other district court cases which interpreted EPCRA’s provision, the Seventh Circuit in Citizens concluded that the most “natural” reading of the statute would permit suits for historical

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206 See United Musical Instruments, 61 F.3d at 474.
207 See id. at 475 (citing 42 U.S.C. § 11046(a)(1)(A)(iv)).
208 Id. at 475.
209 See id. The court in United Musical Instruments also was persuaded that Congress easily could have authorized citizen suits for purely historical violations by simply adopting clear language, as it did with respect to the broad grant of power contained in the EPA enforcement provision. See id. (citing 42 U.S.C. § 11045(c)(4)).
210 See 90 F.3d 1237, 1243 (7th Cir. 1996).
211 See id. at 1242.
212 See id.
213 See id. at 1243.
violations.\textsuperscript{215} The \textit{United Musical Instruments} court had rejected this reading, calling it a "hypertechnical parsing" of the statute.\textsuperscript{216} The \textit{Citizens} court, however, thought EPCRA's "failure to comply" language implied that a violation would occur and be actionable once the violator missed the deadline, irrespective of whether the violation was subsequently cured prior to the actual commencement of the suit.\textsuperscript{217} The Seventh Circuit reasoned that since the citizen suit provision references the substantive portions of the statute containing the filing deadlines, it authorized "citizen suits not only for the failure to complete and submit forms, but for failure to complete and submit forms in accordance with the requirements—i.e., deadlines—set forth in the referenced sections."\textsuperscript{218}

Finally, the \textit{Citizens} court distinguished the Clean Water Act as interpreted by \textit{Gwaltney} on the basis of the tense employed in the statute: the CWA permits suits where a violation "is occurring" (implying an ongoing or current violation), whereas EPCRA authorizes suits where a "violation has occurred" (not implying a limitation to ongoing violations).\textsuperscript{219} Thus, the \textit{Citizens} court concluded that while the CWA required a current violation, EPCRA permitted suits for historical violations.\textsuperscript{220}

After the \textit{Citizens} court interpreted the citizen suit provision of EPCRA as permitting suits for purely historical violations, courts addressing the issue generally followed the reasoning in that circuit and rejected the \textit{United Musical Instruments} court's approach.\textsuperscript{221} Given the statutory language, referring to violations "under" certain sections of the statute, the courts tended to view the filing deadlines of those sections as necessary elements of the "complete and submit" requirement of the citizen suit provision.\textsuperscript{222} The federal court for the District of Arizona in \textit{Don't Waste Arizona v. McLane Foods}, gave a

\begin{itemize}
\item \textsuperscript{215} \textit{See Citizens,} 90 F.3d at 1243.
\item \textsuperscript{216} \textit{See Atlantic States Legal Found. v. United Musical Instruments,} 61 F.3d 473, 477 (6th Cir. 1995).
\item \textsuperscript{217} \textit{See 90 F.3d at 1243.}
\item \textsuperscript{218} \textit{Id.}
\item \textsuperscript{219} \textit{See id. at 1244.}
\item \textsuperscript{220} \textit{See id.}
\item \textsuperscript{222} \textit{See, e.g., Idaho Sporting Congress,} 952 F. Supp. at 692 (stating that Congress used the term "under" for a reason, in order to incorporate the filing deadlines as defined in other sections of the statute into the citizen suit provision).
\end{itemize}
broad reading to the citizen suit provision, stating that this was necessary “when a court is construing a remedial statute . . . in order to give effect to the statute’s remedial purpose.” As a result, every court except the Sixth Circuit has interpreted the citizen suit provision to allow suits to continue even after the violator has cured the violation.

C. Standing

As mentioned earlier, the cases reviewed in Section II generally did not address the issue of standing for citizen suits alleging purely historical violations. Only three cases contain any mention of standing, all of which concluded that the plaintiffs had met the requirements of Article III of the United States Constitution.

Article III limits the jurisdiction of the federal courts to “Cases” and “Controversies.” The doctrine of standing has developed to identify those disputes which rise to the level of a case or controversy as those terms are used in the Constitution. The three requirements for standing are: (1) a concrete and particularized injury; (2) a connection between the injury and the defendant’s conduct; and (3) a likelihood that the injury may be redressed by judicial remedy.

The first court to squarely address the standing issue for suits involving purely historical violations in EPCRA was the District Court for the Eastern District of Pennsylvania in Delaware Valley Toxics.

223 950 F. Supp. at 976.

224 The Citizens case was dismissed, however, on appeal to the Supreme Court. See Steel Co. v. Citizens for a Better Env’t, 118 S. Ct. 1003, 1020 (1998).

225 See supra notes 167–88 and accompanying text (discussing Gwaltney and Hallstrom).

226 See McLane Foods, 950 F. Supp. at 979–81; Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132, 1138–41 (E.D. Pa. 1993). As discussed earlier in this Comment, the court in Atlantic States Legal Foundation, Inc. v. Buffalo Envelope also addressed the standing issue, in the context of a citizen suit involving a continuing failure by the defendant to file the required EPCRA reporting forms. See 823 F. Supp. 1065, 1067–72 (W.D.N.Y. 1993). The reason for other courts’ failure to address the standing issue—a prerequisite to the federal forum—is unclear; possibly, the issue was not raised by the defendants.


