The Public Right-to-Know on a Need-to-Know Basis: Striking the Balance Between National Security and Environmental Protection

Brian Reilly
Boston College Law School, brian.reilly.2@bc.edu

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THE PUBLIC RIGHT-TO-KNOW ON A NEED-TO-KNOW BASIS:
STRIKING THE BALANCE BETWEEN NATIONAL SECURITY AND ENVIRONMENTAL PROTECTION

BRIAN REILLY*

Abstract: Enforcing environmental laws does not immediately appear to be fundamentally inconsistent with maintaining national security. Many people have criticized the Emergency Planning and Community Right to Know Act, however, as potentially placing American citizens at risk of a terrorist attack. This Note discusses the difficulties associated with striking the balance between giving citizens access to important environmental information while limiting terrorists’ ability to misuse that same information. Although this issue is a difficult one on its own, it is compounded by recent developments affecting standing in environmental citizen suits. This Note argues that even if the proper balance is struck with regard to releasing environmental information to the public, it is still unlikely that an average citizen would be able to pass the high standing barrier and successfully bring a citizen suit. The Note then proposes two alternative solutions, each of which could potentially strike a better balance between promoting environmental protection and preventing terrorist attacks.

INTRODUCTION

Do you know what kinds of dangerous chemicals are being used by businesses in your town, and do you have a plan to respond if those chemicals are ever leaked accidentally? Although people rely on the services provided by factories, water treatment plants, power plants, and other large scale polluters on a daily basis, they might not understand the kinds of environmental risks that hazardous chemical leaks pose to citizens, loved ones, and homes.1 To combat the dearth of publicly available information about the kinds, quantities, and dangerousness of chemicals used by polluters, Congress has passed a number of “right-

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to-know” statutes.2 In theory, at least, these statutes allow citizens to discover important information about the chemicals being used in their communities.3

Unfortunately, the current state of environmental law makes it incredibly difficult for citizens to gain access to this important environmental information.4 Moreover, even if citizens manage to acquire the information, recent jurisprudence has made it almost impossible for citizens to act on the information by bringing citizen suits against polluters.5 This Note explains the background and history of right-to-know laws and the citizen suit provisions included in those laws.6 It then explains the current state of the law, focusing on the way the current framework negatively affects citizens and the environment.7 Finally, this Note provides two solutions that would allow citizens to regain control of their neighborhoods and hold polluters accountable.8

I. RIGHT-TO-KNOW LAWS

A. The Freedom of Information Act

President Lyndon B. Johnson first signed the Freedom of Information Act (FOIA) in 1966.9 The Act exists because Congress recognized that public disclosure of information is vital to citizens’ participation in government.10 FOIA requires all federal agencies to make specific pieces of information—such as final opinions, policy statements, administrative manuals and instructions to staff that affect the public, copies of all records, and a general index of records—available to all citizens for inspection and copying.11 Once an agency has made a decision to comply with or deny a request, it must notify the requesting person of its decision and the reasons for the decision.12 Although some agencies might not comply immediately in some instances, FOIA’s aim is to give citizens access to information in an easy and efficient

3 42 U.S.C. § 11044.
4 See infra notes 102–189 and accompanying text.
6 See infra notes 9–101 and accompanying text.
7 See infra notes 102–189 and accompanying text.
8 See infra notes 190–239 and accompanying text.
12 Id. § 552(a)(6)(A)(i).
manner.\textsuperscript{13} Despite this clear goal, there are various exceptions within FOIA and explicit exemptions promulgated by Congress.\textsuperscript{14}

Exemption 1 of FOIA states that FOIA requirements do not apply to matters that are “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy.”\textsuperscript{15} As per Exemption 1, the federal government has promulgated an Executive Order describing the kinds of national security information exempted from public disclosure under FOIA.\textsuperscript{16} There have been amendments altering the scope of Exemption 1 over the past thirty-five years.\textsuperscript{17} President Barack Obama signed the most current Executive Order concerning Exemption 1 in 2009.\textsuperscript{18} The Order sets standards for classifying and declassifying sensitive national security information.\textsuperscript{19} The Order shows that the government recognizes both the rights of the public to be informed about the activities of its government and the need to protect national security information from untimely disclosure.\textsuperscript{20}

After acknowledging the need for a balance between public disclosure and national security, the Order goes on to list eight categories of information that may be subject to classification for national security reasons.\textsuperscript{21} These categories are: foreign government information; vulnerabilities of systems and projects; intelligence activities, sources and methods; cryptology; foreign relations activities; military plans; scientific, technological, and economic matters relating to national security; and government programs dealing with nuclear material.\textsuperscript{22}

B. The Emergency Planning and Community Right-to-Know Act

1. EPCRA’s Origin, Purpose, and Specific Provisions

In 1986, Congress enacted the Emergency Planning and Community Right-to-Know Act (EPCRA).\textsuperscript{23} Congress began writing EPCRA in response

\textsuperscript{13} See id. § 552(a)(4)(A); see, e.g., Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 157 (2004) (exploring the need for a balancing of public and private interests before granting a FOIA request).

\textsuperscript{14} 5 U.S.C. § 552(b).

\textsuperscript{15} Id. § 552(b)(1).

\textsuperscript{16} Id. § 552(b); Exec. Order No. 13,526, 75 Fed. Reg 707 (Jan. 5, 2010).


\textsuperscript{19} Id.

\textsuperscript{20} Id.

