Balancing National Security with a Community's Right-to-Know: Maintaining Public Access to Environmental Information Through EPCRA's Non-Preemption Clause

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BALANCING NATIONAL SECURITY WITH A COMMUNITY’S RIGHT-TO-KNOW: MAINTAINING PUBLIC ACCESS TO ENVIRONMENTAL INFORMATION THROUGH EPCRA’S NON-PREEMPTION CLAUSE

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Abstract: Over the past decade, public information regarding potential environmental hazards has been restricted due to national security concerns over terrorism. Citizens across the country are now hampered in their ability to assess the danger of local chemical facilities—and take proper precautionary measures—due to changing laws that limit or deny access to information about these facilities. This Note explains how states can enhance access to public environmental information while respecting legitimate security concerns. By decreasing reporting thresholds and making information accessible on the internet, states can strike a more proper balance between security concerns and a community’s right to know about chemical and environmental dangers. This Note discusses this balance, and suggests that information regarding chemical plant facilities should remain public because it poses a low security risk and offers a high public benefit.

Introduction

Federal government actions such as raising the threshold for the Toxic Release Inventory (TRI) and passing the Critical Infrastructure Information Act of 2002 (CIIA) are criticized for allowing private sector chemical facilities to restrict the dissemination of safety and environmental information to the local community. Proposed changes to raise the threshold reporting requirements for the TRI have been described as putting “the interests of chemical facilities squarely in front of the families in the community.”1 Similarly, the CIIA is portrayed as

* Articles Editor, Boston College Environmental Affairs Law Review, 2006–07.

overly broad, and protecting business interests rather than national security. However, amendments restricting public access to off-site consequence analysis data addressed security concerns voiced by the Federal Bureau of Investigation prior to the terrorist attacks of September 11, 2001, as well as George W. Bush’s election.

As the varying opinions on recent amendments and proposed regulations demonstrate, balancing legitimate national security concerns and a tradition of public disclosure of local environmental information is a complex issue that creates tension between national and local interests. This Note seeks to unravel a few of these complexities and address how states may protect and enhance communication about toxins by enacting state legislation that supplements the federal Emergency Planning and Community Right-to-Know Act (EPCRA), though in a manner that does not conflict with national security legislation.

Part I of this Note provides a brief overview of the preemption doctrine. Many federal environmental statutes originally evolved from state legislation, with commentators arguing both for and against fed-
eral preemption of environmental laws. Recent federal legislation may preempt states’ attempts to create community right-to-know laws.

Part II surveys how national security concerns have influenced federal legislation. It discusses the Freedom of Information Act (FOIA) and its exemptions to provide an overview of some of the defined instances that have limited a tradition of public disclosure. Additionally, the section examines a series of recent amendments to federal legislation. Each statute discussed has revised public access to environmental information due to a national security concern. For example, recent Safe Drinking Water Act (SDWA) amendments addressed security concerns by requiring facilities to conduct vulnerability assessments.

Part III describes EPCRA, identifies what information is publicly available, and explains why state legislation is not preempted. Part IV provides an analysis of the risk of a chemical attack followed by a description of the role of environmental information in public participation, as well as a discussion of the various types of disclosure. Parts V and VI identify existing state right-to-know laws and explain where state laws supplementing EPCRA may be preempted by federal national security legislation. Part VII examines past federal and state laws, information concerning the risk of a chemical attack, and the need for public participation to suggest manners of balancing national security concerns with the public’s right-to-know. This Note advocates that state right-to-know legislation can avoid the potential implications of higher TRI thresholds, respect legitimate national security concerns, and avoid federal preemption by critically assessing what information is publicly disclosed.

I. Preemption Doctrine

The United States Constitution creates a hierarchical structure, which establishes federal law as the highest law in the country. The Supremacy Clause of the United States Constitution states that the “Constitution, and the Laws of the United States which shall be made


\[\textit{See U.S. Const. art. VI, amend. X.}\]
in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”

However, the Tenth Amendment retains significant powers for the states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Under the Supremacy Clause, the federal government is able to preempt state law, but the powers of the states should remain unconstrained unless there is a clear indication of preemption. A clear indication is necessary because the Tenth Amendment creates a governmental structure in which “states have vast residual powers.” The interaction between the Supremacy Clause and the Tenth Amendment permits federal and state laws to simultaneously regulate the same field.

There is an assumption in areas traditionally dominated by state legislation that the powers of the state should not be superseded by the federal government without Congress expressing a clear and manifest purpose to preempt. For example, the historic police powers of the states should not be superseded by a federal act without either an explicit statement by Congress or an implied preemption through an act’s structure and purpose. However, this assumption regarding preemption is not present when the state regulates an area that has historically been the subject of federal legislation. Federal agencies acting within their congressionally delegated powers can preempt state regulation and render state regulations unenforceable. Preemption is applicable to state laws and regulations; it is generally not applicable to contracts and other voluntary agreements.

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7 Id. art. VI.
8 Id. amend. X.
9 Id. art. VI; see U.S. v. Locke, 529 U.S. 89, 108 (2000).
10 U.S. CONST. amend. X; Locke, 529 U.S. at 109.
14 See Locke, 529 U.S. at 108 (summarizing the opinion from Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)).
15 Id. at 110; City of New York v. Fed. Commc’n Comm’n, 486 U.S. 57, 63 (1988).
There are three ways in which the federal government can preempt state statutes and regulations.\textsuperscript{17} First, a state statute can be preempted through an explicit statement by a federal act indicating preemption.\textsuperscript{18} Absent such an explicit statement, the U.S. Supreme Court has applied conflict preemption and field preemption principles to evaluate whether a state regulation or statute is preempted.\textsuperscript{19} Conflict preemption occurs when either: (1) it is physically impossible to comply with both the state and federal law; or (2) the state law serves as a barrier or obstacle to accomplishing the purpose of the federal law.\textsuperscript{20} Field preemption is applicable when the federal scheme “is ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’”\textsuperscript{21}

Under field preemption, determining whether a state statute is consistent with a federal scheme requires examining the structure and purpose of the federal act.\textsuperscript{22} The structure and purpose of the federal act may indicate that Congress intended only one set of regulations.\textsuperscript{23} If only one set of regulations was implied, then any additional requirements by a state would be interpreted as impeding the federal purpose of a uniform regulatory scheme.\textsuperscript{24} For example, in \textit{Gade v. National Solid Wastes Management Ass’n}, the U.S. Supreme Court decided that while certain provisions of the Occupational Safety and Health Act (OSHA) could indicate that similar state laws requiring additional training for employees handling hazardous waste were acceptable, the overall structure evidenced congressional intent to avoid duplicate regulations.\textsuperscript{25} Because the overall structure indicated that duplicate regulations were against the purpose of the act, the state law was preempted.\textsuperscript{26}

Congress may attempt to remove ambiguities concerning preemption by including either a non-preemption or a savings clause.\textsuperscript{27} A

\begin{thebibliography}{99}
\textsuperscript{17} \textit{Gade}, 505 U.S. at 98; Boyes v. Shell Oil Prods. Co., 199 F.3d 1260, 1267 (11th Cir. 2000).
\textsuperscript{18} \textit{Gade}, 505 U.S. at 98.
\textsuperscript{19} Id.
\textsuperscript{21} \textit{Gade}, 505 U.S. at 98 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
\textsuperscript{22} Id.
\textsuperscript{23} Id. at 98–99.
\textsuperscript{24} Id. at 98–100.
\textsuperscript{25} Id. at 99–100.
\textsuperscript{26} Id. at 102.
\textsuperscript{27} \textit{See Gade}, 505 U.S. at 100.
\end{thebibliography}
non-preemption clause indicates that state and federal law are not mutually exclusive. When federal and state laws are not mutually exclusive, the federal law may be viewed as a minimum standard, which states may then supplement by imposing more stringent standards. A savings clause indicates a specific segment of state legislation that should not be preempted by the federal act. The OSHA savings clause, for example, states: “Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect . . . .” Savings clauses have been interpreted as presupposing a background preemption of all state legislation on the same topic as the federal legislation. The above OSHA savings clause was interpreted in Gade as indicating federal preemption of all state occupational safety and health standards without federal approval as outlined in OSHA.