229 See id. These three requirements for standing—injury in fact, causation, and redressability—are the “irreducible minimum” set of requirements and the burden is on the plaintiff to demonstrate them. See generally Valley Forge College v. Americans United, 454 U.S. 464 (1982).
Coalition v. Kurz-Hastings. The court in Delaware Valley first noted that an organization with a long history of advocacy in the area of environmental law does not have standing to sue merely on the basis of its interest in the environment. The court looked to EPCRA for guidance on what type of injury is cognizable under the statute, concluding that given EPCRA's informational function, the failure to provide those reports required by the statute would constitute a concrete injury for standing purposes. According to the court, the plaintiffs in Delaware Valley had suffered a number of injuries as a result of the defendant's failure to provide the reports in a timely fashion, including the plaintiff's need to spend time and money to discover the defendant's violation, the resulting reduction in time available to educate and disseminate information about their programs, and the ignorance about the defendant's activity among the members of the organization who lived and worked in close proximity to the defendant's plant. Further, the court concluded that these injuries were directly traceable to the defendant's failure to file the reports in a timely fashion. The final requirement for standing, redressability, was also met despite the defendant's cure of the violation. The court noted that injunctive relief, civil penalties, attorneys' fees, and a declaratory judgment were all remedies available to the plaintiff. Despite the fact that the injunction was prospective in nature and the civil penalties were payable to the Treasury Department and not the plaintiff, the court nonetheless held that these remedies were sufficient to redress the plaintiff's historical injury.

As in Delaware Valley, the federal district court in Don't Waste Arizona v. McLane Foods also determined that the plaintiffs had standing to sue for a purely historical violation. The court discussed

239 See 813 F. Supp. at 1132.
231 See id. at 1139.
232 See id.
233 See id. at 1140.
234 See id.
235 See Delaware Valley Toxics Coalition, 813 F. Supp. at 1140.
236 See id. at 1141.
237 See id.
238 950 F. Supp. 972, 979-81 (D. Ariz. 1997). The case also discussed the requirements of "representational standing," where an organization may demonstrate standing in its own right providing that: (1) the members of the organization must have standing to sue in their own right; (2) the interests sought are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires that the members participate in the suit individually. See id. at 980.
the requirements of "representational standing," where an organization may demonstrate standing in its own right: (1) the members of the organization individually must have standing to sue; (2) the interests sought must be germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, should require that the members participate in the suit individually.239 After determining that these three requirements for representational standing were met,240 the court concluded that the Article III standing requirement was met without considering the causation or redressability issues.241 Thus, both Delaware Valley and McLane Foods, though addressing the standing issue, had some gaps in reasoning: Delaware Valley gave short shrift to the redressability issue,242 and McLane Foods failed entirely to discuss either causation or redressability.243

D. Sixty-Day Notice Provision

Courts evaluating the viability of EPCRA citizen suits for historical violations have also looked to the sixty-day notice requirement to give meaning to the statute. Two main views, consistent with the Supreme Court's lead in Gwaltney and Hallstrom, have developed, in line with the Sixth Circuit's approach in United Musical Instruments or with the Seventh Circuit's approach as expressed in Citizens.244

Citing Gwaltney and Hallstrom repeatedly,245 the court in United Musical Instruments viewed the sixty-day notice provision as serving a dual function: notice to the EPA gives the agency the opportunity to file suit itself, thereby precluding a citizen suit, while notice to the violator allows him or her the opportunity to remedy the violation prior to the suit.246 Notice to the alleged violator, according to the court, becomes gratuitous if suits can survive based on wholly past

240 See McLane Foods, 950 F. Supp. at 980–81.
241 See id. at 981. Other opinions addressing the standing issue in the context of organizations as plaintiffs have still required the three main prongs of standing—injury, causation, and redressability—in addition to the "representational standing" requirements. See generally Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
242 See supra note 238 and accompanying text.
243 See supra notes 240–41 and accompanying text.
244 See Atlantic State Legal Found. v. United Musical Instruments, 61 F.3d 473, 476 (6th Cir. 1995); Citizens for a Better Env't v. Steel Co., 90 F.3d 1237, 1244 (7th Cir. 1996).
245 See supra notes 167–88 and accompanying text (discussing the rationales for Gwaltney and Hallstrom).
246 See United Musical Instruments, 61 F.3d at 476.
violations.\textsuperscript{247} Thus, the court interpreted the notice provision as evidence of Congress' intent not to permit suits for historical violations.

A number of courts have come to the opposite conclusion. In \textit{Atlantic States Legal Foundation v. Whiting Roll-Up Door}, the court distinguished \textit{Gwaltney} even though the statute construed in that case, the Clean Water Act, had a similar notice provision.\textsuperscript{248} The court found it significant that Congress had amended the Clean Air Act (CAA)\textsuperscript{249} after \textit{Gwaltney} to specifically permit citizen suits for historical violations.\textsuperscript{250} The court reasoned that Congress' amending the CAA to permit suits for historical violations, while at the same time leaving the notice provision intact, indicated that the notice provision was not incompatible with the concept of suits for historical violations, thereby undercutting the Supreme Court's analysis in \textit{Gwaltney}.\textsuperscript{251}

However, this precise reasoning was rejected by the \textit{United Musical Instruments} court:

Although this argument has a certain logic, it is unpersuasive since one can argue with at least equal force that by amending the Clean Air Act, but failing also to amend EPCRA, Congress intended to limit EPCRA's citizen suit provision to violations existing at the time the suit is filed.\textsuperscript{252}

Thus, the \textit{United Musical Instruments} court refused to alter the reasoning in \textit{Gwaltney} and \textit{Hallstrom} regarding the notice provision, absent a clear legislative mandate in the form of an amendment to EPCRA, not some other environmental statute.\textsuperscript{253}

In \textit{Citizens}, the Seventh Circuit did not respond to \textit{United Musical Instruments}' criticism regarding the implications of the amendment to the Clean Air Act, but merely reiterated the same reasoning as the court in \textit{Whiting}.\textsuperscript{254} The \textit{Citizens} court chose to hypothesize about the

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\textsuperscript{247} See \textit{id.} (citing \textit{Gwaltney} of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 59–60 (1987)).


\textsuperscript{249} 42 U.S.C. § 7604(a).

\textsuperscript{250} See \textit{Whiting,} 772 F. Supp. at 753.

\textsuperscript{251} See \textit{id.}

\textsuperscript{252} See \textit{United Musical Instruments,} 61 F.3d at 477.

