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THE UNCERTAIN FUTURE OF CITIZEN SUITS UNDER EPCRA: CAN CITIZENS SUE FOR PAST VIOLATIONS OF THE STATUTE'S REPORTING REQUIREMENTS?

I. INTRODUCTION

In the biblical tale of David and Goliath, a powerless underdog took on a mighty giant. The fearsome Goliath disdained David because of his youth and inexperience, but David used the limited resources of a stone and the power of his faith to fell Goliath and win the day.¹ An analogous story has developed in the growing arena of environmental law, where a constant battle rages between the powerless citizen, seeking to enforce a variety of compliance standards, and the corporate giant, seeking to escape liability despite society's increasing sensitivity to environmental destruction.

When Congress enacted the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986,² it tried to alleviate the struggle between the Davids and Goliaths of the environmental battleground. EPCRA arms citizens with the powerful tool of essential information on hazardous substances by providing a stringent set of reporting requirements for corporations dealing with hazardous substances.³ These requirements result in publicly available disclosure forms, which alert citizens to the threats presented by such substances.⁴ Further, the requirements allow communities to create response plans in the event of hazardous emergencies.⁵

Although EPCRA has several enforcement sections,⁶ the

1. See 1 *Samuel* 17:1-54.

2. Pub. L. No. 99-499, 100 Stat. 1728 (codified at 42 U.S.C. §§ 11001-11050 (1994)).

3. See 42 U.S.C. §§ 11021-11023.

4. See *id.* §§ 11021(c)(2), 11022(e)(3), 11023(h), 11044.

5. See *id.* § 11003.

6. See *id.* §§ 11045-11046. These sections provide the Administrator of the Environmental Protection Agency (EPA) with primary authority to enforce the Act, while giving states, local governments, and citizens certain judicial access should the EPA fail to act. See *id.* The provisions allow the EPA and others to order facilities

citizen-suit provision⁷ is one of the most frequently litigated. Because of ambiguities within the provision, citizens have encountered several obstacles while pursuing industry compliance with the Act.⁸ One of the more significant issues within the Act's citizen-suit provision is whether citizens may bring suit for reporting violations that are wholly past and have been corrected before a citizen suit is filed.

EPCRA's citizen-suit provision allows "any person [to] commence a civil action . . . against . . . [a]n owner or operator of a facility for failure to . . . [c]omplete and submit an inventory form under section 11022(a) . . . [or] [c]omplete and submit a toxic chemical release form under section 11023(a)."⁹ The absence of specific timing requirements within the citizen-suit provision has perplexed courts: Can a facility preclude a citizen's suit by filing the requisite forms after receiving notice of the intent to sue¹⁰ but before a lawsuit has been filed with the court? On one hand, the provision seems to require only that facilities complete and submit the required forms before the citizen's suit has been filed with the court.¹¹ On the other hand, the provision also refers to 42 U.S.C.

to comply with the Act's requirements. *See id.* In the event of noncompliance, facilities may be assessed civil, administrative, and criminal penalties. *See id.* § 11045.

7. *See id.* § 11046(a)(1).

8. *See* Eric M. Falkenberry, *The Emergency Planning and Community Right-to-Know Act: A Tool for Toxic Release Reduction in the 90's*, 3 BUFF. ENVTL. L.J. 1, 15-21 (1995). Among the difficulties confronting citizens bringing enforcement actions are (1) proving "injury in fact," *see* Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp., No. 90-CV-1109S, 1993 WL 114676, at *2-7 (W.D.N.Y. Mar. 31, 1993), and (2) proving that the citizen suit is not an unconstitutional delegation of power under the separation-of-powers doctrine. *See* Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132, 1136-38 (E.D. Pa. 1993).

9. 42 U.S.C. § 11046(a)(1).

10. EPCRA requires citizens, prior to filing suit, to give notice to the alleged perpetrator. *See id.* § 11046(d) ("No [citizen suit] may be commenced under subsection (a)(1)(A) of [the] section prior to 60 days after the plaintiff has given notice of the alleged violation to . . . the alleged violator.").

11. After receiving notice of the citizen's intent to sue, a facility has 60 days to correct its failure to annually file the required forms. Yet this reality is disconcerting in that the "failure to file" is rarely an administrative oversight but rather a deliberate effort by a corporation to avoid filing forms that could subject them to additional costly environmental regulation and, perhaps worse, bad publicity. *See, e.g.,* Robert W. Shavelson, *EPCRA, Citizen Suits and the Sixth Circuit's Assault on the Public's Right-to-Know*, 2 ALB. L. ENVTL. OUTLOOK 29, 37-38 (1995) (stating that if facilities need only complete and submit the required forms before a citizen suit has been filed, violators will wait as long as they can to comply with the requirements, thereby avoiding enforcement and maintaining a competitive advantage over their counterparts who do comply with the timing requirements). For a discussion of the potential for bad publicity and exposure to additional liability that results from EPCRA re-

§§ 11022(a) and 11023(a), which require the annual submission of forms,¹² thereby providing a basis for the argument that companies also need to comply with the timing provisions in order to avoid a citizen suit. The answer is critical, for if companies need only complete the required forms prior to the filing of a suit, the citizen-suit provision is meaningless and gives no incentive for the Davids of the environmental arena to initiate enforcement proceedings.