II. Access to Environmental Information: The Impact of National Security Concerns on Specific Federal Acts

A. An Overview of Access to Information: Freedom of Information Act

The Freedom of Information Act (FOIA) has been described as establishing the principle that all government records should be publicly available. Though the Act contains a number of exemptions, only four of those exemptions are likely related to data reporting for chemical facilities due to national security concerns: preclusion by other laws, national security, law enforcement, and well data. The first is a blanket exemption for all documents excluded from FOIA by other statutes. Statutes exempting information must “leave no discretion on the issue” and “establish particular criteria for withholding or

28 Id.
30 See Gade, 505 U.S. at 100.
32 See Gade, 505 U.S. at 100.
33 Id. at 99–100.
36 Id. § 552(b)(3).
refer to particular types of matters to be withheld.”37 An example of this type of exemption is the CIIA.38

The second exemption is applicable to national security and applies to documents classified pursuant to an executive order for reasons of national security or foreign policy.39 The third exemption is for records or information compiled for law enforcement purposes when production or distribution of such information could “reasonably be expected to endanger the life or physical safety of any individual.”40 The fourth exemption is applicable to wells, and allows for information concerning geological and geophysical data—including maps of wells—to be excluded from FOIA.41

B. Limiting Access: The Clean Air Act and the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act

The Clean Air Act (CAA) incorporates a reporting requirement for stationary sources that emit chemicals.42 The chemicals covered include at least 100 substances that are “known to cause . . . death, injury, or serious adverse effects to human health or the environment.”43 This list includes vinyl chloride and fifteen other substances identified by Congress, and it currently includes seventy-seven toxic substances and sixty-three flammable substances.44

Under CAA section 112(r), stationary sources must report a risk management plan (RMP) to the U.S. Environmental Protection Agency (EPA) that contains an Off-Site Consequence Analysis (OCA).45 The RMP provides an assessment of the potential effects resulting from an accidental release of a hazardous chemical.46 The RMP includes the

37 Id.
39 5 U.S.C. § 552(b)(1). This is considered a limited exemption because not all agencies have the authority to classify information. Conrad, supra note 34, at 724–26. Also, it can be inhibitive for everyday use of the information because of the necessary security clearances and procedures for maintaining document security. Id. However, recent news demonstrates the current administration’s desire to utilize the clause to reclassify documents in the Library of Congress. See Scott Shane, U.S. Reclassifies Many Documents in Secret Review, N.Y. TIMES, Feb. 21, 2006, at A1, A16.
41 Id. § 552(b)(9).
42 See 42 U.S.C. § 7412(r) (2000) (“Stationary sources’ means any buildings, structures, equipment, installations, or substance emitting stationary activities.”)
43 Id. § 7412(r)(3).
44 Id. § 7412(r)(D)(3); 40 C.F.R. § 68.130 (2005).
46 Id. § 7412(r)(7)(B)(ii)(I).
previous release history for the past five years, an accidental release prevention program, and a response program for protecting human health and the environment in the case of an accident.\(^47\)

The RMP’s OCA summarizes the worst case scenario for a facility.\(^48\) In some cases, it describes a more likely scenario, referred to as an “alternative release scenario.”\(^49\) The conditions necessary to produce a worst case scenario are noted in the OCA, an example of which might be a fire on a windy day.\(^50\) The OCA also describes the vulnerability zone—the area potentially impacted by a worst case scenario—including the total population, public receptors, and environmental receptors that would be affected.\(^51\)

Section 112(r) of the CAA mandates that the RMP be available to the public and submitted to the state and any local agency responsible for responding to an accidental release.\(^52\) The RMP, with OCA data removed, was previously available on the internet.\(^53\) After the passage of the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act in 1999 (CSISSFRA),\(^54\) EPA pulled the information from the internet and implemented new public access regulations.\(^55\)

The CSISSFRA and its corresponding regulations limited public access to OCA data in order to balance national security concerns and

\(^{47}\) Id. § 7412(r)(7)(B)(ii). Every RMP contains an executive summary that states the stationary source and regulated chemical(s), the general accidental release prevention program, chemical-specific prevention steps, the five-year accident history, the emergency response program, and planned changes to safety. 40 C.F.R. § 69.155 (2005).


\(^{49}\) 42 U.S.C. § 7412(H)(i)(III); 40 C.F.R. § 68.28; Jacobson, supra note 48, at 359.

\(^{50}\) 40 C.F.R. § 68.165.

\(^{51}\) Id.; Accidental Release Prevention Requirements; Risk Management Programs Under the Clean Air Act Section 112(r) (7); Distribution of Off-Site Consequence Analysis Information, 65 Fed. Reg. 48,108, 48,127–28 (Aug. 4, 2000) [hereinafter OCA Data II].


\(^{55}\) Id.; Jacobson, supra note 48, at 361–63.
the public’s right-to-know.56 The regulations allow a paper copy of the OCA data to be available to the public in at least fifty designated reading rooms located throughout the United States and its territories.57 Any person can read the reports in these rooms, but they may not remove the report or make a mechanical copy.58 One reason for limiting taking notes to non-mechanical copies is that technological advances, such as copy machines and digital cameras, have increased the risk that the reports will be reproduced and posted on the internet, thus undermining the government’s attempts to limit the dissemination of OCA information.59

Identification is required in order to obtain access to the records, and individuals may not access more than ten OCAs per month.60 These requirements increase the personal contact necessary to obtain the data, and therefore decrease the risk of illicit use.61 Between 1999 and 2002, only thirty-three persons in total visited these reading rooms.62 While limiting the public’s access to paper copies, the new regulations allow citizens to determine whether a location is part of a vulnerability zone through an internet request.63 EPA currently uses a computer-based indicator, Vulnerable Zone Indicator System (VZIS), to process the requests.64 The EPA’s VZIS website instructs users to type in their electronic mail address and the location in question’s address or longitude and latitude.65 Users entering a location that may be within a vulnerability area are notified via electronic mail and provided with

56 40 C.F.R. § 1400.3, 1400.6 (2005); OCA Data II, 65 Fed. Reg. at 48,109; Dep’t of Justice, Assessment of the Increased Risk of Terrorist or Other Criminal Activity Associated with Posting Off-Site Consequence Analysis Information on the Internet 1 (2000) [hereinafter Dep’t of Justice].
57 40 C.F.R. § 1400.3.
58 Id. Handwritten notes are allowed. See id.
59 See Dep’t of Justice, supra note 56, at 46.
60 40 C.F.R. § 1400.3. Personal information should be kept by the government for no longer than three years. Id.
61 See Dep’t of Justice, supra note 56, at 4, 43.
63 40 C.F.R. § 1400.4.
65 See VZIS, supra note 64. The same information can be requested via telephone or mail. 40 C.F.R. § 1400.4.
suggestions on how to obtain more information. Suggested manners for obtaining more information include visiting the reading room and obtaining OCA data, contacting the Local Emergency Planning Committee, searching RMP data on EPA's website, and viewing other information on EPA's website. The locations or identity of the individual stationary sources creating the risk is not provided, nor is any additional information concerning health effects or the range of the vulnerability zone.