\textsuperscript{253} \textit{Id.}

\textsuperscript{254} See \textit{Citizens for a Better Env't v. Steel Co.,} 90 F.3d 1237, 1244 (7th Cir. 1996). The court stated: "[According to the Supreme Court,] allowing citizens to sue after violations ceased would defeat the purpose of the notice provision . . . . This line of reasoning is no longer as compelling as it was when \textit{Gwaltney} was decided. Since then, Congress has expressly intended precisely that result [by amending the Clean Air Act]." \textit{Id.} The court did not respond to the Sixth Circuit's argument that the failure to similarly amend EPCRA mitigated against this analysis.
function of the notice provision. The court in Citizens pointed to a number of other functions potentially served by the notice provision—aside from giving the violator time to cure—including providing an opportunity for the alleged violator to rectify false information and to limit its exposure. In addition, according to the Seventh Circuit in Citizens, the notice requirement preserves the EPA's enforcement discretion and promotes settlement between the parties. Thus, the court determined that the notice requirement was not rendered meaningless by allowing citizen suits for historical violations to proceed.

The only court to address the Sixth Circuit's argument about the effect of the CAA amendment on the analysis in Gwaltney was the district court in Don't Waste Arizona v. McLane Foods. In holding that the CAA amendment was clearly designed to circumvent Gwaltney (which held that notice to violators would be superfluous if suits alleging only historical violations were allowed to proceed), the court in McLane Foods stated:

This argument [of the United Musical Instruments court] assumes that the language of the EPCRA is identical to the language of the pre-1990 Clean Air Act. But Congress did not need to amend the language of the EPCRA's citizen suit provision because that language already authorized citizen suits for wholly past violations.

Thus, the court in McLane Foods believed that the failure to amend EPCRA at the same time as the CAA indicated that Congress viewed EPCRA as already permitting suits for historical violations.

While the exact import of EPCRA's notice provision with respect to suits for historical violations remains undetermined, the only Supreme Court decision to deal with notice provisions generally, Hallstrom, endures as persuasive authority having spelled out the functions of a notice provision. Similarly, the impact of subsequent environmental legislation on EPCRA remains unresolved by the courts.

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255 See id.
256 See id.
257 See id.
258 See id.
260 Id.
261 See id.
262 See supra notes 178–85 and accompanying text (discussing Hallstrom).
E. The Role of Citizen Suits Vis-à-Vis EPA Enforcement Authority

In framing EPCRA, Congress envisioned a two-pronged enforcement mechanism, with the EPA given primary responsibility for enforcing the statute but with citizens also permitted to sue violators of the statute.263 Within the context of citizen suits for purely historical violations, the courts have posited structural arguments about the proper role of citizen suits in light of the EPA's broader enforcement authority.

In United Musical Instruments, the Sixth Circuit addressed this structural issue, arguing that the supplementary role of citizen suits as envisioned by Congress precluded suits for historical violations.264 First, the United Musical Instruments court stated that the different, broader authority granted to the EPA under section 11045(c)(4) "indicates a congressional intent to limit citizen suits to ongoing violations and to give the EPA sole authority to seek penalties for historical violations."265 Specifically, the court considered it significant that the EPA was empowered to seek a broad range of criminal, civil, and administrative penalties.266 Second, the court drew on the reasoning in Gwaltney, stating that an "anomaly" would develop if citizen suits were allowed to proceed on the basis of historical violations.267 The ban on citizen suits once an agency action was underway bespoke a congressional intent that "the citizen suit is meant to supplement rather than to supplant government action."268 Allowing citizen suits alleging only historical violations to continue would "undermine the supplementary role envisioned for the citizen suit."269 Finally, the court noted that the EPA's "dealmaking" power could be compromised by an over-broad reading of the citizen suit provision.270 The EPA might deem it appropriate in certain cases to forego penalties in return for some concession of the violator.271 Violators would have

264 See Atlantic States Legal Found. v. United Musical Instruments, 61 F.3d 473, 475 (6th Cir. 1995).
265 Id.
266 See id.
267 See id. at 476.
268 See id. (citing Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987)).
269 See United Musical Instruments, 61 F.3d at 476 (citing Gwaltney, 484 U.S. at 60).
270 See id.
271 See id.
little incentive to strike a bargain with the EPA if they could face civil penalties years later in a citizen suit.\footnote{272}

The court in *McLean Foods* addressed this argument, arriving at a different conclusion.\footnote{273} Responding to the defendant's contention that allowing citizen suits for historical violations would supplant rather than supplement the EPA's role, the court noted the limited resources of the EPA and indicated that the proper role for the citizen suit is to permit the citizen to take action where administrative considerations do not permit the EPA to do so.\footnote{274} The court reasoned that it was impossible for the kind of "duplicative" enforcement hypothesized by the courts in *Gwaltney* and *United Musical Instruments* to occur, because citizen suits are barred as soon as the EPA begins pursuing administrative or civil actions against an alleged violator.\footnote{275} However, the court did not address the precise situation about which those courts speculated: when the EPA made an administrative decision *not* to pursue an action in exchange for some other concession.\footnote{276} The EPA's priority in pursuing a violator to the exclusion of citizen suits only arises if the Administrator is pursuing a civil or administrative action, not if the EPA makes some alternate kind of arrangement.\footnote{277}