\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} 42 U.S.C. § 11001 (2006); Durham-Hammer, supra note 1, at 324.
to several large-scale toxic chemical leaks that occurred around 1984.24 In the most notorious incident, a Union Carbide plant in Bhopal, India accidentally released a large quantity of hazardous chemicals.25 The release caused thousands of deaths and numerous injuries.26 Because lawmakers feared that many American towns would have inadequate response plans for accidental releases like the one in Bhopal, they created EPCRA as a means of forcing towns to create such plans.27

EPCRA utilizes three key strategies for decreasing the dangers of chemical releases in American towns.28 First, EPCRA mandates that all states must have State Emergency Response Commissions (SERCs) and that all Emergency Planning Districts (EPDs) must have Local Emergency Planning Committees (LEPCs) that will be responsible for creating and implementing response plans.29 Second, the Act requires parties using or storing more than a threshold amount of specific chemicals to provide the public with information about the chemicals and give notice of any accidental releases.30 Third, EPCRA has a citizen suit provision, and any party that fails to comply with EPCRA can be subject to heavy fines and other penalties.31

a. State Emergency Response Commissions and Local Emergency Planning Committees

Understanding the complexity of the EPCRA framework is essential to understanding why cutbacks in right-to-know laws have made it incredibly difficult for citizens to gain access to vital environmental information.32 Under EPCRA, the governor of each state appoints a SERC.33 The SERCs must designate EPDs within their respective states.34 The SERC must also appoint an LEPC for each EPD.35 The LEPC is the group tasked with creating and implementing an emergency response plan for the EPD.36

24 Steel Company I, 90 F.3d at 1238–39.
25 Id.
26 Id.
27 See id.
29 Id. §§ 11001, 11003.
30 Id. §§ 11002, 11004, 11022, 11023, 11044.
31 Id. §§ 11044–11046.
34 Id.
35 Id.
36 Id. § 11003.
The emergency response plan must include a wide variety of information about local facilities, including a list of facilities within the EPD that are subject to EPCRA, likely transportation routes for extremely hazardous substances, and a list of facilities that are at increased risk due to their proximity to EPCRA facilities.\textsuperscript{37} The plan must also lay out the emergency procedures to be followed by facility owners and emergency personnel in response to an accidental release.\textsuperscript{38} In addition to this bureaucratic work, the LEPC is responsible for creating methods to determine when a leak has occurred and developing appropriate response, training, and evacuation plans in the event of a release.\textsuperscript{39} Despite the numerous responsibilities, LEPCs have been largely successful in creating and implementing emergency response plans.\textsuperscript{40}

b. Public Disclosure and the Notice Requirement

Congress passed EPCRA to require facilities possessing, storing, or using chemicals in excess of established thresholds to report their chemical use and give notice of accidental releases in a timely manner.\textsuperscript{41} When a release occurs, the facility owner must give notice of the chemical released, whether it is listed as an extremely hazardous chemical, the quantity released, the duration of the release, the medium into which the release occurred, potential health risks associated with the released chemical, and proper precautions to take.\textsuperscript{42}

In addition to giving timely notice of accidental releases, facilities subject to EPCRA must also complete three different forms for each listed chemical possessed, used, or stored by the facility.\textsuperscript{43} The facility must give a copy of each of these forms to the SERC, LEPC, and local fire department.\textsuperscript{44} If a citizen requests copies, the facility must also make the forms available.\textsuperscript{45}

Of these three forms, the inventory form contains information most relevant to the public.\textsuperscript{46} The inventory form can contain two different kinds of information, labeled Tier I information and Tier II information.\textsuperscript{47} Tier I information includes estimates of the maximum amounts of hazardous chemicals present at the facility, estimates of daily amounts present, and the general loca-

\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} See Steel Company I, 90 F.3d at 1239.
\textsuperscript{41} 42 U.S.C. § 11004.
\textsuperscript{42} Id.
\textsuperscript{43} Id. §§ 11021, 11023, 11044.
\textsuperscript{44} Id. § 11022.
\textsuperscript{45} Id.
\textsuperscript{46} See id.
\textsuperscript{47} Id. § 11022.
tion of the hazardous material within the facility. Tier II information must only be given on request from a member of the public and is more specific than Tier I information. Tier II information includes all Tier I information as well as specific chemical names, a description of the manner in which the chemicals are stored, and the exact location of the chemicals in the facility. Both Tier I and Tier II information are available to the public, though some Tier II information will only be released if the request is accompanied by an explanation regarding why the information is needed. Widespread publication of Tier II information has raised the most concerns regarding national security, and therefore such publication has been curtailed.

2. The Rollbacks

After the September 11th terrorist attacks, it has become more difficult for citizens to obtain sensitive environmental information under right-to-know statutes such as EPCRA. Facility owners may refuse to publicly disclose the exact location of chemicals, even after receiving a Tier II information request. Moreover, due to the national security exemption in FOIA, the federal government can choose to classify any information that it believes will create a national security risk. It is within the purview of the federal government (under Exemption 1 of FOIA) to prevent disclosure of the type and nature of chemicals being used, possessed, and stored at facilities around America. Although the intention is to protect national security, limiting access to EPCRA information might have the effect of worsening any accidental releases that take place.

48 Id. § 11022(d)(1).
49 Id. § 11022.
50 Id. § 11022(d)(2).
51 Id. § 11022(e)(3). Although theoretically available to the public, these documents can be difficult to obtain for various reasons. See infra notes 53–57 and accompanying text.
57 Babcock, supra note 53, at 146; see infra notes 190–239 and accompanying text.
C. The Clean Air Act

1. Information Requirements

The Clean Air Act (CAA) was enacted in 1963 in response to a growing awareness of air pollution and its attendant health affects throughout the country. Specifically, Congress recognized that the United States was becoming increasingly urban, that this increase in urbanization and industrialization was leading to “mounting dangers to the public health and welfare,” and that controlling air pollution is primarily the responsibility of state and local government.

In an effort to accomplish the goals of reducing air pollution, enhancing air quality, and thereby improving public health, Congress, through the CAA, implemented a complex permitting and reporting process. The statute works by implementing various standards for quantities and kinds of pollutants that may be emitted by stationary sources (factories and power plants) into an area. The CAA labels geographic areas with pollutant levels below the given standards as attainment areas for a given pollutant, while it labels those above the standards as non-attainment. The ultimate goal of the CAA is to keep attainment areas at attainment levels while simultaneously bringing non-attainment areas into attainment.

2. Off-Site Consequence Assessments

To ensure the highest possible degree of public safety, the CAA requires that “the owner or operator of stationary sources at which a regulated substance is present in more than a threshold quantity . . . prepare and implement a risk management plan to detect and prevent or minimize accidental releases of such substances.” These risk management plans (RMP) must be filed with a local administrator and are designed to allow for a quick and efficient emergency response to protect the health of surrounding citizens.