C. Limited Access to Infrastructure Information: The Critical Infrastructure Information Act

The Critical Infrastructure Information Act of 2002 (CIIA) was part of the Homeland Security Act. CIIA covers information “not customarily in the public domain and related to the security of critical infrastructure or protected systems.” The phrase “in the public domain” was recently defined as “information lawfully, properly and regularly disclosed generally or broadly to the public.” Examples of this information include the ability of a system to resist a potential attack, the misuse of data communications, and any past operational problems regarding the system including repairs or reconstruction. The purpose of CIIA is to gather critical infrastructure information in order to foster an understanding of security risks and prevent, or recover from, interferences in the system.

66 40 C.F.R. § 1400.4; e-mail from Jacob Noble, U.S. Environmental Protection Agency Chemical Emergency Preparedness and Prevention Office, to Katherine Chekouras (March 2, 2006, 11:18:21 EST) (on file with author). Author entered addresses on two separate occasions. One received a response that the location is “likely to be in a vulnerability zone of a potential accidental release” and the other did not receive a response. Id.

67 See Noble, supra note 66. Hyperlinks to the websites were provided in the e-mail. Id. Many Local Emergency Planning Committees (LEPC) do not obtain copies of risk management plans (RMP) or will not release Offsite Consequence Analysis (OCA) and RMP data because of the potential penalty for improper disclosure to the public. National Institute for Chemical Studies, Local Emergency Planning Committees and Risk Management Plans: Encouraging Hazard Reduction 19, 21 (June 2001), available at http://www.nicsinfo.org/LEPCStudyFinalReport.pdf. Public requests for RMPs from LEPCs that do not maintain the full document on file are directed to the facility. Id. at 19.

68 See Noble, supra note 66.


73 Id. § 131(5); Wells, supra note 2, at 1213.
The CIIA covers critical infrastructure information voluntarily submitted to certain federal agencies for security reasons or “other informational purpose[s].” This information is exempt from FOIA, and it cannot be used by any federal, state, or local authority, or a third party in a civil lawsuit without written consent. CIIA states that if the information is given to a state or local government entity, it cannot be made available under local laws requiring disclosure, or used for purposes other than critical infrastructure. However, CIIA does provide that critical infrastructure information can be obtained by state, local, and federal government through other applicable laws including those that disclose the information generally or broadly to the public.

D. A Possible Balance for Information Access: The Safe Drinking Water Act

The Public Health Security and Bioterrorism Preparedness Response Act of 2002 addressed security concerns for water systems by making several amendments to the Safe Drinking Water Act (SDWA). The amendments required community water systems serving more than 3300 persons to conduct an assessment of the systems’ vulnerability to terrorist attacks or other intentional acts that would disrupt service. The vulnerability assessment includes, at the minimum, a review of pipes and physical barriers as well as treatment, storage, and computer systems. Community water systems must submit the vul-

75 Id. The information can, under certain conditions, be disclosed without written consent to aid in a criminal prosecution, or for use by a House of Congress or the Comptroller General. Id.
76 Id. § 133(a)(1)(E).
77 Id. § 133(a)(2)(c). This notion is also supported by the rulemaking for CIIA’s corresponding regulations, which state that the rule “does not impose any regulation that has substantial direct effects on the States . . . or the distribution of power and responsibilities among the various levels of government.” Procedures for Handling CII, 71 Fed. Reg. 52,252, 52,271 (Sept. 1, 2006) (final rule for 6 C.F.R. pt. 29).
nerability assessment to EPA and create an emergency response plan addressing the vulnerabilities identified in the assessment.\textsuperscript{82} The emergency response plan does not need to be submitted directly to EPA, but the community water system should coordinate with the Local Emergency Planning Committees (LEPCs).\textsuperscript{83}

Vulnerability assessments are protected from disclosure to state, regional, or local governments and are exempted from FOIA.\textsuperscript{84} The amendments may preempt any state or local legislation which seeks to create access to the reports because SDWA states that “[n]o community water system shall be required under State or local law to provide an assessment.”\textsuperscript{85}

While exempting vulnerability assessment information from public disclosure, the SDWA also requires contamination reporting to the public.\textsuperscript{86} The public notice requirement mandates that a consumer confidence report be distributed to customers of the drinking water supply.\textsuperscript{87} The report outlines whether the results exceeded the maximum contaminant level goal, and whether any variances or exceptions were granted.\textsuperscript{88} The report must also state in “plain language” the health concerns resulting from any regulated chemical that exceeded the maximum contaminant level that year.\textsuperscript{89}

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

The Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986 was created with the purpose of providing communities with information concerning potential chemical hazards and facilitating emergency preparedness at the state and local levels.\textsuperscript{90} Subchapter I of EPCRA creates State Emergency Response Commissions (SERCs), Emergency Planning Districts, and Local Emergency

\textsuperscript{82} Id. § 300i-2(a), (b).
\textsuperscript{83} Id. § 300i-2(b); Chilakamarri, \textit{supra} note 79, at 935.
\textsuperscript{84} 42 U.S.C. § 300i-2(a)(3). The regulated entities include chemical facilities. \textit{Homeland Security}, \textit{supra} note 80, at 4. Similarly, the Maritime Transportation Security Act of 2002 requires vulnerability assessments for facilities adjacent to waters subject to U.S. jurisdiction. 46 U.S.C. §§ 70101–03. These assessments, along with facility security plans authorized under the chapter, are exempt from public disclosure. 46 U.S.C. § 70103.
\textsuperscript{85} 42 U.S.C. § 300i-2(a)(4).
\textsuperscript{86} Id. §§ 300i-2(a) (3), 300g-3(c) (4).
\textsuperscript{87} Id. § 300g-3(c) (4).
\textsuperscript{88} Id. § 300g-3(c) (4) (B).
\textsuperscript{89} Id.
\textsuperscript{90} Id. § 11001; Am. Chem. Council v. Johnson, 406 F.3d 738, 739 (D.C. Cir. 2005).
Planning Committees (LEPCs). Both subchapters include the following forms that must be accessible to the public: emergency notification, material safety data sheets, an emergency and hazardous chemical inventory, and toxic chemical release forms. Under EPCRA, emergency notifications must be sent by the owner of a facility to the LEPCs impacted by the release of an extremely hazardous substance. Individual citizens do not need to be contacted by a facility owner. The notice should include the chemical name, an indication of whether the substance is extremely hazardous as defined by EPCRA, the estimated quantity of the release, the time and duration of the release, the medium or media into which the release occurred, known acute or chronic health risks associated with the emergency, advice regarding medical attention, proper precautions to take as a result of the release, and a contact for further information.

Owners and operators of facilities are required under EPCRA to have available a material safety data sheet and emergency and hazardous chemical inventory for chemicals considered hazardous under the Occupational Safety and Health Act (OSHA). Both forms must be submitted to the LEPC, SERC, and the fire department with jurisdiction over the facility. Chemicals below a threshold amount, usually 10,000 pounds, may be excluded from the material safety data sheet. The material safety data sheet must contain a list of hazardous chemicals, grouped by category of health and physical hazards as set forth by OSHA, and the hazardous components of the chemicals.