F. Legislative History

As is typical in the case of an ambiguous statutory provision, the courts have looked to the legislative history of the statute for guidance in interpreting EPCRA's citizen suit provision.\footnote{278} The courts have noted Congress' emphasis on promptly filing the reports required by EPCRA in order to enable communities to adequately formulate emergency response plans.\footnote{279} However, determining the best manner in which to address the failure to comply with EPCRA's deadlines—through citizen suits or EPA action—has divided the courts.\footnote{280}

\begin{footnotes}
\item[272] See id.; see also *Gwaltney*, 484 U.S. at 61 (stating that allowing citizen suits years later for the same violation would "curtail[] considerably" the exercise of the EPA's discretion and thereby "change the nature of the citizens' role from interstitial to potentially intrusive.").
\item[274] See id.
\item[275] See id.
\item[276] See id.
\item[277] See id.
\item[280] See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1244–45 (7th Cir. 1996); Atlantic States Legal Found. v. United Musical Instruments, 61 F.3d 473, 476 (6th. Cir. 1995).
\end{footnotes}
In *Whiting*, the district court considered the congressional Conference Report related to the passage of EPCRA.281 The court quoted one passage in particular:

[The filing of EPCRA reports such as the MSDS] is obviously a critical first step to achieving the intent of EPCRA, for without the filing of this information, state and local officials have no way of receiving the necessary information regarding hazardous chemicals to make available to the public and to formulate an effective emergency response plan.282

The emphasis placed on obtaining full and accurate information on a timely basis, in the interests of public safety, persuaded the court that to overlook EPCRA's reporting deadlines in the context of citizen suits by disallowing suits for historical violations would “subvert the objectives of EPCRA.”283 The inability of SERCs and LEPCs to form emergency response plans because of overdue or unavailable information would clearly frustrate the intent of Congress in passing the statute.284

The court in *United Musical Instruments* acknowledged the importance Congress attached to such information being made available both to the public and to the necessary authorities.286 Nonetheless, the court noted that once the forms are filed, this congressional goal is achieved and a citizen suit is rendered unnecessary.286 Nothing in the legislative history, according to the court, indicated that Congress intended to allow citizens to sue in the case of purely historical violations.287

Despite these attempts to glean from EPCRA's legislative history some guidance on the citizen suit provision, the fact remains that in no part of its history does Congress specifically address whether EPCRA intended to allow citizen suits for historical violations. The murky and ambiguous legislative history has led a majority of courts to sidestep this analysis altogether, and attempt instead to focus on the language of the statute.288

281 See 772 F. Supp. at 750.
282 Id. (citing H.R. CONG. REP. NO. 99-962 at 309–10 (1986)).
283 See id. at 751.
284 See id. For a similar analysis and conclusion, see Leybold Techs. Inc., 784 F. Supp. at 768.
285 61 F.3d at 477.
286 See id.
287 See id.
288 See supra notes 189–225 and accompanying text.
G. Policy Arguments

The courts have also turned to policy arguments to bolster their readings of EPCRA's citizen suit provision. The court in *United Musical Instruments* was most concerned about the preemption of the EPA's enforcement authority by citizen suits. Also, in that court's view, once the required forms were filed, a citizen suit was unnecessary because the congressional goal of providing information was satisfied. The court seemed to conclude that a broad reading of the citizen suit provision was unwise given the structure of the statute, which granted greater enforcement authority to the EPA and envisioned only a supplementary role for citizen enforcement.

The Seventh Circuit, and district courts following its reasoning, adopted a broader reading of the citizen suit provision to encompass purely historical violations because those courts believed that Congress' remedial purpose was best effectuated by allowing such suits. First, the *Citizens* court noted EPCRA's relatively light burden on industry, requiring only reporting and filing forms, not substantive reductions in the amount of chemicals released. The *Citizens* court noted that most of the information requiring disclosure under EPCRA must be compiled for other purposes, and asserted that the costs associated with compliance are low. Neither the statute itself nor the EPA's regulations mandate a particular methodology for collecting the information required for the reports. Section 11023(g)(2), for example, states: "[n]othing in this section requires the monitoring or measurement of the quantities, concentration, or frequency of any toxic chemical released into the environment beyond that monitoring and measuring required under other provisions of law or regulation." The court also cited annual cost figures for compliance with this section: $326 in fixed costs, and from $43.50 to $146.81 in variable costs. A violator's failure to comply with a statute imposing so few burdens and such light costs seemed to persuade the court that allow-

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289 See generally 61 F.3d at 473.
290 See id. at 477.
291 See id.
292 See, e.g., *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1244 (7th Cir. 1997).
293 See id. at 1239.
294 See id.
295 See id.
296 See id.
297 42 U.S.C. § 11023(g)(2) (referring to toxic release information contained in Form Rs).
298 See *Citizens*, 90 F.3d at 1240.
ing citizen suits for even historical violations was permissible to ensure compliance.298

In addition to relatively light reporting costs, the court in Citizens saw another reason for permitting suits for historical violations. The court viewed EPCRA as creating 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."299 If citizen suits are not allowed to proceed once the violator has cured the violation by submitting the required forms, the court saw no incentive for citizens to invest those resources.300 As the court stated, "[p]ut simply, if citizens can't sue, they can't recover the costs of their efforts."301 The result of not permitting suits for past violations would be that private enforcement of the reporting requirements would decline.302 The citizen suit provision would be rendered, according to the court, "virtually meaningless."303

IV. STEEL CO. v. CITIZENS FOR A BETTER ENVIRONMENT

With the judicial landscape characterized by confusion over the proper interpretation of the citizen suit provision, the United States Supreme Court granted certiorari in the Citizens case.304 In determining whether EPCRA's citizen suit permitted suits for purely historical violations, the Sixth and Seventh Circuits had split over virtually every issue: the meaning of the statutory language, the effect of the notice provision, the role of the citizen suit in light of the EPA's enforcement authority, the import of the legislative history, the effect of Gwaltney and Hallstrom, and the dominant policy objectives.305 The only issue every district and appeals court implicitly agreed upon was that the plaintiffs had standing to sue for historical violations.306 However, in Steel Co. v. Citizens for a Better Environment, the Supreme