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59 Id.
60 See id. § 7412.
61 Id.
62 Id. § 7407.
63 See id. Any given area can simultaneously be classified as an attainment area in regard to some pollutants and a non-attainment area in regard to others. See id. Therefore, the designation “attainment area” is granted only as it pertains to specific individual pollutants. See id.
64 Id. § 7412(q)(7)(B)(ii).
65 Id. § 7412(q)(7)(B)(iii).
The RMPs must include a hazard assessment that explores the potential release amounts of hazardous air pollutants, the potential harmful health effects for humans, and the potential for exposure to nearby people.66 After the RMP has been created, specific portions of the plan, labeled “off-site consequences analysis information” (OCA) become available to the public.67 OCA information is made up of “those portions of a risk management plan, excluding the executive summary of the plan, consisting of an evaluation of 1 or more worst-case release scenarios or alternative release scenarios.”68 Although OCA information must be released to all members of the public, there has been much debate over how exactly the government should go about releasing the information.69 This debate stems from the fact that the CAA requires the President to analyze both the risk of terrorist activity associated with posting the OCA information on the Internet, and the benefit of having such information readily, publicly available in the event of an accidental release.70 The President must then create regulations that minimize these risks while also allowing “access by any member of the public to paper copies of off-site consequences analysis information for a limited number of stationary sources located anywhere in the United States.”71 Initially the OCA information was publicly available through the Internet, but it has been removed due to heightened concerns regarding terrorism.72

3. New Procedures

Although OCA information is no longer publicly available through the Internet, it is still possible for individual citizens to access the data under fairly rigorous conditions.73 The CAA includes a provision explicitly giving the President the authority to “exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than 2 years

66 Id. § 7412(q) (7)(B)(ii)(I).
67 Id. § 7412(q)(7)(H)(i).
68 Id. § 7412(q)(7)(H)(i)(III) (emphasis added).
69 See Chekouras, supra note 32, at 124; Babcock, supra note 53, at 145–47; Beierle, supra note 52, at 3–5; Durham-Hammer, supra note 1, at 349–50.
71 Id. § 7412(7)(H)(ii)(II)(aa).
... [the exemption] may be extended for 1 or more additional periods.”74 At least in theory, the President could indefinitely exempt RMPs from being filed.75

Under the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act, enacted in 1990, the federal government analyzed the risks associated with publicly releasing OCA information in paper form and through the Internet.76 From the analysis, the government determined that although Internet access to OCA data would help to prevent accidental releases of hazardous air pollutants, it would also increase the likelihood of a deliberate release of such pollutants.77 As a result, the government decided to eliminate Internet access to OCA data altogether and place specific requirements on accessing paper copies.78

To access paper copies of OCA information, the government requires citizens to visit one of approximately fifty reading rooms located throughout the country.79 Some reading rooms are operated by federal EPA offices located in each state, while others are run by the Department of Justice.80 Once citizens arrive at a reading room, they must show a form of federal or state identification and sign a certification sheet.81 After they receive access to documents, citizens may not make any photocopies and may only look at ten OCAs outside their geographic area per month; they may look at an unlimited number of OCAs that affect their local communities.82 Although it is fairly clear that these regulations limit the dissemination of sensitive national security information, there is a debate on whether the limitations restrict disclosure in a way that causes more harm than good.83

75 See id.
76 ENVTL. PROT. AGENCY, supra note 72, at 1–3.
77 Id.
78 Id.
79 Federal Reading Rooms, supra note 73.
80 Id.
81 Id.
82 Id.; ENVTL. PROT. AGENCY, supra note 72, at 1–3.
D. Critical Response to the Cutbacks

After September 11th, there have been numerous scholarly articles written on the topic of right-to-know laws.\(^{84}\) The vast majority, if not all, of these articles agree that such laws have been rolled back due to national security fears.\(^{85}\) Many of these articles focus specifically on the cutbacks in information publicly released under EPCRA and the CAA.\(^{86}\)

Some authors argue that fears about national security have led to a decrease in publicly available information and support such reductions.\(^{87}\) The standard argument follows the reasoning that when people release information publicly, especially on the Internet, they lose control of that information.\(^{88}\) As a result, there is a higher likelihood that those looking to misuse the information (typically for terrorism) will be able to obtain it easily.\(^{89}\) If people can obtain environmental information released through right-to-know laws in support of their malicious purposes, then they are more likely to carry out those purposes.\(^{90}\) Therefore, releasing environmental information through right-to-know laws places America in greater danger of being a target of a terrorist attack than if such information were not released.\(^{91}\) These authors generally contend that rollbacks in access to information are beneficial to society overall and should be implemented broadly.\(^{92}\)

Numerous authors disagree with this position.\(^{93}\) These authors contend that limiting the public release of environmental information might actually create a greater potential for harm.\(^{94}\) They generally recognize the fact that releasing environmental information publicly will make it more likely that the information will be used by people seeking to use it for nefarious purposes.\(^{95}\) These authors, however, argue that limiting the dissemination of this information prevents citizens from becoming involved in protecting their communi-

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\(^{84}\) Chekouras, supra note 32; Babcock, supra note 53, at 106–07; Durham-Hammer, supra note 1, at 343–47; Tran, supra note 83, at 387–88.

\(^{85}\) Chekouras, supra note 32, at 107; Babcock, supra note 53, at 106–07; Durham-Hammer, supra note 1, at 326; Tran, supra note 83, at 370.

\(^{86}\) Chekouras, supra note 32, at 108; Durham-Hammer, supra note 1, at 335; see Babcock, supra note 53, at 106–07.

\(^{87}\) Tran, supra note 83, at 387.

\(^{88}\) Id. at 380.

\(^{89}\) Id. at 382.

\(^{90}\) Id.

\(^{91}\) Id. at 387–88.

\(^{92}\) Id.

\(^{93}\) Babcock, supra note 53, at 153; Durham-Hammer, supra note 1, at 352.

\(^{94}\) Chekouras, supra note 32, at 125; Durham-Hammer, supra note 1, at 356–57.