Facility owners may choose to submit a federal tier I or tier II emergency and hazardous chemical inventory form, unless the SERC, LEPC, or fire department requests a tier II. Most of the forms sub-

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92 Id. §§ 11001–11023.
93 42 U.S.C. § 11004(b)(1).
94 Id. § 11004.(b)(1).
95 Id. § 11004(b)(1).
96 Id. §§ 11021(a)(1), 11022(a)(1).
97 Id. §§ 11021(a)(1), 11022(a)(1).
100 Id. § 11022; Kuszaj, supra note 98, §§ 7.02, 7.05–.06.
mitted are tier II forms.101 Both tier I and tier II forms require reporting of estimated ranges of the maximum amount of hazardous chemicals present during the preceding year, and of the daily amount of hazardous chemicals released.102 Tier I forms allow this information to be reported in aggregate terms with hazardous chemicals grouped by OSHA categories of health and physical hazards.103 A tier II form is more specific and requires reporting for each hazardous chemical, including its chemical name and a brief description of the manner of storage.104 While tier I forms require disclosure of the general location of each category of chemical, tier II forms require reporting of each chemical’s specific location.105 Facility owners filing a tier II form, however, may elect to withhold the location of the hazardous material from the public.106

The toxic chemical release form differs significantly from the other forms because it is submitted directly to EPA and any designated state agency.107 The toxic chemical release form only needs to be available to the SERC, LEPR, and the local fire department.108 In addition, the toxic chemicals reported are not “hazardous chemicals” under OSHA, but a separate list under EPCRA.109 EPCRA requires reporting of over 300 hazardous chemicals.110

Unlike the other reporting sections in EPCRA, the toxic chemical release reporting section only applies to owners and operators of facilities in specified industries that employ more than ten full-time employees.111 Approximately 6000 facilities in these industries—such as power generation, hazardous waste disposal, and petroleum wholesale—must file reports.112 The toxic chemical release forms include the name, location, and principal business activities of the facility, how the chemical is used, an estimate of the maximum amount present at the facility throughout the year, a description of the efficiency of the

101 Kuszaj, supra note 98, § 7.04.
102 42 U.S.C. § 11022(d).
103 Id. § 11022(d)(1)(A).
104 Id. § 11022(d)(2).
105 Id. § 11022.
106 Id. § 11022(d)(2)(F).
107 Id. §§ 11004, 11021, 11022, 11023; Kuszaj, supra note 98, at fig.2-2.
108 42 U.S.C. § 11023; see Kuszaj, supra note 98, at fig.2-2.
109 See 42 U.S.C. § 11023(c).
111 42 U.S.C. § 11023(b).
112 Dudley, supra note 110, at 1–2.
disposal process, and the annual quantity of toxins entering the environment.\textsuperscript{113}

### A. EPCRA’s Public Availability Section

EPCRA explicitly states that all four forms and the emergency response plan must be available to the general public.\textsuperscript{114} The information must be available during normal working hours at locations designated by the appropriate government entity.\textsuperscript{115} An explicit exclusion from public review exists for the specific location of chemicals as designated on a tier II form and confidential or trade secret information.\textsuperscript{116}

EPCRA states that the toxic chemical release forms were intended to be available to “citizens of communities surrounding covered facilities.”\textsuperscript{117} This intent manifests through the requirement that the forms be available “to inform persons about releases of toxic chemicals to the environment; to assist governmental agencies, researchers, and other persons in the conduct of research and data gathering . . . .”\textsuperscript{118} Congress has also evidenced its intent to make the forms accessible to the public by requiring that the available data be accessible via computer telecommunications and other means.\textsuperscript{119} The TRI database compiles data collected under EPCRA and is currently available on EPA’s website.\textsuperscript{120}

### B. EPCRA and Preemption

EPCRA includes a non-preemption clause that explicitly states that the federal government is not preempting state and local measures.\textsuperscript{121} Section 110041 of EPCRA states that nothing in the chapter shall “preempt any State or local law.”\textsuperscript{122} While EPRCA requires that data sheets include information identical to the federal form, a state or locality can require the submission of additional information.\textsuperscript{123}

\begin{itemize}
  \item \textsuperscript{113} 42 U.S.C. § 11023(g).
  \item \textsuperscript{114} Id. § 11044(a).
  \item \textsuperscript{115} Id. Appropriate entities include LEPCs and EPA. Id.
  \item \textsuperscript{116} Id. §§ 11044(a), 11042. This Note will not address trade secrets.
  \item \textsuperscript{117} Id. § 11023(h).
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} 42 U.S.C. § 11023(j).
  \item \textsuperscript{120} Id.; U.S. Environmental Protection Agency, TRI Explorer, http://www.epa.gov/ triexplorer/ (last visited Dec. 26, 2006) [hereinafter U.S. EPA, TRI Explorer].
  \item \textsuperscript{121} 42 U.S.C. § 11041.
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Id. § 11041(b).
\end{itemize}
For example, in *Ohio Chamber of Commerce v. State Emergency Response Commission*, the SERC adopted rules pursuant to the Commission’s outlined role in EPCRA. These rules required owners and operators of regulated facilities to submit scaled maps indicating the location of chemicals.

The court in *Ohio Chamber of Commerce* addressed whether these rules exceeded the Commission’s authority. Opponents to the rule argued that EPCRA intended that the required forms be “consistent with and equivalent in scope, content, and coverage” with the federal form. The Commission interpreted EPCRA as a “floor”—or minimum reporting requirement—that not only allows more stringent regulations to be passed by the state, but anticipates that states will expand upon the federal requirements. The court ruled that the federal statute explicitly rules out preemption and allows states to create their own form, thus demonstrating that the federal law was created as a comprehensive law leaving room for additional state intervention. In addition, the court believed the State Emergency Response Commission rule to be consistent with the stated federal purpose “to provide the public with information concerning hazardous chemicals in their communities and to encourage and support emergency planning efforts at state and local levels.”

**IV. Risks and Benefits of Disclosing Chemical Facility Information**

**A. The Risk of a Chemical Attack**

The risk of a hazardous substance release from a facility triggered by terrorist activities is considered to be low. Of the 353 known or suspected terrorists acts in the United States perpetrated from 1980 to 2000, only a few involved chemical facilities, and as of 2000 there had yet to be a criminally caused chemical release from a facility in the United States. Yet the Department of Justice (DOJ) considers the...
possibility of an attack a “real and credible” risk based on the increasing number of terrorist attacks against other targets and the risk of mass damage to life and property. Estimates as to the severity of a chemical release vary depending on whether a flammable or hazardous chemical release occurs, with estimates of the median number of persons impacted ranging from 15 to 1500.

Another reason that the threat is considered real and credible is the international history of using chemical facilities as weapons. Outside of the U.S., multiple groups across the globe have utilized intentional chemical releases from industrial facilities as weapons. For example, during the war in Croatia, Serbian forces attacked a chemical plant producing fertilizer, and in Colombia, the Revolutionary Armed Forces of Colombia exploded a pesticide warehouse resulting in mass evacuations of the surrounding area.

It is believed that terrorists select a target facility based on criteria similar to that used by the U.S. military. The military’s approach is based on obtaining nine pieces of crucial information: knowledge of the facility’s existence, the chemicals present, the off-site consequences of a release, the facility’s security, the facility’s layout, the location of the chemicals, knowledge of mitigation measures to limit the damage, the facility’s emergency response plan, and the community’s emergency response plan.

Chemical plant attackers will likely try to attack a chemical facility at its most vulnerable point. Assessing the most vulnerable point requires consideration of the security systems’ weaknesses and the operating or environmental conditions that would provide an advantage to the attacker. Security or protection systems include detection devices such as sensors, physical barriers that cause delays such as locks, strong security response action as demonstrated by the ability to communicate the threat and neutralize it, and mitigation factors including automatic

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133 See Dep’t of Justice, supra note 56, at 2.
135 See Dep’t of Justice, supra note 56, at 2.
136 See id. at 22–27.
137 See id. at 23, 26.
138 See id. at 38.
139 See id. at 38–39.
141 Id. at 20–21.
shut-down mechanisms. Vulnerability can be determined by evaluating system features with the least protection, and by predicting the worst case scenario. Protection systems should also be examined as a whole to determine if there is balanced protection which ensures that an adversary cannot overcome protective measures with one single attack method. A vulnerability assessment should also take into account advantages that an attacker may have, such as emergency conditions, lack of personnel on site, and inclement weather.