298 See id.
299 Id. at 1244.
300 See id.
301 Id.
302 See Citizens, 90 F.3d at 1245.
303 See id. at 1244.
305 See generally Citizens, 90 F.3d 1237; Atlantic States Legal Found. v. United Musical Instruments, 61 F.3d 473 (6th Cir. 1995).
306 See generally notes 190–304 supra and accompanying text (discussing the federal courts' various approaches to the historical violations issue).
Court seized on the issue of standing and held that the plaintiff in fact had not met the Article III requirements.\textsuperscript{307} The Court ordered the judgment vacated and the case dismissed because the lack of standing meant the federal courts were deprived of jurisdiction to entertain the case.\textsuperscript{308}

In an opinion penned by Justice Scalia,\textsuperscript{309} the Court devoted a majority of its discussion to explaining why an adjudication on the merits was inappropriate when the Article III standing requirements were not met.\textsuperscript{310} Specifically, Justice Scalia responded to Justice Stevens’ concurrence, which argued that the question whether section 11046(a) permitted citizen suits for historical violations was also “jurisdictional,” and thus had an equivalent claim to being resolved first.\textsuperscript{311} The majority regarded this argument as an “attempt to convert the merits issue in this case into a jurisdictional one.”\textsuperscript{312} The Court, according to the majority, was not permitted to proceed to the merits of the case without ascertaining whether the plaintiff had standing.\textsuperscript{313} Assuming “hypothetical jurisdiction” in order to proceed to the merits of the case would carry the Court “beyond the bounds of authorized judicial action and thus offend fundamental principles of separation of powers.”\textsuperscript{314}

Turning to the standing question, the Court first reviewed the three requirements: injury, causation, and redressability.\textsuperscript{315} This triad, according to the Court, “comprises the core of Article III’s case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.”\textsuperscript{316} The Court refused to decide whether being deprived of the information requiring disclosure under EPCRA was a cognizable injury in fact.\textsuperscript{317} However, even

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\textsuperscript{307} 118 S. Ct. 1003, 1020 (1998).
\textsuperscript{308} See id.
\textsuperscript{309} Justice Scalia also authored the \textit{Lujan v. Defenders of Wildlife} decision, 504 U.S. 555 (1992), and has greatly influenced the Court’s interpretation of the doctrine of standing. In \textit{Lujan}, the Court held that the plaintiff organization lacked standing to sue under the citizen suit provision of the Endangered Species Act because the Court found no cognizable injury. \textit{See id.; see also} Scalia, \textit{supra} note 227, at 881.
\textsuperscript{310} See \textit{Steel Co.}, 118 S. Ct. at 1009–16.
\textsuperscript{311} See id. at 1009.
\textsuperscript{312} Id. at 1012.
\textsuperscript{313} See id.
\textsuperscript{314} Id. at 1012, 1015. The Court’s standing discussion is not entirely germane to this Comment so only the key points are highlighted.
\textsuperscript{315} See \textit{Steel Co.}, 118 S. Ct. at 1016–17.
\textsuperscript{316} Id. at 1017.
\textsuperscript{317} See id. at 1018.
assuming that the plaintiff could show injury, the Court held that the plaintiff had failed to satisfy the third requirement of standing, redressability. The Court listed each of the remedies sought in the complaint, and tested whether those remedies would redress the kind of injuries alleged by the plaintiff. The plaintiff requested the following remedies: (1) a declaratory judgment that the defendant violated EPCRA; (2) authorization to periodically inspect defendant's facility and records (with costs borne by the defendant); (3) an order requiring the defendant to provide the plaintiff with copies of all compliance reports submitted by the EPA; (4) an order requiring the defendant to pay civil penalties; (5) reasonable witness and attorney's fees; and (6) any other relief the court deemed appropriate.

The Court addressed the declaratory judgment remedy first. Considering that the defendant had admitted that it had failed to file the reports in a timely fashion and recognized this was a violation of EPCRA, the Court found this to be "not only worthless to the plaintiff, [but also] seemingly worthless to all the world." The Court also summarily dismissed the argument that the remedies allowing the plaintiff to inspect the defendant's records and to receive copies of reports filed with the EPA would remedy the plaintiff's injury. The Court categorized these remedies as injunctive (and therefore prospective) in nature, because they were aimed at preventing future wrongs, not remedying past violations.

The Court noted that civil penalties, on the other hand, were generally appropriate to remedy an injury to a plaintiff. However, while awarding monetary damages to the plaintiff would normally remedy a past wrong, EPCRA damages are payable to the Treasury Department, not to the individual plaintiff. In requesting monetary damages under EPCRA, the plaintiff is serving an "undifferentiated public interest," not attempting to receive compensation for the wrong committed against him. Further, any "psychic satisfaction" received

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318 See id.
319 See id.
320 See Steel Co., 118 S. Ct. at 1018.
321 See id.
322 Id.
323 See id. at 1019.
324 See id.
325 See Steel Co., 118 S. Ct. at 1018.
326 See id.; see also 42 U.S.C. § 11045(c).
327 Steel Co., 118 S. Ct. at 1018 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992)).
by the plaintiff in seeing the defendant punished did not rise to the level of satisfying the redressability prong.\footnote{328}

In addressing the attorney’s fees and costs remedy, the Court noted that a plaintiff may not “achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself.”\footnote{329} The plaintiff had also argued that it was entitled to an award for the costs associated with investigating the alleged violation.\footnote{330} The Seventh Circuit had held that permitting citizen suits for historical violations was necessary so that plaintiffs could recover their costs and be encouraged to sue.\footnote{331} In rejecting this argument, the Court noted that the statute itself only permitted monetary relief for “costs of litigation,” not investigatory costs.\footnote{332} The Court noted that “for the expenses to be reimbursable under the statute, they must be costs of litigation; but reimbursement of the costs of litigation alone cannot support standing.”\footnote{333}

Not finding that any of the plaintiff’s potential injuries could be redressed by the requested relief, the Court ordered the case dismissed.\footnote{334} While the judgment of the Court was unanimous, the part of the Court’s opinion addressing the plaintiff’s standing was joined by six justices.\footnote{335} The remaining three members of the Court, though concurring in the judgment that the case should be dismissed, did not join the Court’s opinion because they viewed passing on the undecided constitutional standing question as unnecessary to the resolution of the case.\footnote{336}