\(^{95}\) Chekouras, supra note 32, at 124; see Babcock, supra note 53, at 106, 110.
ties from pollution hazards.\textsuperscript{96} These authors point to evidence that when citizens are informed about the environmental risks posed to their communities by local polluters, total levels of pollution in their neighborhoods tend to decrease.\textsuperscript{97} Moreover, these arguments frequently follow the line of reasoning that an informed community might serve a watchdog function and thereby force companies to protect their hazardous chemicals more thoroughly.\textsuperscript{98} In turn, these authors argue that there would likely be fewer releases and that it would be more difficult for people seeking to do something harmful to succeed.\textsuperscript{99} Almost all of these authors argue for some kind of increase in publicly available information.\textsuperscript{100}

Despite the large number of articles discussing the issues related to cutting back the information available through EPCRA for national security reasons, none of these articles give serious consideration to the windfall that these cutbacks create for polluters and how the windfall effect is precipitated by the death of the environmental citizen suit.\textsuperscript{101}

\section*{II. The Death of Environmental Citizen Suits}

Although rollbacks in right-to-know laws prompted by national security concerns are problematic on their own, the issue is compounded by a diminished ability of citizens to sue polluters.\textsuperscript{102} While Congress has curtailed access to environmental information, the courts have made it more difficult for citizens to bring environmental suits.\textsuperscript{103}

\begin{thebibliography}{99}
\bibitem{96} Chekouras, \textit{supra} note 32, at 125; Durham-Hammer, \textit{supra} note 1, at 352–53.
\bibitem{97} Chekouras, \textit{supra} note 32, at 125–26; Beierle, \textit{supra} note 52, at 3–5.
\bibitem{98} Chekouras, \textit{supra} note 32, at 125; Beierle, \textit{supra} note 52, at 3–5; Babcock, \textit{supra} note 53, at 149; Durham-Hammer, \textit{supra} note 1, at 353.
\bibitem{100} Babcock, \textit{supra} note 53, at 110; Durham-Hammer, \textit{supra} note 1, at 355.
\bibitem{102} See infra notes 190–239 and accompanying text.
\end{thebibliography}
A. Citizen Suits in Environmental Law

1. History

A citizen suit provision is a statutory provision that creates a cause of action under which a citizen can sue the government or another entity. These provisions place specific requirements on the circumstances under which a citizen can sue as well as the remedies that a citizen may seek. For instance, many citizen suit provisions have a sixty-day notice requirement whereby citizens must notify both the potential defendant and the EPA of their intent to sue sixty days prior to bringing suit. Citizen suit provisions may allow for remedies including declaratory relief, temporary and permanent injunctions, monetary damages (to be paid either to the citizen bringing suit or to the treasury), and attorney’s fees and costs.

The first environmental citizen suit provision appeared in the Clean Air Act (CAA). Congress subsequently included similar provisions in many other environmental statutes. The first statute under which a large number of people successfully brought citizen suits was the Clean Water Act (CWA), as the self-reporting requirement of the Act made it easy for citizens to spot and litigate violations. These suits gradually gained traction in the courts. These gains were later undermined by a series of appellate and Supreme Court decisions throughout the late 1980s and 1990s.

2. The Bell Begins to Toll for Environmental Citizen Suits: Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.

When the Supreme Court decided Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation in 1987, it created a precedent that precipitated the ultimate erosion of environmental citizen suits. In Gwaltney, two environmen-

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107 42 U.S.C. § 7604(a); 33 U.S.C. § 1365(d); 42 U.S.C. § 11046(c), (f).
109 Id.
110 Id. at 81.
111 Id. at 78. Courts initially took an expansive view of standing in environmental cases, which allowed plaintiffs to bring citizen suits successfully. Id. Courts eventually became resistant to this broad grant of standing. Id.
112 Steel Company II, 523 U.S. at 109–10; Gwaltney, 484 U.S. at 67; Steel Company I, 90 F.3d at 1245; United Musical Instruments, 61 F.3d at 478.
113 See Steel Company II, 523 U.S. at 109–10; Gwaltney, 484 U.S. at 67.
tual groups sued a meatpacking company based on allegations that it had violated the CWA.\(^\text{114}\) Like the CAA, the CWA requires citizens to give sixty days notice to the potential defendant and the EPA before bringing suit.\(^\text{115}\) The group sought declaratory relief, injunctive relief, monetary penalties, and attorney’s fees.\(^\text{116}\)

The case presented a unique question for the courts because the plaintiffs were suing for violations that were wholly past.\(^\text{117}\) Gwaltney had brought its factory into compliance during the notice period and was no longer in violation at the time of the lawsuit.\(^\text{118}\) Therefore, the Supreme Court had to decide whether the language of the CWA conferred jurisdiction over suits for wholly past violations of the statute.\(^\text{119}\) The Court decided that the best reading of the phrase “to be in violation” in the Act required “that citizen-plaintiffs allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future.”\(^\text{120}\) The Court then went on to explain that the purpose of the notice requirement was to allow violators to come into compliance with the statute and thereby avoid a lawsuit.\(^\text{121}\) In the Court’s view, to allow citizen suits for wholly past violations would undermine the purpose of the notice requirement.\(^\text{122}\)

Based on this interpretation of the CWA, the Court vacated the lower court’s ruling and remanded.\(^\text{123}\) Because citizens would not be allowed to sue for wholly past violations, the only question on remand was whether the complaint contained a good-faith allegation of ongoing violations by Gwaltney.\(^\text{124}\)

B. Post-Gwaltney Environmental Citizen Suits: EPCRA Refuses to Go Down Without a Fight

1. The 1990 Amendments to the CAA

In 1990, Congress amended the CAA’s citizen suit provision.\(^\text{125}\) Prior to the 1990 amendments, the citizen suit provision read: “[A]ny person may com-

\(^{114}\) Gwaltney, 484 U.S. at 54.


\(^{116}\) Gwaltney, 484 U.S. at 54.

\(^{117}\) Id. at 56–57.

\(^{118}\) Id. at 53–54.

\(^{119}\) Id. at 52.