Terrorists have demonstrated the ability to obtain information through both legal and illegal means. Terrorist groups have built a reputation for attracting and training members with the specialized operative skills likely required for implementing an attack. As Joseph D. Jacobson—Judge Advocate then assigned to the Litigation Division of the Air Force Legal Services Agency—argued in an article entitled Safeguarding National Security Through Public Release of Environmental Information: Moving the Debate to the Next Level, terrorists are likely to acquire needed information from raw data more readily than community groups due to their motivation and specialized knowledge.

The counterargument is that providing information online, such as the worst case scenario, creates “one-stop shopping” by providing terrorists with a majority of the information needed to select a target from anywhere in the world.

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142 See id. at 16–17, 20.
143 See id. at 20.
144 Id. at 26.
145 Id. at 21.
146 Bagley, supra note 2, at 69. The author cites the al Qaeda Manual found in Manchester, England by the Metropolitan Police, who found the manual while searching an al Qaeda member’s home, and later translated and introduced it at an embassy bombing trial in New York. Id.; see al Qaeda Manual, beginning at http://www.usdoj.gov/ag/manualpart1_1.pdf. The manual states that eighty percent of the information needed comes from public sources such as newspapers, books, broadcasts, and jokes by everyday people. al Qaeda Manual, supra, at BM-80–82, available at http://www.usdoj.gov/ag/manualpart1_3.pdf. It then states that the other twenty percent can be procured through illegal means such as “[i]ndividuals who are recruited as either volunteers or because of other motives.” Id. at BM-82.
B. The Role of Environmental Information in Public Participation

Public involvement in environmental enforcement is supported by three rationales: normative, instrumental, and substantive.\(^\text{150}\) The normative rationale is that communities have a right to know, and the ability to mitigate any negative effects from a chemical facility.\(^\text{151}\) The instrumental rationale argues that information disclosure improves environmental performance because of community response.\(^\text{152}\) This theory also supports the notion that decreasing hazardous wastes is one of the better options for reducing terrorist threats to chemical facilities.\(^\text{153}\) The substantive rationale is that information disclosure leads to the cooperation necessary to understand and solve environmental problems.\(^\text{154}\) This theory can be applied to security concerns by advocating that information shared with the community leads to measures that reduce terrorist threats.\(^\text{155}\)

In 2003, EPA published a report identifying how TRI data is utilized by citizens, citizen groups, industry, investing groups, and government.\(^\text{156}\) The report explained that citizen groups have utilized the information to educate communities, identify environmental justice concerns, and to engage in direct negotiation for pollution reductions.\(^\text{157}\) For example, in July 2005, a community group in Pilsen, Illinois, learned from TRI data that a nearby industry was one of the


\(^{156}\) See generally *Toxic Release Data Use*, *supra* note 152.

\(^{157}\) Id. at 3–9; see also Mary Graham, *Democracy by Disclosure: The Rise of Technopopulism* 21–61 (2002) (tracing the history and impact of the TRI program on industries and democracy).
city’s largest polluters. With this information, they were able to gain the attention of city and state officials and initiate negotiations between the EPA and the factory for reduced emissions.

The EPA website that allows citizens to search the TRI draws approximately 240,000 searches annually. The website allows access mainly to raw data, which is difficult for citizen groups to utilize because it requires expert knowledge of the chemical in order to draw a conclusion about the potential health impacts. To reduce the difficulty citizens encounter when interpreting raw data, national organizations such as OMB Watch and Environmental Defense analyze the raw data and provide guidance on the health effects of particular toxins released in a geographic area. This interpreted data has attracted twice as many participants; the Environmental Defense Fund’s “scorecard” website draws approximately half a million views per month.

C. Levels of Disclosure

Information may be disclosed at a variety of levels. For example, information may be disclosed only to government agencies and not the general public, such as the case with trade secrets under EPCRA. The next applicable level of disclosure is notification only to

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161 Id.; Durham-Hammer, supra note 92, at 345–46 (outlining possible mistakes citizens may make when attempting to interpret information).


164 Beierle, supra note 150, at 337–38.

those affected, referred to as community disclosure.\textsuperscript{166} Community disclosure is implemented in the Safe Drinking Water Act (SDWA) when utility customers are provided with consumer reports.\textsuperscript{167} Finally, full disclosure occurs when information is made available to the general public.\textsuperscript{168} Full disclosure, which derives from FOIA, is applicable to systems such as TRI reporting that allow citizens public access to government internet databases.\textsuperscript{169} According to Thomas C. Beierle, “[a]ll modern models of full disclosure involve the compilation of information into electronic databases that support comparison, ranking, and tracking of facility performance.”\textsuperscript{170} The internet is considered a more effective means for disseminating information than traditional methods.\textsuperscript{171}

The ability to access information tends to be the greatest under full disclosure and progressively weaker with community and agency disclosure.\textsuperscript{172} Because of exemptions in FOIA, CIIA, EPCRA, and SDWA, specific environmental information provided to government agencies can be withheld from public disclosure.\textsuperscript{173} This suppression of information results in the government carrying the full burden of enforcement and mitigation of community risk.\textsuperscript{174} This government burden goes against the congressional intent of public participation and enforcement in the environmental law realm as demonstrated by citizen suits and disclosure provisions in environmental laws such as EPCRA, CAA, and the Clean Water Act (CWA).\textsuperscript{175}

\textsuperscript{166} See Beierle, supra note 150, at 337.
\textsuperscript{167} See 42 U.S.C. § 300g-3(c)(4).
\textsuperscript{168} Beierle, supra note 150, at 337.
\textsuperscript{170} Beierle, supra note 150, at 337.
\textsuperscript{171} DEP’T OF JUSTICE, supra note 56, at 43; Stephen M. Johnson, The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet, 50 ADMIN. L. REV. 277, 301 (1998).
\textsuperscript{172} See Beierle, supra note 150, at 337.
\textsuperscript{174} See Beierle, supra note 150, at 337.
V. States Going Beyond the Federal Floor

While EPCRA contains a federal right-to-know provision, states including California, Illinois, Massachusetts, and New Jersey have implemented additional reporting requirements. Some state right-to-know laws seek to enhance dissemination of information by notifying citizens directly, instead of through a State Emergency Response Commission (SERC) or Local Emergency Planning Committee (LEPC), as allowed by EPCRA. This section advocates that the Illinois right-to-know law successfully relays information to the public because it embraces methods that have been successful at the state and federal level.

A. The Beginning: New Jersey—Informing Citizens About Health Effects in Plain Language

New Jersey’s environmental surveys create an inventory of the hazardous substances present, similar to EPCRA’s toxic chemical release forms and emergency and hazardous chemical inventory forms. The surveys are available to the public when requested in writing and were available online prior to September 11, 2001. In addition to the inventory, New Jersey’s Right-to-Know Act requires the State Department of Health to create health fact sheets for each regulated chemical. The fact sheets are available online and summarize the health effects of the substance in an accessible form, including recommendations on how to reduce exposure in the workplace, acute and chronic health effects, cancer or reproductive hazards, suggested medical tests for

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178 N.J. Stat. Ann. § 34:5A-4–5, -9. The original New Jersey Worker and Community Right-to-Know Act mandated disclosure of information to the public and to workers. N.J. State Chamber of Commerce v. Hughey, 774 F.2d 587, 590 (3d Cir. 1985). Many of the worker disclosure mandates, such as workplace surveys designed to facilitate the reporting of hazardous substances, have been preempted by the Occupational Safety and Health Administration (OSHA), but the environmental sections of the statute are still valid. Id. at 593. For example, environmental surveys, fact sheets, and the public disclosure of this information are not preempted. Id. at 594–96.
those with high exposure, and commonly asked questions. For example, one of cadmium sulfate’s acute effects is eye irritation and a common question is “[i]f I have acute health effects, will I later get chronic health effects?” Although not available on the same form as the facility description, the fact sheet in conjunction with the reporting survey provides communities with health information in a user-friendly format that is beneficial to the public.