\footnote{328 See id.}
\footnote{329 Id. at 1019.}
\footnote{330 See id.}
\footnote{331 See Citizens for a Better Env’t v. Steel Co., 90 F.3d 1237, 1244 (7th Cir. 1996).}
\footnote{332 See Steel Co., 118 S. Ct. at 1019; Atlantic States Legal Found. v. Whiting, 1994 WL 236473 (W.D.N.Y. 1994) (holding that investigatory work conducted prior to the plaintiff’s “notice of intent to sue” being sent to the defendant is not compensable under EPCRA); see also 42 U.S.C. § 11046(f).}
\footnote{333 Steel Co., 118 S. Ct. at 1019; see also Citizens, 90 F.3d at 1244.}
\footnote{334 See Steel Co., 118 S. Ct. at 1020.}
\footnote{335 See generally id. Chief Justice Rehnquist and Justices O’Connor, Kennedy, Thomas, and Breyer joined Justice Scalia’s opinion.}
\footnote{336 See id. at 1021 (Stevens, J., concurring). The discussion regarding Justice Stevens’ views on why the standing question need not be addressed first are not germane to this Comment and therefore will not be recited here. See id. at 1021–27 (discussing justification for avoiding the constitutional issue and ruling on the statutory construction issue). His opinion was joined in part by Justices Souter and Ginsberg. See id. at 1021.}
According to Justice Stevens, the determination of whether EPCRA permitted citizen suits for purely historical violations was, like the standing issue, also a jurisdictional question. He evaluated whether the statute granted the federal courts jurisdiction to hear suits alleging only historical violations. While Justice Stevens expressed a preference for first determining this aspect of the jurisdictional question, he did address the standing issue before turning to what he saw as the other, nonconstitutional, jurisdictional question.

Justice Stevens began by citing the cases in which the Court denied standing for lack of redressability, noting they all shared a common feature: the plaintiff was challenging the government's action or inaction. In none of these cases had the Court denied standing to a private plaintiff suing a private defendant to impose a statutory sanction. Justice Stevens saw a danger in denying standing to a plaintiff who has alleged a legitimate injury on the basis of redressability alone. According to the majority opinion, if Congress had authorized a payment directly to the plaintiff, rather than to the Treasury Department, the plaintiff would have had standing. In Justice Stevens' view, allowing the standing question to turn on whether the plaintiff received compensation was an artificial distinction.

Justice Stevens, in evaluating the assertion that EPCRA itself did not permit suits for historical violations, relied on the Gwaltney case and the United Musical Instruments line of reasoning. Noting the ambiguity in the language of EPCRA's citizen suit provision, Justice Stevens found two justifications for refusing to allow citizen suits for purely historical violations. First, he determined that the notice provision of EPCRA should be construed as evidence of congressional intent to limit citizen suits to ongoing and future violations, as the Court had found in Gwaltney. Second, Justice Stevens viewed per-
mitting suits for historical violations as supplanting, rather than supple­
menting, the EPA’s role.348 Given Congress’ allocation of broader en­
forcement powers to the EPA, allowing citizen suits in this situation
would complicate and interfere with the statutory structure estab­
lished by Congress.349 Justice Stevens also cited a possible third justi­
fication for his conclusion: this interpretation avoided an unnecessary
adjudication of the constitutional standing issue.350 Thus, the concur­
rence also would recommend that the case be dismissed, for lack of
subject matter jurisdiction over suits alleging purely historical viola­
tions.351

V. Analysis

In the wake of Steel Co., several questions linger. The Steel Co.
majority left unanswered the question of whether EPCRA’s citizen
suit provision encompassed suits for purely historical violations.352
However, the Court’s ruling on the standing issue indicates that such
suits will not be constitutionally permitted absent some means of
redressing the historical injury.353

While criticizing the Court’s reasoning in Steel Co., this Section
argues that the result—permitting EPCRA citizen suits only for
current or ongoing violations—is correct.

A. Effect of Steel Co.

The Court in Steel Co. avoided the statutory question and deter­
mined that the plaintiff lacked standing to sue based on its failure to
demonstrate redressability.354 In reaching this conclusion, the Court
held that injunctive relief, an award of costs, and the payment of civil
penalties to the Treasury Department were insufficient to meet the
redressability test.355 As a result, Congress would need to provide
some other means of remedying the injury to EPCRA plaintiffs in
order to satisfy the Court’s stringent redressability standard. How­
ever, even this may not be sufficient to render a suit for historical

348 See id.
349 See Steel Co., 118 S. Ct. at 1031.
350 See id. at 1032.
351 See id.
352 See generally id. at 1003.
353 See id. at 1018.
354 See Steel Co., 118 S. Ct. at 1018.
355 See id. at 1018–19.
violations constitutional. The Court did not evaluate whether, in the words of one commentator, "the informational injury to the plaintiffs would satisfy the constitutional standing requirement for a particularized injury." The Court upon future review of EPCRA might deem the injury alleged as not sufficiently distinct and particularized to meet constitutional standing requirements.

Thus, one practical effect of the Steel Co. case is that Congress may be unable to constitutionally authorize citizen suits for purely historical violations (for any environmental statute) in light of the standing problem. Because of the potential for a broader application of the Steel Co. case in other environmental law contexts and due to the danger inherent in utilizing the standing doctrine to defeat disfavored legislation, the Steel Co. case seems to have arrived at the correct conclusion while pursuing a faulty line of reasoning. A better justification for the result was articulated in Justice Stevens’ concurrence, which stated that EPCRA itself does not permit citizen suits. To Justice Stevens, it seemed illogical to deny standing merely because the remedy authorized by Congress was payable to the Treasury and not to the plaintiff.