Several courts have sought to resolve the difficult issue of whether citizens may sue for wholly past violations of the Act—infractions that continue after rogue facilities receive the required sixty-day notice letter from citizens intending to bring suit but are corrected before an EPCRA suit is filed.¹³ Three federal district courts addressed the matter, each holding that citizens may sue facilities under the Act for past failures to comply with the reporting provisions of the statute that are cured before the actual suit is filed.¹⁴ In 1995, however, the Sixth Circuit Court of Appeals reached a different result in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*¹⁵ Unlike the three district court decisions, the Sixth Circuit reasoned that the “plain language and structure of EPCRA lead us to conclude that citizen plaintiffs may not bring actions . . . for purely historical violations.”¹⁶ Thus, the *Atlantic States* opinion construed the EPCRA citizen-suit provision in a way that diminished the might of the citizen suit in EPCRA enforcement.

Recently the issue of EPCRA citizen suits was muddled yet again when the Seventh Circuit, in *Citizens for a Better Environment v. Steel Co.*,¹⁷ held that citizens could sue for past violations under the Act even after violators had submitted overdue filings.¹⁸

porting, see discussion *infra* notes 265-74 and accompanying text.

12. See 42 U.S.C. §§ 11022(a)(2), 11023(a). “[Hazardous chemical] inventory form[s] . . . shall be submitted on or before March 1, 1988, and annually thereafter on March 1, and shall contain data with respect to the preceding calendar year,” *id.* § 11022(a)(2), while “toxic chemical release form[s] . . . shall be submitted . . . on or before July 1, 1988, and annually thereafter on July 1 and shall contain data reflecting releases during the preceding calendar year.” *Id.* § 11023(a).

13. See Falkenberry, *supra* note 8, at 19 n.98.

14. See *Delaware Valley*, 813 F. Supp. at 1141; *Williams v. Leybold Tech., Inc.*, 784 F. Supp. 765, 770 (N.D. Cal. 1992); *Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 753 (W.D.N.Y. 1991).

15. 61 F.3d 473 (6th Cir. 1995).

16. *Id.* at 478.

17. 90 F.3d 1237 (7th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3581 (U.S. Feb. 25, 1997) (No. 96-643).

18. See *id.* at 1244.

The court found that this interpretation was consistent with the legislative intent underlying EPCRA,¹⁹ conformed to the most natural reading of the statute's wording,²⁰ and gave meaning to the citizen-suit provision as a whole.²¹ The *Citizens* decision resolved the issue of citizen suits under the Act consistent with the previous district court decisions but contrary to the Sixth Circuit's interpretation. Therefore, a split exists among the circuits on the issue of citizen suits under EPCRA. Recently, the United States Supreme Court granted review of the *Citizens* decision²² and will soon determine which of the two courts' interpretations of the provision is correct. In order to ensure that EPCRA's provisions are given full effect and substance, the Supreme Court must conclude that citizens can hold facilities liable for *all* violations, past or present, and thereby discourage corporations from contravening EPCRA's mandates.

This Comment examines the debate and proposes a solution to the split among the circuits. Part II surveys the purposes and provisions of EPCRA and summarizes the district court decisions preceding the circuit courts' conflicting opinions. Part III addresses the circuit split by first examining the rationale of the Sixth Circuit in the *Atlantic States* decision and then scrutinizing the *Citizens* decision by the Seventh Circuit. After describing the sources of the circuit split, Part III identifies the common ground shared by the two decisions, which is the reliance by both courts on the 1987 Supreme Court case, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*²³ In *Gwaltney* the Court confronted citizen suits for past violations of the Clean Water Act²⁴ and thereby set a precedent for future cases related to citizen-suit provisions contained in environmental statutes. Part IV employs the *Gwaltney* methodology to resolve the EPCRA citizen-suit issue. Finally, this Comment concludes that the proper resolution of the citizen-suit issue permits citizens to bring suits for wholly past violations of EPCRA.

19. See *id.* at 1243 n.2.

20. See *id.* at 1242-44.

21. See *id.* at 1244.

22. See 65 U.S.L.W. 3581 (U.S. Feb. 25, 1997) (No. 96-643).

23. 484 U.S. 49 (1987).