B. An Effective Miss—Agency, but Not Public, Disclosure: California’s Proposition 65

In 1986, California approved Proposition 65 as part of the state’s Safe Drinking Water and Toxic Enforcement Act. This act is hailed for encouraging agency disclosure, but criticized for failing to provide the general public with information about facilities in their area. Proposition 65 requires a blanket warning before exposing individuals to a chemical known by the state to cause cancer or reproductive toxicity, and applies to consumer product, work, and environmental exposures. For environmental exposures, the Proposition 65 warning must be clear and convey that the chemical in the area is known to cause reproductive toxicity or cancer. No additional information, such as the name of the chemical or its exact location, is necessary. The notice may be posted in one of three manners: a sign in the area, a mailed notice, or a media announcement. Proposition 65 has been criticized for lacking critical health information such as the level

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183 See N.J. Stat. Ann. § 34:5A-5; supra Part IV.B–C (supporting the assertion that interpreted data is more effective than raw data, and internet access is more efficient at disseminating information than other methods).
189 Id. § 22-12601 (d) (1).
of risk and nature of exposure. In addition, because many companies utilize inconspicuous newspaper advertisements and sometimes do not identify the facility, it can be difficult to determine which facility caused the exposure.

Proposition 65 differs significantly from EPCRA’s TRI because it provides a blanket warning, lacks specific information, and does not produce a “stream of generally available and comparable performance data.” But, like EPCRA’s TRI, Proposition 65 is credited as reducing pollution. Proposition 65’s success has been partly credited to an exemption possibility in the statute. The exemption allows regulated entities demonstrating that the exposure in question poses “no significant risk” to avoid reporting. Professor Bradley C. Karkkainen explains that this exemption creates an incentive to provide the state with credible data to establish no significant risk; thus creating a “rich flow of toxicity and exposure data that has allowed the state to establish regulatory standards for dozens of pollutants, at a far faster pace than under conventional regulatory approaches.”

C. Massachusetts’s Failed Attempt

The Massachusetts Continuing Legal Education Environmental Law Series presents a dim picture of the state’s right-to-know law, noting that “enforcement is at best desultory” and that the Massachusetts Department of Environmental Protection (DEP) “has closed its Right-to-Know office.” The Massachusetts law requires citizens to have knowledge of an environmental harm before being guaranteed access to more information. The statute allows residents of the town or city where the facility is located to file a petition requesting an investig-

190 Rechtschaffen, supra note 184, at 336.
191 See id. at 333, 336.
192 Karkkainen, supra note 185, at 347.
193 See id. at 346–47 (noting Proposition 65’s ability to shift the information burden); Rechtschaffen, supra note 184, at 348 (discussing that the law is “greatly flawed” but it has nonetheless been able to aid in pollution reduction).
194 Cal. Health & Safety Code § 25249.10; see Karkkainen, supra note 185, at 346.
196 Karkkainen, supra note 185, at 346.
The petition must set forth the grounds for believing that the public health is endangered and provide any information which may assist the municipality’s investigation. The decision to pursue an investigation is at the discretion of the municipal coordinator, with the possibility of review by the DEP. DEP may, but is not obligated to, release material safety data sheets to the petitioner.

The statute mandates that the public keep confidential any information disclosed by the state. Section 21(b) restrains disclosure of the information received by anyone not statutorily authorized. This provision essentially prohibited community members from sharing safety and health information with one another. In Lawlor v. Shannon, the U.S. District Court for the District of Massachusetts found the provision unconstitutional on its face; finding that the section was an abridgement of protected speech in violation of the First Amendment. In its analysis, the court determined that the proposed substantial government interest—“risk of sabotage or robbery”—was unsubstantiated because the government offered no evidence that such concerns were legitimate and that if such risks existed, other states with right-to-know laws, such as New Jersey, would already have experienced robbery or sabotage.

D. Bringing Together the Benefits and Avoiding Prior Pitfalls: Illinois

In response to concerns surrounding groundwater contamination that affected at least seven hundred homes, the Illinois state legislature enacted a bill enhancing the state’s community right-to-know reporting requirements. The bill is described as “putting Illinois at the forefront of State-enacted environmental protection law” and

199 Id.
200 Id.
201 Id.
202 Id.
203 Id. § 21(b).
207 Id. at *14–15.
“making Illinois the nation’s leader in ensuring communities’ right-to-know about potentially dangerous local environmental threats.”

The new law requires that the Illinois Environmental Protection Agency (IEPA) notify property owners of any soil contamination that extended beyond a facility’s property boundaries and poses a threat of public exposure above a specified threshold. For ground water contamination that poses a threat of public exposure, notice must be given to owners of the water systems and the properties affected. Similarly, the Act requires notice when IEPA refers a situation for enforcement or performs an immediate removal. This notice must be given to property owners within 2500 feet, or a distance determined by IEPA, and to county officials.

The act does not mandate the notification method; rather, it states that the method required “shall be determined in consultation with members of the public and appropriate members of the regulated community.” Suggested methods include personal notification, public meetings, signs, electronic notification, and print media. The notification may contain the name and address of the facility, the name of the contaminant released, a specification of whether the contaminant was released or suspected of release, a brief description of the potential adverse health effects, recommendations that the impacted wells be tested, and contact information for a person at IEPA. The law required IEPA to create an internet database of chemical facility information indexed and searchable by notification date, zip code, site or facility name, and geographic location.

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210 415 ILL. COMP. STAT. 5/25d-3(a)(1).

211 Id. at 5/25d-3(a)(2).

212 Id. at 5/25d-3(b); Cornbleet, supra note 209, at 13.

213 415 ILL. COMP. STAT. 5/25d-3(b), (c).

214 Id. at 5/25d-3(c).

215 Id.

216 Id. Reasonable notification costs must be paid for by the potentially responsible party (PRP), but a PRP with an approved community relations plan may use their own agency-approved notifications in lieu of notifications written by IEPA. Id. at 5/25d-3(c)–(d).

EPA databases containing similar information about releases in Illinois.\textsuperscript{218}

Illinois’s right-to-know law requires a direct warning to the public and a description in plain language of the chemicals’ health effects; New Jersey, California, and Massachusetts laws, unlike that in Illinois, fail to include both of these elements.\textsuperscript{219} Illinois, like TRI, allows for easy comparisons between facilities by utilizing the most accessible medium of full public disclosure, the internet.\textsuperscript{220} In addition, there is no showing of public endangerment necessary to gain access to information, thus avoiding Massachusetts’s flaw.\textsuperscript{221} Illinois law provides access that is useful to communities by utilizing the advantages seen in New Jersey and the federal TRI, but it may not spur the agency disclosure seen in California because it has no exemption for facilities posing no significant risk.\textsuperscript{222}

VI. NAVIGATING PREEMPTION: OPTIONS AND BOUNDARIES FOR STATE LAWS

While the debate continues on whether information disclosure should remain a local issue or be under federal control, states currently have the ability under the Tenth Amendment of the U.S. Constitution and EPCRA’s preemption clause to implement reporting and disclosure requirements that best complement the state’s goals.\textsuperscript{223} This ability is not without limitations because a state law cannot conflict with the federal law by making it physically impossible to comply with both, nor may it serve as a barrier to the federal law.\textsuperscript{224} The Critical Infrastructure Information Act of 2002 (CIIA) and the Safe Drinking Water Act (SDWA) are sources of possible federal preemption regarding the dissemination of information that identifies the specific location of chemical facility infrastructure to the general public under a state’s full disclosure scheme.\textsuperscript{225}

\begin{itemize}
\item \textsuperscript{218} 415 ILL. COMP. STAT. 5/25d-5; see also IEPA, Notifications, supra note 217.
\item \textsuperscript{219} See supra Parts V.A–C.
\item \textsuperscript{220} 415 ILL. COMP. STAT. 5/25d-5; see supra Part IV.C.
\item \textsuperscript{221} See supra Part V.C.
\item \textsuperscript{222} 415 ILL. COMP. STAT. 5/25d-3, 5/25d-3; see supra Parts IV.B–C, V.A, V.B.
\end{itemize}
CIIA and EPCRA both contain clauses addressing a state’s ability to require disclosure of additional information. EPCRA explicitly states that it does not preempt the field, thus maintaining an avenue for states to promulgate their own reporting requirements as done by California, Illinois, Massachusetts, and New Jersey. CIIA, while preempting states from requiring disclosure of voluntarily submitted infrastructure information, maintains that the information can be made available through legal means other than FOIA, ex parte communications, civil action without written consent, and state and local disclosure of information or records laws. For example, the Maine Public Utilities Commission requires that maps of specified public utility infrastructure be filed with the state. In a recent dispute, the Commission dismissed AT&T’s argument that such information did not need to be submitted under CIIA by affirming that CIIA “does not limit the ability of a state agency to obtain such information independently.”