\(^{120}\) 42 U.S.C. § 7604; Gwaltney, 484 U.S. at 57.

\(^{121}\) Gwaltney, 484 U.S. at 60.

\(^{122}\) Id.

\(^{123}\) Id. at 67.

\(^{124}\) Id.

\(^{125}\) Stubbs, supra note 108, at 86.
mence a civil action on his own behalf . . . against any person . . . who is al-
leged to be in violation of” an emissions standard or limit, or an order pertaining
to a standard or limit. The section was amended to include the phrase 
alleged to have violated (if there is evidence that the alleged violation has
been repeated).” In signing the amendments into law, President George
H.W. Bush declared that this change was meant to codify the Gwaltney deci-
sion. Contrary to this declaration, some courts have relied on the plain lan-
guage of the amendments to hold that the reference to past violations was in-
tended to overturn the Gwaltney decision, rather than codify it. Under this
interpretation, citizens have been able to bring citizen suits for wholly past acts
(assuming there was more than one violation) under the CAA. Not all courts
agree with this interpretation, and as a result some jurisdictions have barred
lawsuits for wholly past violations under the CAA.

2. The EPCRA Cases

Under the Emergency Planning and Community Right-to-Know Act
(EPCRA), individual citizens, as well as local, state, and federal government,
have a right to sue facilities and administrators. Generally speaking, citizens
may sue when a facility owner fails to submit any of its required forms. Likewise, if the facility owner submits the forms but the Administrator fails to
make them public, a citizen may sue.

After Gwaltney, there was ambiguity as to whether citizen suits for whol-
ly past violations could be brought under environmental statutes other than the
CWA. The EPCRA citizen suit provision was the subject of multiple law-
suits aimed at deciding whether its language, like the language of the CWA,
barred citizen suits for wholly past violations. This lack of clarity is particu-
larly problematic in a situation such as this one, where the penalties for failing

128 Remarks on Signing the Bill Amending the Clean Air Act, 1990, 26 WEEKLY COMP. PRES.
DOC. 46 (Nov. 15, 1990).
129 Stubbs, supra note 108, at 86–87; see, e.g., New York v. Niagara Mohawk Power Corp., 263 F.
130 Id.; see, e.g., Steel Company I, 90 F.3d at 1242; United Musical Instruments, 61 F.3d at 476.
131 Steel Company I, 90 F.3d at 1242; United Musical Instruments, 61 F.3d at 476.
133 Id.
134 Id.
135 See Steel Company I, 90 F.3d at 1242; United Musical Instruments, 61 F.3d at 476.
136 Id.; see, e.g., Families for Asbestos Compliance Testing & Safety v. City of St. Louis, Mo.,
638 F. Supp. 2d 1117, 1117 (E.D. Mo. 2009) (barring a citizen suit where the plaintiff failed to show
that violations were imminent or continuing).
to comply with the statute are extremely high.137 Under EPCRA, a facility owner who fails to submit the required forms can be fined up to $25,000 per violation.138 Each day that passes is considered a new violation.139 Therefore, it is possible for a facility to commit numerous violations in only a few days, thus subjecting the facility to large fines.140

Whereas the citizen suit provision of the CWA uses the present tense (“who is alleged to be in violation”), EPCRA states that a citizen may sue an owner, operator, or Administrator for a list of specific violations.141 The grounds for a citizen suit include failure to submit a follow-up emergency notice, submit a material safety data sheet, complete and submit an inventory form, or complete and submit a toxic chemical release form.142 Differing interpretations of EPCRA’s language resulted in a circuit split in which the U.S. Court of Appeals for the Seventh Circuit held that citizens could sue for wholly past violations while the U.S. Court of Appeals for the Sixth Circuit held that the Gwaltney analysis applied to EPCRA’s citizen suit provision.143 Eventually this split made its way to the Supreme Court.144

a. Atlantic States Legal Foundation v. United Musical Instruments: The Sixth Circuit Strikes the First Blow Against EPCRA Citizen Suits

In the 1995 case Atlantic States Legal Foundation v. United Musical Instruments, an environmental group, the Atlantic Legal States Foundation (ASLF), sued an instrument manufacturer called United Musical Instruments (UMI).145 ASLF alleged that UMI had failed to file forms required by EPCRA for several years.146 Prior to filing suit, and in compliance with the notice requirement in the citizen suit provision of EPCRA, ASLF gave UMI sixty days notice.147 During the notice period, UMI filed all of the EPCRA forms that it had failed to file from 1988 through 1991.148 Once the notice period passed, ASLF brought suit alleging that UMI had failed to timely file its forms and

138 Id.
139 Id.
140 See id.
143 Steel Company I, 90 F.3d at 1245; United Musical Instruments, 61 F.3d at 478.
144 Steel Company II, 523 U.S. at 86.
145 United Musical Instruments, 61 F.3d at 474.
146 Id.
147 42 U.S.C. § 11046 (2006); United Musical Instruments, 61 F.3d at 474.
148 United Musical Instruments, 61 F.3d at 474.
sought injunctive relief, damages, and attorney’s fees. UMI filed a motion to
dismiss on the grounds that at the time ASLF’s complaint was filed, UMI had
cured any EPCRA violations by completing and filing the necessary forms.

At trial the district court found for UMI on the grounds that the suit was
barred by the statute of limitations. The Sixth Circuit affirmed on different
grounds. The Sixth Circuit found that based on the plain language of the
statute, the analysis was the same as in *Gwaltney*. It also focused on the fact
that EPCRA allows citizen suits when an owner fails to file its forms; here,
though the forms were not filed in a timely manner, they had nonetheless been
filed before suit commenced.

Fights Back*

In the 1996 case *Citizens for a Better Environment v. Steel Co.*, an envi-
ronmental group, Citizens for a Better Environment (CBE), sued a steel manu-
factoring and pickling company. The allegations and facts involved in
CBE’s claim were all but identical to those in the *United Musical Instruments*
case. In 1995, CBE discovered that Steel Company had failed to file its nec-
essary EPCRA reports for several years. CBE, in accordance with the citizen
suit provision of EPCRA, gave notice to both Steel Company and the EPA of
its intent to sue. During the sixty-day notice period, Steel Co. filed all of its
outstanding reports. Then, at the end of the sixty day notice period CBE
commenced suit.