24. See *id.* at 52-56. The Clean Water Act is codified at 33 U.S.C. §§ 1251-1387 (1994).

II. THE BACKGROUND OF THE CIRCUIT COURT SPLIT

A. *The Emergency Planning and Community Right-to-Know Act of 1986*

1. Reasons underlying the act's passage

In 1986 Congress enacted EPCRA²⁵ as an independent law found in Title III of a more comprehensive environmental enactment, the Superfund Amendments and Reauthorization Act of 1986 (SARA).²⁶ EPCRA furthers two distinct but equally important purposes. First, each state must establish state and local emergency planning bodies to promulgate emergency response plans in the event of accidental chemical releases from industrial facilities.²⁷ Second, industrial facilities must compile accurate information disclosing the use, storage, and release of toxic chemicals at their premises and must make such information readily available to the public.²⁸

Congress enacted EPCRA for several reasons. First, the Act was a reaction to the 1984 international disaster in Bhopal, India, when a toxic chemical release at a Union Carbide pesticide plant killed over 2000 people.²⁹ Considered one of the worst industrial disasters of modern times, the tragedy occurred when forty-five tons of the toxic chemical methyl isocyanate leaked from a faulty storage tank.³⁰ Subsequent reports revealed that a plant inspection made two years prior to the spill discovered "ten potentially major safety deficiencies, as well as a number of other irregularities."³¹ In hindsight, many officials attributed the disaster to those problems.³²

During congressional floor debate prior to the Act's passage,

25. 42 U.S.C. §§ 11001-11050.

26. Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 10 U.S.C., 26 U.S.C., and 42 U.S.C.).

27. See 42 U.S.C. §§ 11001-11005. This requirement constitutes the "Emergency Planning" component of the Act. See Falkenberry, *supra* note 8, at 4-5.

28. See 42 U.S.C. §§ 11021-11047. This composes the "Community Right-to-Know" component of the Act. See Falkenberry, *supra* note 8, at 8.

29. See Steven J. Christiansen & Stephen H. Urquhart, *The Emergency Planning and Community Right to Know Act of 1986: Analysis and Update*, 6 BYU J. PUB. L. 235, 235 (1992).

30. See Pico Iyer, *Clouds of Uncertainty: For Bhopal and Union Carbide, the Tragedy Continues*, TIME, Dec. 24, 1984, at 24.

31. *Id.* at 27.

32. See *id.*

EPCRA sponsors reiterated concerns that the Bhopal tragedy had raised:

We are but one short year from Bhopal, India. A leaky storage tank, an early morning emergency, . . . a pall of white smoke that spread with the wind, poisoning human beings as if they were insects. Over 2,000 people died, over 200,000 people were maimed or injured. Bhopal was in India, but it was an American company operating in a replica of an American plant.³³

Indeed, the Bhopal disaster had significant international repercussions,³⁴ such as motivating Congress to seek a means of avoiding such a tragedy closer to home.³⁵

A second event prompting Congress to pass EPCRA was another chemical release after Bhopal that reinforced the need for emergency release provisions. In 1985 a leak at the Union Carbide plant in Institute, West Virginia, formed a toxic gas cloud over the community, sending almost 200 residents to seek medical attention.³⁶ The company attributed the leak to a valve failure caused by a buildup of pressure in a storage tank containing 500 pounds of aldicarb oxime, a gas derived from the chemical that had leaked at the Bhopal plant.³⁷ Investigators were even more alarmed to learn that the West Virginia plant had only recently resumed production after a five-month closure for installation of five million dollars in safety equipment, a response to the Bhopal disaster.³⁸ As a result, the administrator of the Environmental Protection Agency (EPA) communicated a "sense of urgency" in the need to tighten general

33. 131 CONG. REC. 34,763 (1985) (statement of Rep. Gerry E. Sikorski (D-Minn.)).

34. See Jayadev Chowdhury, *Bhopal, a Year Later: Learning from a Tragedy*, CHEMICAL ENGINEERING, Dec. 9, 1985, at 14. "Many Bhopal-inspired laws, covering such aspects as stricter controls and penalties on accidental emissions, emergency-response procedures and community right-to-know laws, have been making headway in legislatures throughout the world." *Id.* For example, in the Tarragona and Huelva regions of Spain, where more than half of the country's chemical industries are located, concern about chemical hazards led to pressure from various communities to hurry the adoption of an environmental safety plan that had been in progress for three years. *See id.*

35. See 131 CONG. REC. 34,640 (1985) (statement of Rep. M. G. (Gene) Snyder (R-Ky.)) ("In response to the Bhopal . . . crisis, [the Act] provides for comprehensive community right-to-know and emergency response programs.").

36. See Karen Tumulty, *Scores Hurt by Leaking Chemicals: Faulty Valve Cited at Union Carbide's West Virginia Plant*, L.A. TIMES, Aug. 12, 1985, at A1.