The SDWA excludes vulnerability assessments from public disclosure. A state law requiring public disclosure of vulnerability assessment information will likely be preempted by SDWA because it would be in direct conflict with the SDWA’s purpose to keep this information from the public by exempting it from FOIA. While public access to this information could aid safety by motivating communities to negotiate with facilities to improve safety and security measures, state legislation disclosing vulnerability assessments would likely directly conflict with the federal statute prohibiting disclosure.

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228 6 U.S.C. § 133(c). The Department of Homeland Security rejected a suggested loophole for civil discovery, but the Department acknowledged the possibility that the Act may not protect independently existing information obtained for civil litigation from a source other than CII records, and that those records may be used in litigation. See Procedures for Handling CII, 71 Fed. Reg. 52,252, 52,264–65 (Sept. 1, 2006) (final rule for 6 C.F.R. pt. 29).
230 Id. at 2 n.1.
233 See 42 U.S.C. § 300i-2; Gade, 505 U.S. at 99–100; Bagley, supra note 2, at 88–89 (arguing for full public disclosure of benchmarks which indicate a vulnerability ranking for a specific facility in order to increase chemical plant safety). Similarly, facilities covered by the Maritime Transportation Security Act of 2002 require vulnerability assessments for
While many public disclosure laws concerning infrastructure information may be preempted, there is an opening for state legislation to make this information available to first responders. Ohio Chamber of Commerce v. State Emergency Response Commission demonstrates the ability of states to require infrastructure information about the exact location of hazardous chemicals for purposes of preparing emergency responders, such as firefighters.

Despite a potential conflict with the dissemination of vulnerability assessments and infrastructure information, requiring additional data reporting and providing readily interpretable information—such as health effects caused by a chemical—should not conflict with federal legislation. This information is not explicitly prohibited from public disclosure under CIIA, SDWA, or FOIA. Often, additional health information will advance the federal government’s goals, including EPCRA’s purpose of providing the public with information concerning hazardous chemicals.

VII. Determining What Information to Disclose

If states implement right-to-know laws, they will likely need to balance the public’s need for access to information against legitimate security concerns as seen in CAA, SDWA, and CIIA. This section suggests what information should be disclosed to the public, what information may need to be withheld, and what information may need to be disseminated in a manner that reduces risk, but maintains community access to the information. To provide insight into various manners of balancing security information with the community’s right-to-know about hazardous chemicals, this section draws from DOJ’s
analysis of whether to disclose OCA data, techniques used for assessing vulnerability, and legislators’ past decisions.240

A. Facility Names, Chemicals Present, Health Effects, and Emergency Release Information Should Be Publicly Disclosed

The facility name, chemicals present, accident history, health effects of the chemicals, and emergency release notifications should be accessible to the public because the information poses a low security risk and provides a community benefit. The risk is low because many facility names and a description of the chemicals stored are currently available through EPCRA’s TRI.241 In addition, basic chemical facility information for many chemicals, not just those covered by TRI, can be found through other sources such as trade organization publications, company and professional organization websites, and telephone books.242 While the argument remains that this information is part of the analysis for selecting a chemical facility for attack, these are only two of the nine criteria needed, and neither of the two adds substantive information that aids in identifying a facility’s greatest vulnerabilities.243 As noted by the U.S. District Court for the District of Massachusetts, similar information has been available in New Jersey for decades and has not resulted in an attack.244

Disclosure of chemical facility identities and the chemicals present therein poses a security risk, but is essential to all theories underlying public disclosure.245 Without knowing the facility responsible for a release, communities are impeded from negotiations to mitigate the facility’s negative effects.246 Massachusetts and California are examples of state reporting laws that do not include public disclosure of

240 See generally DEP’T OF JUSTICE, supra note 56; NIJ, supra note 140; supra Parts II, V (describing past legislative actions at the federal and state level). This Note’s conclusions are not intended as rules or standards, but rather as reflection on past legislative considerations at the federal and state level based on the tension between national security and communities’ right-to-know.
241 See 42 U.S.C. §§ 11023, 11044 (EPCRA only covers listed chemicals above a specific threshold); U.S. EPA, TRI Explorer, supra note 120.
243 See DEP’T OF JUSTICE, supra note 56, at 39; NIJ, supra note 140, at 20–21; supra Part IV.A.
245 See supra Part IV.B–C (describing rationales underlying public disclosure).
246 See supra Part IV.B–C.
the individual chemical facility names. The use of anonymous newspaper advertisements under Proposition 65 has been criticized as not providing the information that citizens need to reduce hazards. The Massachusetts right-to-know law requires a citizen to establish grounds for asserting that a facility poses a risk to the community. This standard may be why the law has had unsatisfactory results. State regulations that require facilities to identify themselves—and the chemicals they possess—can avoid the faults of California and Massachusetts legislation, while not creating additional security risks.

Because of information available in the public realm, augmenting the list of chemicals reported should not pose a security threat and would provide a benefit by imposing market pressure to decrease the use of harmful chemicals. Similarly, lowering TRI reporting may decrease the security risk by lowering the quantities of hazardous chemicals used. Additionally, when the federal government proposed to increase the threshold, it cited the burden of reporting, rather than any national security considerations, indicating that higher thresholds are not directly related to national security.

The accident history of a facility, the health consequences of the chemicals present, and notification of releases should also be disclosed to the public. None of these items are specifically identified as among the criteria used to select a chemical facility as a potential target. The accident history has been available under CAA for years, and larger accidents are often reported by the media; thus terrorist groups can acquire much of the information through alterna-

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248 Rechtschaffen, supra note 184, at 335–36.
250 See id.; MCLE, supra note 197, at § 21.7.1.
255 See N.J. Stat. Ann. § 34:5A–1 (West 2000) (providing an example of how to combine these elements as part of a state right-to-know law); see also Lawlor, No. 86-2516-Mc, 1988 U.S. Dist. LEXIS 15671 at *4 (noting the minimal security risk created by New Jersey’s right-to-know law).
256 See Dep’t of Justice, supra note 56, at 38–39.
tive means. Similarly, the health effects of a specific chemical can be researched independently through scientific journals or a simple Google search. In addition, despite the assessment of Off-Site Consequence Analysis (OCA) by DOJ and the events of September 11, 2001, the accident history reports remain easily accessible on the internet, indicating that public access to this material is not a security concern.