B. Statutory Analysis

Regardless of the practical effect of the Steel Co. case, the Court ostensibly refused to pass on the issue of whether EPCRA's plain language either directly or implicitly allows citizen suits for purely historical violations. For several reasons, this Comment maintains that the statute does not and should not permit such suits.

Numerous courts have attempted to divine clarity from an admittedly ambiguous statutory provision. The citizen suit provision of EPCRA empowers citizens with the ability to sue owners or opera-

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358 See Funk, supra note 356, at *5 (discussing the "unrelenting hostility of the Court to citizen suits as an adjunct or supplement to government enforcement, a hostility that was expressed in Justice Scalia's opinion for the Court in Lujan").
359 See id.
360 See infra notes 365–96 and accompanying text (justifying the prohibition on citizen suits alleging only historical violations).
361 See Steel Co., 118 S. Ct. at 1031–32.
362 See id. at 1028–29.
363 See id. at 1020.
364 See supra notes 190–226 and accompanying text (discussing the attempts by the federal courts to interpret the language of EPCRA's citizen suit).
tors of facilities covered by the statute who fail to complete and submit the required forms. The provision goes on to reference the sections which describe the forms required and establish deadlines for the submission of such forms. Courts such as the Seventh Circuit in Citizens have construed this latter language—requiring forms “under” other referenced sections of the Act—as incorporating the filing deadlines into the citizen suit provision.

A better reading of the provision would treat the referenced sections as merely identifying and clarifying which forms must be completed and filed to avoid a citizen suit. For example, section 11046(a)(1)(A)(iv) permits citizens to sue owners or operators of facilities who fail to complete and submit a chemical release form “under section 11023(a) of this title.” The “under” language merely amplifies and defines what is meant by a “chemical release form” and does not impose any additional elements. Further, the “failure to do” language implies a lack of completion and indicates that once the forms are in fact filed, the violator no longer can be said to have “failed” to do something. It should be noted, however, that the completion of the forms only insulates the violator from further citizen suit liability, not from investigation by the EPA. Moreover, this reading avoids placing additional potential liability with respect to citizen suits on owners and operators in the absence of a reasonably clear congressional mandate.

Second, the Supreme Court’s decisions in Gwaltney and Hallstrom construing the function of the notice provision remain good law. In Hallstrom, the Court held that the purpose behind requiring notice to alleged violators was to give them the opportunity to cure the violation prior to suit, thereby rendering the citizen suit unnecessary. Subsequent decisions, including Citizens, have argued that Congress’ post-Gwaltney amendment to the Clean Air Act permitting citizen suits for purely historical violations while leaving the notice provision intact fatally undermines the analysis of those cases.


See id.

See, e.g., Citizens for a Better Env’t v. Steel Co., 90 F.3d 1237, 1243 (7th Cir. 1997).


See id. § 11046(a)(1).

See id. § 11045.

See supra notes 168–89 and accompanying text (discussing Gwaltney and Hallstrom).

See supra notes 179–86 and accompanying text (discussing Hallstrom).

See, e.g., Citizens for a Better Env’t v. Steel Co., 90 F.3d 1237, 1244 (7th Cir. 1996).
Two arguments caution against this conclusion. First, Congress cannot overrule the Supreme Court's decision regarding one environmental statute, the Clean Water Act, by amending another, the Clean Air Act. Second, a subsequent act of Congress (whether or not motivated by the Gwaltney decision) can be construed in different ways, not necessarily in favor of the conclusion that the Supreme Court's reasoning regarding the notice provision was wrong. The result in Gwaltney may have led Congress to clarify what it originally intended in framing the suit provision, i.e., to permit suits for purely historical violations.\textsuperscript{374} However, an equally plausible reason for the change is that the Supreme Court was correct in its analysis but that Congress in fact changed its collective mind. Also, the failure to amend EPCRA (or the CWA) at the same time as it amended the CAA could mean that the Court's interpretation was correct with respect to EPCRA and the CWA but wrong with respect to the CAA. Attempting to disregard binding Supreme Court precedent on the basis of an amendment to one law and the failure to change another does not represent sound statutory analysis. The Court's reading of the notice provision as affording the opportunity for the violator to cure remains a reasonable interpretation of the function of the provision, whatever other functions the courts may hypothesize the provision serves.\textsuperscript{375}

Apart from the statutory language and the notice provision, a third structural argument militates against allowing citizen suits for historical violations. The courts in United Musical Instruments and Gwaltney both emphasized the supplementary role of citizen enforcement, with primary enforcement authority vested in the EPA.\textsuperscript{376} Both Gwaltney and United Musical Instruments were concerned about the possibility of the EPA's dealmaking powers being compromised by a citizen suit.\textsuperscript{377} The court in McLean Foods did not appear concerned about the possible dilution of EPA authority, believing that the ban on citizen suits once the EPA pursues an investigation eliminates the possibility of duplicative enforcement.\textsuperscript{378}

Nonetheless, the fears of the Supreme Court and the Sixth Circuit, regarding the threat to EPA power by citizen suits alleging only historical violations, materialized in Neighbors for a Toxic Free Com-

\textsuperscript{374} See id.


\textsuperscript{376} See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987); Atlantic States Legal Found. v. United Musical Instruments, 61 F.3d 473, 476 (6th Cir. 1995).

\textsuperscript{377} See Gwaltney, 484 U.S. at 60; United Musical Instruments, 61 F.3d at 476.