The district court applied the reasoning of *United Musical Instruments*
and *Gwaltney* and dismissed the case. CBE appealed to the Seventh Cirt-
cuit. Although the Seventh Circuit acknowledged the similarities between
*United Musical Instruments* and the *Steel Company* case, it chose not to adopt

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149 Id. (emphasis added).
150 See id. at 474–75.
151 Id.
152 Id. at 475.
153 Id. at 475–76.
154 Id. at 475.
155 *Steel Company I*, 90 F.3d at 1241.
156 Id. at 1242.
157 Id. at 1241.
159 *Steel Company I*, 90 F.3d. at 1241.
160 Id.
161 Id.
162 Id.
the explicit reasoning of either the Sixth Circuit in *United Musical Instruments* or the Supreme Court in *Gwaltney*. Instead, it decided to apply the “interpretative methodology” used to analyze the CWA in *Gwaltney* to the EPCRA citizen suit provision.

Under this analysis the Seventh Circuit stated that “the language of EPCRA differs from the language interpreted in *Gwaltney*; EPCRA authorizes citizens to sue ‘for failure to’ comply with the statute while the Clean Water Act authorized citizen suits where a defendant was alleged ‘to be in violation.’” Keeping this distinction in mind, the Seventh Circuit focused on the fact that EPCRA uses past tense language, while the CWA uses the present tense throughout. The court emphasized that since *Gwaltney*, Congress had amended the CAA’s citizen suit provision to allow wholly past violations while maintaining the sixty-day notice provision. Finally, the court stated that refusing to allow citizen suits for wholly past violations places the costs of litigation on environmental groups and creates incentives for polluters to remain non-compliant with EPCRA. Based on all of these considerations, the Seventh Circuit held that citizen suits for wholly past violations under EPCRA were appropriate.

c. Steel Co. v. Citizens for a Better Environment: *The Supreme Court Connects with a Knockout Blow Against EPCRA*

As a result of the split between the Sixth and Seventh Circuits, the Supreme Court decided to hear *Steel Company v. Citizens for a Better Environment* in 1998. Prior to considering the substantive merits of the *Steel Company* case, the Supreme Court identified two potential preliminary issues. These issues were whether the plaintiffs had standing to sue and whether the EPCRA citizen suit provision permitted the cause of action for wholly past violations. In his majority opinion, Justice Antonin Scalia began with the standing analysis. In contrast, Justice John Paul Stevens argued in his concurring opinion that because both potential issues were “jurisdictional,” the

163 *Id.* at 1242.
164 *Id.*
166 *Steel Company I,* 90 F.3d. at 1244.
167 *Id.*
168 *Id.* at 1244–45.
169 *Id.* at 1245.
170 *Steel Company II,* 523 U.S. at 88.
171 *Id.* at 86.
172 *Id.*
173 *Id.* at 102.
court could choose which analysis to undertake first; he then proceeded to examine the issue of subject matter jurisdiction.\textsuperscript{174}

In his majority opinion, Justice Scalia first discussed the standard for standing: A plaintiff must have an injury in fact, caused by the defendant, that is redressable.\textsuperscript{175} Justice Scalia focused on redressability.\textsuperscript{176} He stated that even if there had been an injury in fact, there would still be no redressability for that harm because any penalties would be paid to the treasury, not the plaintiffs.\textsuperscript{177} The mere “psychic satisfaction” that the plaintiff would have received from seeing the law enforced was not sufficient to establish redressability.\textsuperscript{178} Therefore, the plaintiff’s case was dismissed.\textsuperscript{179}

In his concurring opinion, Justice Stevens came to the same conclusion that the case should be dismissed, though he arrived at that conclusion through a subject matter jurisdiction analysis.\textsuperscript{180} According to Justice Stevens, “if [the EPCRA citizen suit provision] authorizes citizen suits for wholly past violations, the district court has jurisdiction over these actions; if it does not, the court lacks jurisdiction.”\textsuperscript{181} He ultimately followed the reasoning in Gwaltney and stated that EPCRA failed to give courts subject matter jurisdiction to hear cases alleging wholly past violations of the EPCRA citizen suit provision.\textsuperscript{182}

C. Critical Responses to the Combined Effects of Gwaltney and Steel Company

Much like the responses to the cutbacks in right-to-know laws, the critical response in the aftermath of Gwaltney, United Musical Instruments, and Steel Company had two poles.\textsuperscript{183} On one hand, there are numerous articles criticizing the Supreme Court’s Steel Company decision.\textsuperscript{184} These authors generally

\begin{footnotesize}
\begin{enumerate}
\item Id. at 112–13 (Stevens, J., concurring).\textsuperscript{174}
\item Id. at 103 (majority opinion).\textsuperscript{175}
\item Id. at 106–10.\textsuperscript{176}
\item Id. at 107.\textsuperscript{177}
\item Id.\textsuperscript{178}
\item Id. at 109–10.\textsuperscript{179}
\item Id. at 112–13, 134 (Stevens, J., concurring).\textsuperscript{180}
\item Id. at 113 (Stevens, J., concurring).\textsuperscript{181}
\item Id. at 132.\textsuperscript{182}
\item Stubbs, supra note 108, at 78; Sheldon, supra note 183, at 4; Roblan & Sage, supra note 183, at 60–61.\textsuperscript{184}
\end{enumerate}
\end{footnotesize}
favor the approaches that are not as restrictive of citizen suits. They essentially argue that the Supreme Court has effectively killed environmental citizen suits, as it is now almost impossible for a citizen plaintiff to pass the high standing threshold in an EPCRA suit.

On the other side, commentators have argued that allowing environmental citizen suits for wholly past violations was unnecessarily harsh for polluters. These authors view the *Steel Company* decision as a step in the right direction and approved placing limitations on a citizenry that might otherwise be too litigious.

Regardless of the argument, none of the literature that has appeared in the aftermath of the *Steel Company* case has commented on the windfall effect that the limitation on citizen suits, in combination with the cutbacks in right-to-know laws, has given to polluters.