For citizens, having access to accident histories allows for comparisons with other facilities, and furthers their ability to persuade facilities to improve their environmental performance. The importance of informing citizens of health risks in plain language is demonstrated by SDWA’s consumer reports, New Jersey’s fact sheets, and Illinois’s right-to-know law. Utilizing plain language is important because the public is more likely to be able to use interpreted information than raw data. Legislatures have deemed notification of a release a necessary disclosure as indicated by SDWA’s consumer reports, Illinois’s notices, and EPCRA’s emergency notification. Notification of a chemical release has been the focus of legislation because people have an obvious interest in knowing whether a release will affect them or their property. States should follow Illinois’s lead by requiring mailings or notices to the individuals affected rather than only requiring a notice to the LEPC as allowed by EPCRA. Because of the seemingly limited security risk associated with this information and the benefit provided


259 See ECHO, supra note 257. See generally DEP’T OF JUSTICE, supra note 56.

260 See Johnson, supra note 152, at 149–56.


263 See 42 U.S.C. §§ 300g-3(c), 11004; 415 ILL. COMP. STAT. 5/25d-3(c).


265 See 42 U.S.C. §§ 300-g(c)(4), 11004; 415 ILL. COMP. STAT. 5/25d-3(b).
to citizens, this information should be fully disclosed to the public, ideally through an internet-accessible database.\(^{266}\)

**B. Chemicals’ Locations and Facility Layouts Should Be Disclosed to Emergency Personnel but Not to the Public**

Information regarding facility layout and the location of chemicals within a plant poses a higher security risk and provides minimal community benefit.\(^{267}\) This information is critical for attacking a plant and identifying the facility’s vulnerabilities.\(^{268}\) A facility layout may indicate barriers to entry that are a factor in determining the vulnerability of an area.\(^{269}\) Similarly, the location of the chemical, in conjunction with information about a barrier, would allow for identification of the chemical that would cause the most damage with the least amount of effort.\(^{270}\) The sensitive nature of this information is also reflected in the option to remove specific location information from public disclosure under EPCRA’s tier II form.\(^{271}\) This factor may also have been a consideration for New Jersey when it removed its Community Right-to-Know surveys—which identified the location of the chemicals—from the internet.\(^{272}\)

Despite a potential security risk, this more sensitive information must be disclosed to emergency personnel.\(^{273}\) The case *Ohio Chamber of Commerce v. State Emergency Response Commission* centered on emergency response personnel obtaining a map of the facility with the chemicals’ locations identified.\(^{274}\) The Ohio Fire Chiefs’ Association’s brief of amicus curiae advocated that the requirement of a map or site plan depicting the locations of hazardous chemicals is necessary to effectively plan for a chemical emergency.\(^{275}\) The amicus brief described the need for the map as “critical to averting loss of life or

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\(^{266}\) See Beierle, *supra* note 150, at 336–37.

\(^{267}\) See *infra* Part VII.B.

\(^{268}\) See *Dep’t of Justice, supra* note 56, at 38–39; *NIJ, supra* note 140, at 16–18, 20–22.

\(^{269}\) See *NIJ, supra* note 140, at 16–18, 20–22.

\(^{270}\) Id.


\(^{272}\) See *OMB Watch, supra* note 179; *N.J. Dept. Envtl. Prot., supra* note 179.

\(^{273}\) See *Brief for Ohio Fire Chiefs’ Ass’n, Inc. as Amicus Curiae Supporting Appellant at 9–16, Ohio Chamber of Commerce v. State Emergency Response Comm’n, 597 N.E.2d 487 (Ohio 1992) (No. 91–1507).*


\(^{275}\) See *Brief for Ohio Fire Chiefs’ Ass’n, Inc. as Amicus Curiae Supporting Appellant, supra* note 273, at 9.
property.” EPCRA accounts for emergency personnel needs by granting them access to location information contained on tier II forms even if the facility chooses not to disclose the information to the general public. Emergency responder advocates claim that the thresholds for reporting are too high and that information regarding all chemical storage should be reported. This claim suggests a need for state legislation providing full information to emergency personnel at lower thresholds than EPCRA requires.

C. Specific Security Measures and Vulnerability Assessments Should Not Be Publicly Disclosed

Specific facility security measures and vulnerability assessments including this information should not be disclosed; this information is critical to planning an attack at a facility and helps to identify the most vulnerable locations. This information was not previously available through other reporting requirements—such as EPCRA or CAA—and would likely be difficult to access through other means. Legislatures have repeatedly attempted to keep this information from public disclosure. Federal legislation requiring vulnerability assessments such as CIIA, SDWA, and the Maritime Transportation Security Act include FOIA exemptions, thus potentially preempting state regulations requiring full disclosure of this information for facilities with voluntarily submitted critical infrastructure information, or regulated by SDWA or Marine Transportation Act.

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276 Id. at 10.
279 See id.
280 See Dep’t of Justice, supra note 56, at 38–39; NIJ, supra note 140, at 16–18, 20–22.
281 See 42 U.S.C. §§ 7412, 11001; see also Jacobson, supra note 48, at 389–91 (discussing vital information available online, but failing to mention that vulnerability assessments and security measures are similarly available).
D. Vulnerability Zone Information Should Be Disclosed but in a Manner That Reduces the Risk of Illicit Use

Knowledge of the vulnerability zone is a critical element for identifying a target, but also involves strong public disclosure interests.284 The OCA data reported under CAA 112(r) posed similar equities that were resolved by maintaining access to some of the information while reducing its risk of illicit use; similar solutions may be useful at the state level, maintaining access to specific hazardous chemical information while reducing the risk of “one-stop shopping” for terrorists and others.285

Maps of the vulnerability zone and the information necessary to create a map were cited as the highest risk information contained in OCA data.286 Community disclosure is one method utilized with OCA data that states could use to inform the public while reducing a security risk.287 Community disclosure reduces “one-stop shopping” because it is more difficult to compare facilities over a large geographic range from anywhere in the world.288 Although community disclosure may prevent comparative analysis, if other information such as accident history and a chemical inventory are accessible via the internet, communities can still compare data and negotiate with chemical facilities.289

Community disclosure can be implemented by utilizing a computer program such as the Vulnerable Zone Indicator System (VZIS) or SDWA’s consumer reports.290 Community disclosure should seek to notify persons living within a vulnerability zone and inform them about the potential health effects of the chemicals stored and the facility’s safety record.291 Providing interpretable information to citizens would reduce the information chase that EPA’s electronic mail initiates by not identifying the source of the risk, and avoid the bar of having to know about a danger in order to receive more information as Massachusetts requires.292 Thus the form would mimic that used by

285 See supra Part II.B (discussing the balance between national security and the public’s right-to-know).
286 See Dep’t of Justice, supra note 56, at 38.
287 See supra Part II.B.
288 See Dep’t of Justice, supra note 56, at 45.
289 See supra Part IV.B–C.
290 42 U.S.C. § 300g-3(c) (4) (B) (2000); VZIS, supra note 64.
291 See supra Part IV.B–C.
Illinois to alert people within an area that could be affected by a release.\footnote{See 415 ILL. COMP. STAT. 5/25d-3 (2005).}

**Conclusion**

Influenced by private sector concerns, TRI threshold requirements are being increased, and federal legislation concerning chemical facility security is constantly proposed and rejected.\footnote{Toxics Release Inventory Burden Reduction Final Rule, 71 Fed. Reg. 76,932 (Dec. 22, 2006) (to be codified at 40 C.F.R. § 372); S. 2145, 109th Cong. (2006) (proposing that many chemical facilities should conduct vulnerability assessments and emergency response plans); Charlie Savage, Chertoff Touts Chemical Plant Plan, BOSTON GLOBE, Mar. 22, 2006, at A2.} In this ever-changing atmosphere, states maintain the ability to supplement EP-CRA and maintain or enhance the dissemination of information to communities. With TRI being heralded as an effective method of decreasing toxics, state efforts at maintaining tough public disclosure requirements may continue to ensure safer facilities. By requiring information that is beneficial to local communities while respecting legitimate security concerns, states can reduce the hazards present and decrease chemical facilities’ attractiveness as terrorist targets.