In that case, a quantity of toxic chemicals, including hydrochloric acid, was released from a tank car leased by the defendant, Vulcan, and the spill required the evacuation of some 200 residents from the surrounding area. The EPA later served an administrative complaint alleging violations of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) stemming from Vulcan's failure to report the spill for over four hours after it was discovered. The EPA later entered into a consent agreement with Vulcan, which "serve[d] as a full and fair settlement of all issues, claims and allegations relating to [Vulcan's] reporting requirements in connection with the release of hydrochloric acid raised in the complaint." Notwithstanding the consent agreement, the plaintiff organization filed suit against Vulcan, alleging a violation of EPCRA for the failure to submit a follow-up emergency notice as required by the statute. When Vulcan moved to dismiss the action because of the preclusive effect of the consent agreement, the court ruled that the EPA had acted under the auspices of CERCLA, not EPCRA, and thus the allegation regarding the EPCRA violation was not precluded.

The danger inherent in this decision stems from the fact that the plaintiff was permitted to continue in a suit for a purely historical violation, after the EPA sought to resolve the entire incident giving rise to the suit through a consent agreement. The EPA could have avoided this result by including the EPCRA violation in the consent agreement. However, environmental legislation is characterized by overlapping provisions in many cases (such as the situation occurring in the Vulcan case with respect to separate EPCRA and CERCLA violations), making it difficult for the EPA to mention every conceivable violation under every statute in a consent agreement. Further, it was apparent in the Vulcan case that the EPA attempted to settle all claims relating to the underlying incident. In the future, violators may be unwilling to settle with the EPA because they cannot be guaranteed that the consent agreement will bar future citizen suits.

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380 See id. at 1449.
381 See 42 U.S.C. §§ 9603, 9609.
382 See Vulcan, 964 F. Supp. at 1449.
383 Id.
384 See id.
385 See id. at 1450.
386 See id. (discussing the language of the settlement agreement).
This result easily can be avoided by refusing to allow citizen suits for purely historical violations.

C. Policy Arguments

The Sixth Circuit determined that public policy considerations favored a supplementary role for citizen suits and the preservation of the EPA's broad authority. The Seventh Circuit, on the other hand, determined that the relatively light burden of EPCRA reporting requirements weighed in favor of allowing suits for purely historical violations. Also, the Seventh Circuit was worried that disallowing such suits would cripple the citizen suit provision because citizens would be discouraged from investing time, money, and effort if there was the potential for the case to be dismissed as soon as the violator came into compliance with the statute.

The Steel Co. case, however, does not preclude citizen suits for ongoing or current violations. Nonetheless, Professor William Funk of Lewis and Clark Law School has argued: "[A]ny [EPCRA] defendant receiving a 60-day notice letter could file the necessary reports before the complaint was filed and avoid suit on the strength of this case. This would effectively eviscerate the EPCRA citizen suit provision." This view seems to coincide with the predictions of some commentators prior to the Steel Co. case. Despite the continued viability of the citizen suit provision for present violations, these commentators anticipate the speedy demise of EPCRA.

This forecasting completely ignores the function of EPCRA. The entire purpose of the statute is to provide citizens with information concerning the chemicals being used or stored in their neighborhoods and communities. The fact that a facility can avoid a suit entirely by merely filing the requisite forms spares the citizen the cost of litigating, prompts early compliance by the facility, and achieves the precise result EPCRA intended. The facility does not “escape” the mandates

387 See Atlantic States Legal Found. v. United Musical Instruments, 61 F.3d 473, 476 (6th Cir. 1995).
388 See Citizens for a Better Env't v. Steel Co., 90 F.3d 1237, 1239 (7th Cir. 1996).
389 See id. at 1244.
390 See Funk, supra note 356, at *5.
391 See Lohmann, supra note 205, at 1748 (stating that permitting suits for historical violations is necessary to “teach the [corporate and industrial] Goliaths that they cannot escape [EPCRA]”); see also Vahey, supra note 205, at 270–71 (arguing that citizens must be allowed to pursue suits alleging only historical violations to safeguard the public’s right of “supplemental enforcement” of EPCRA).
of the statute by filing the forms prior to the commencement of the suit. While it can be argued that the prohibition on suits for historical violations encourages companies to avoid the law until a citizen files suit, this ignores the role of the EPA. The EPA can always punish such an intentional violator (by fines and criminal penalties), even if the violator cannot be sued by citizens. Moreover, a citizen or environmental group denied the opportunity to pursue a suit because the violation has been cured can always notify the EPA and request that it proceed against the violator.

Thus, the structure and function of EPCRA justify the prohibition of citizen suits for wholly historical violations. First, it bears repeating that a violator who files the necessary reports prior to the commencement of a suit is not completely insulated from liability. The EPA can always choose to pursue violators for past and present violations, and can act to deter future violations. Second, prohibiting citizen suits for historical violations does not preclude suits alleging a high likelihood of the offense recurring from proceeding, even if the owner or operator has since complied with the statute. Third, EPCRA is by nature a statute which requires cooperation from industry to function properly. None of the reporting requirements mandate a particular methodology for collecting the necessary information. Consequently, the threat of citizen suits for past violations, instead of encouraging industry compliance, may provoke industry to release inaccurate or incomplete information merely to comply with the deadlines. Finally, EPCRA is unlike other environmental statutes because its purpose consists of promoting the public's right to know. It is informational in nature, not truly regulatory. It does not penalize facilities for the levels of toxic chemicals stored or disposed of on the premises. It merely requires the disclosure of such information to the public for planning purposes. This function is inconsistent with exposing facilities to the threat of citizen suits once the public interest is satisfied by the violator filing the required forms.

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392 See generally notes 17–22 supra and accompanying text (discussing informational and planning functions of EPCRA).
393 See id.
394 See id.
396 See id.
CONCLUSION

While the practical effect of the Steel Co. case remains to be seen, the case does indicate that constitutional standing requirements would not permit citizen suits for purely historical violations, due to an inability to demonstrate redressability. Congress could alleviate the redressability problem by providing for monetary damages to plaintiffs; the statutory interpretation problem could be remedied by an amendment specifically authorizing suits for historical violations. However, the structure and function of EPCRA, with its reliance on voluntary compliance and its uniquely informational nature, militates against such a change by Congress.