### III. How the Current Framework Results in a Windfall to Polluters

This Part argues that the rise of national security-related cutbacks in access to information and judicial checks on citizen suits have led to a windfall for polluters. After examining these problems, this Part proposes two potential solutions that could help citizens regain the power to defend their communities from pollution. By empowering citizens to protect their communities, and giving them the information and legal standing necessary to do so, Congress can help citizens to protect their environments.

**A. The Cutbacks in Right-to-Know Laws, Combined with the Death of Environmental Citizen Suits, Has Created a Windfall for Polluters**

Although recent cutbacks in right-to-know laws and limits placed on the ability of citizens to bring environmental suits may not appear to be related, the combination of these two, independent trends has created a more polluter-

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187 Green, *supra* note 183, at 432–33.
188 *Id.*
189 See *infra* notes 194–239 and accompanying text.
190 See *infra* notes 194–239 and accompanying text.
191 See *infra* notes 194–239 and accompanying text.
192 See *infra* notes 194–239 and accompanying text.
193 See *infra* notes 194–239 and accompanying text.
friendly environment in America.\textsuperscript{194} In reducing both the kinds and quantity of environmental information that is available to citizens, the right-to-know cutbacks have made it harder for citizens to fight back against polluters in their communities.\textsuperscript{195} This difficulty has been compounded by citizens’ inability to bring suits for wholly past violations under the Emergency Planning and Community Right to Know Act (EPCRA) and the Clean Water Act (CWA).\textsuperscript{196} Furthermore, the inability to obtain adequate environmental information makes it all but impossible for citizens to meet the standing requirement to sue a polluter for an ongoing violation.\textsuperscript{197} This analysis explores how these dual hurdles impede citizen enforcement and thereby provide a windfall to polluters, and then suggests possible solutions.\textsuperscript{198}

First, if citizens are denied access to Freedom of Information Act (FOIA) information that has been exempted for national security reasons under Exemption 1, then much of the information that would normally be available through EPCRA will be taken out of citizens’ reach.\textsuperscript{199} If citizens are unable to gain access to EPCRA information by using a FOIA request, then they will certainly struggle to monitor local polluters.\textsuperscript{200} Moreover, without this important information there is a very low likelihood that citizens will be able to satisfy the standing requirement.\textsuperscript{201} How can a citizen allege an injury in fact, caused by a polluter, that is redressable if that citizen has little or no access to information regarding that polluter’s pollution habits? Assuming that a citizen can get past the standing threshold, that citizen will then encounter the prohibition on citizen suits for wholly past violations.\textsuperscript{202} Given the amount of time and effort it may take to acquire environmental information, if it can be acquired at all under the current framework, it is highly likely that many violations would only be discovered after they were already wholly past.\textsuperscript{203}

If, despite all these hurdles, a citizen managed to acquire information of ongoing violations, the notice provision included in each right-to-know statute

\textsuperscript{194} See Chekouras, supra note 32, at 107; Stubbs, supra note 108, at 117.

\textsuperscript{195} See Chekouras, supra note 32, at 107; supra notes 9–101 and accompanying text.


\textsuperscript{197} Stubbs, supra note 108, at 117; supra notes 102–189 and accompanying text.

\textsuperscript{198} See infra notes 199–239 and accompanying text.


\textsuperscript{200} See Chekouras, supra note 32, at 125; Durham-Hammer, supra note 1, at 351.

\textsuperscript{201} See Chekouras, supra note 32, at 107; Stubbs, supra note 108, at 117; Sheldon, supra note 183, at 47 (stating that after Steel Company, environmental plaintiffs suffer “special constitutional standing disabilities”) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 595 (1992)).

\textsuperscript{202} Gwaltney, 484 U.S. at 66–67; supra notes 102–189 and accompanying text.

\textsuperscript{203} See ENVTL. PROT. AGENCY, supra note 72, at 1–3; Federal Reading Rooms, supra note 73.
would give the polluter sixty days to correct the violation. Assuming that the polluter does correct its violations (and it is reasonable to think that any sophisticated polluter would), the citizen suit would fall into the category of suing for wholly past violations and would therefore be outside a court’s jurisdiction under *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation* and *Steel Co. v. Citizens for a Better Environment.*

Second, under the current Clean Air Act (CAA) framework it is very difficult for any person to acquire environmental information. Any person wishing to do so must go to a reading room. Moreover, although some courts have read the CAA to allow citizen suits for wholly past violations, there is no definitive decision saying that this is the proper interpretation. Thus, a person’s ability to bring an environmental citizen suit under the CAA would hinge on whether that person was fortuitous enough to live in a jurisdiction that interprets the CAA in a favorable manner.

Under the current framework, a person would need the time, funds, and commitment to travel to a reading room, find information that implicates a polluter, and then happen to be in a jurisdiction that interprets the CAA favorably. Even after going through these steps, the citizen would still need to present sufficient information to allege an injury in fact, caused by the polluter, that is redressable before successfully bringing suit. As such, it seems likely that under the current framework it would be all but impossible for any but the most motivated and well-funded citizens even to begin the undertaking of monitoring and suing a polluter. Ultimately, the cutbacks in the availability of CAA information, combined with the high standard for bringing an environmental citizen suit after *Steel Company*, make it difficult (though still much easier than under EPCRA) to bring an environmental citizen suit under the CAA.

There has been a dramatic decline in the number of citizen suits since the 1980s. It is not clear that there have been any successful environmental citi-
zen suits brought under EPCRA since the Supreme Court’s ruling in *Steel Company* in 1996. Moreover, the CAA reading rooms were used by a total of only thirty-three people between 1999 and 2002. All of this considered together with the present dearth of available environmental information paints a bleak picture for the ability of citizens to protect their neighborhoods from polluting corporations.

B. Implementing Either of Two Proposed Solutions Will Remove the Windfall for Polluters and Protect National Security and the Environment

Congress should implement either of two possible solutions to empower citizens to fight back against pollution in their communities. Both solutions would allow citizens to sue for wholly past violations. Under the first solution, Congress would statutorily adopt the reasoning of the U.S. Court of Appeals for the Seventh Circuit’s *Steel Company* decision and simultaneously amend EPCRA to allow citizens to recover monetary damages. Under this scenario, the government could continue to take a tough stance on protecting sensitive national security information. This solution would mimic the modern-day CAA in that it would give citizens a right to sue for wholly past violations and would make it possible to meet the redressability prong of the standing analysis.

Under the second solution, however, Congress would not allow citizens to recover monetary damages under right-to-know statutes. Instead, it could give citizens more access to high quality, accurate environmental information under these laws. In this way, even though the standing requirements would still be high, the larger amount of available information would increase the likelihood

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215 A search for cases brought under the EPCRA citizen suit provision turned up no results in which a plaintiff had prevailed.
217 *Supra* notes 9–189 and accompanying text.
218 See *infra* notes 220–239 and accompanying text.
219 For example, Congress could amend EPCRA to include language to the effect that owners and operators must timely file their forms.
220 See *Steel Company* I, 90 F.3d at 1242–45.
221 See 5 U.S.C. § 552(b) (2012) (allowing the government to withhold sensitive national security information from the public); ENVTL. PROT. AGENCY, *supra* note 72, at 1–3; Federal Reading Rooms, *supra* note 73.
of meeting the redressability requirement. Under either solution, Congress should also seriously consider altering the reading room requirement of the CAA to give citizens increased access to important, local environmental information. Both of these solutions would have the desired effect of protecting the public from national security threats while also creating greater latitude for citizens to be active participants in protecting their environments.

The two proposed solutions arise from the idea that for citizens to be involved in monitoring polluters and bringing lawsuits, they need to either have easy and inexpensive access to more environmental information or face a lower threshold for bringing successful environmental civil suits. Under the first solution, which would allow citizens to recover damages under EPCRA, citizens would still have limited access to information, thereby assuaging any national security concerns. Under this framework, citizens would no longer have such difficulty satisfying the high standing requirements laid out in the Supreme Court’s Steel Company decision, and they would have the additional option to sue for wholly past violations. Polluters would also know that even if information is more difficult for citizens to access, there would still be some likelihood of citizens obtaining the information at some point in the future. A violator, therefore, would be forced to comply or risk being punished for its noncompliance at some point in the future. Likewise, because citizens would also be aware of their ability to sue for wholly past violations (and could expect to survive a standing analysis), they would likely be more inclined to invest the extra time and resources needed to gain access to environmental information under the current framework.

The second solution—which would not allow citizens to recover damages but would give them greater access to environmental information—would not be as effective at protecting sensitive national security information. If one adopts the view, however, that more information actually leads to safer commu-

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224 See Steel Company II, 523 U.S. at 103; Beierle, supra note 52, at 3–5; Roblan & Sage, supra note 183, at 81.
225 See ENVTL. PROT. AGENCY, supra note 72, at 1–3; Federal Reading Rooms, supra note 73; Chekouras, supra note 32, at 115–16.
226 See supra notes 9–189 and accompanying text.
227 See Steel Company I, 90 F.3d at 1242–45; Chekouras, supra note 32, at 125; Durham-Hammer, supra note 1, at 334–52.
231 Id.
233 See supra notes 9–101 and accompanying text.
nities, then this framework might do an equal or even better job of preventing harm to communities.234 This solution would also appease people who want to see citizen suits limited by a high standing threshold.235 It gains its greatest strength from the fact that an informed citizenry would necessarily have a greater likelihood of acquiring information sufficient to surpass the high standing barrier.236

As things currently stand, the right-to-know law cutbacks and the death of environmental citizen suits have stacked the deck against citizen plaintiffs.237 They have no viable way to gain easy access to important environmental information, and even if they did, there is no realistic way for them to bring successful citizen suits against infringing polluters.238 There is probably not a one-size-fits-all solution to this complex problem, but either of the solutions proposed in this Note would be better for citizens, society, and the environment than the current system.239

CONCLUSION

The current state of affairs in environmental law provides polluters with an unwarranted windfall for two reasons. First, rollbacks in publicly available information have prevented citizens from becoming informed about the kinds of pollution harms that might arise in their communities. Even those citizens who actively seek to learn about local polluters are likely to face roadblocks as a result of national security concerns. Second, citizens who manage to gather information are unable to take a proactive stand to prosecute law-breaking polluters because courts have made it nearly impossible for citizens to take advantage of many citizen suit provisions. Fortunately, Congress can easily rectify this problem in either of two ways. First, Congress could statutorily allow lawsuits for wholly past violations under the Emergency Planning and Com-

234 See Chekouras, supra note 32, at 125; Beierle, supra note 52, at 3–5.
235 See Green, supra note 183, at 432–33.
236 See Steel Company II, 523 U.S. at 103; Beierle, supra note 52, at 3–5.
237 See Stubbs, supra note 183, at 117.
238 Supra notes 9–101 and accompanying text.
239 Supra notes 190–236 and accompanying text. The January 2014 chemical spill of 4-methylcyclohexane methanol into West Virginia’s Elk River brought these issues into the national spotlight. See Coral Davenport & Ashley Southall, Critics Say Chemical Spill Highlights Lax West Virginia Regulations, N.Y. TIMES, Jan. 13, 2014, at A8. As a result of the spill, more than 300,000 people in the greater Charleston, West Virginia, area were left without usable water. Id. Officials were unsure of what long-term health effects the contamination might cause. See id. Some sources blamed the leak on lax regulations and a lack of oversight. Id. Although it is still unclear what role EPCRA or citizen suits could have played in preventing this disaster, this spill highlights the importance of preventing the intentional release of harmful chemicals and providing citizens with the means to monitor potential polluters within their communities.
munity Right-to-Know Act (EPCRA), as it has already (arguably) done under the Clean Air Act. Second, Congress could amend EPCRA to allow citizens to collect monetary awards for successful suits, thereby alleviating the redressability issue that currently undermines the standing requirement. By taking either of the proposed actions Congress could empower citizens to protect their environments through citizen suits and in turn remove the windfall to polluters that the current framework facilitates.