37. *See id.*

38. *See id.*

safety measures.³⁹

A third reason motivating Congress to pass EPCRA was the gravity of the problem: studies had shown that the number of chemical accidents in the United States was significant. One 1985 publication claimed that "[i]n America . . . 60,000 chemicals are produced in over 6,000 communities and last year alone we had 5,700 toxic chemical accidents."⁴⁰ Prior to the Bhopal and Institute disasters, no comprehensive national plan existed that could provide the government and, more importantly, citizens with important information concerning hazardous chemicals in their communities as well as methods of protection in the event of an emergency.⁴¹

The potential for another Bhopal in the United States was alarmingly real.⁴² The two disasters and the toxic chemical statistics motivated Congress to pass EPCRA, a law that would "provide for the development of local emergency response plans . . . [,] give important information . . . about hazardous chemicals present at facilities . . . [,] [a]nd . . . require that people be informed of hazardous chemicals that are present in their communities."⁴³

2. EPCRA's key provisions

a. emergency planning and notification

EPCRA consists of three distinct sets of provisions.⁴⁴ First,

39. *Under a Noxious Cloud of Fear: A Toxic Gas Leak Rocks "Chemical Valley" Residents*, TIME, Aug. 26, 1985, at 13.

40. 131 CONG. REC. 34,763 (1985) (statement of Rep. Gerry E. Sikorski (D-Minn.)).

41. Three significant statutes enacted prior to SARA and EPCRA address hazardous waste: the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692 (1994); the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992(k); and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675. Although each statute regulates the testing, storage, management, and clean-up of toxic and hazardous wastes, none require public disclosure of the presence of hazardous waste at premises or provide emergency planning in the event of hazardous substance mismanagement.

42. See Jayne S.A. Pritchard, *A Closer Look at Title III of SARA: Emergency Planning and Community Right-to-Know Act of 1986*, 6 PACE ENVTL. L. REV. 203, 203-05 (1988) (discussing the concern that no federal agency had authority over the types of chemical releases similar to that which had occurred in Bhopal despite the fact that numerous toxic chemical accidents had occurred in the United States between 1980-1985 and had resulted in many deaths and injuries).

43. 132 CONG. REC. 29,761 (1986) (statement of Rep. Al Swift (D-Wash.)).

44. Subchapter I, containing emergency planning and notification provisions, is codified at 42 U.S.C. §§ 11001-11005; Subchapter II, consisting of reporting require-

the emergency planning and notification provisions require each governor to establish state commissions, planning districts, and local committees,⁴⁵ all of which are instructed to develop emergency response plans in the event of chemical releases.⁴⁶ In turn, facilities that produce, use, or store hazardous chemicals are required to provide notice to the local emergency planning committees that they are subject to EPCRA's emergency planning provisions.⁴⁷ The facilities must also give immediate notice in the event of any release of either an extremely hazardous substance as defined in EPCRA or a nonextremely hazardous substance that nonetheless requires notification under other environmental statutes.⁴⁸

b. reporting requirements

The second important component of EPCRA is the community right-to-know subchapter, which is composed of the various reporting requirements. Prior to EPCRA's passage, the reporting requirements subchapter was hailed during floor debates as the best means of preventing another Bhopal.⁴⁹ The provisions specify

ments, is codified at *id.* §§ 11021-11023; Subchapter III, containing general provisions, is codified at *id.* §§ 11041-11050.

45. *See id.* § 11001. At 42 U.S.C. § 11001(c), which obligates the state emergency response commissions to establish local emergency planning committees, EPCRA requires each planning committee to include owners and operators of facilities subject to EPCRA's requirements. *See id.* § 11001(c).

46. *See id.* § 11003.

47. *See id.* § 11002(c). A facility is subject to the requirements of the Act if an "extremely hazardous substance" is present at the facility in an amount that exceeds an established threshold planning quantity. *See id.* § 11002(b). "Extremely hazardous substance" is defined as a substance present on a list published by the administrator of the EPA. *See id.* § 11002(a). This same list was published in 1985 in the Appendix of the Chemical Emergency Preparedness Program Interim Guidance. *See id.* § 11002(a)(2). EPCRA defines the threshold planning quantity of each substance, stating that "the Administrator shall publish an interim final regulation establishing a threshold planning quantity for each substance on the [extremely hazardous substances] list, taking into account . . . the toxicity, reactivity, volatility, dispersability, combustability, or flammability of a substance." *Id.* § 11002(a)(3), (4).

48. *See id.* § 11004. Specifically, this provision refers to substances not considered extremely hazardous but which nonetheless merit notification under section 103(a) of CERCLA. *See* 42 U.S.C. § 9603 (requiring persons to notify authorities immediately of any release of a hazardous substance in quantities as mandated in 42 U.S.C. § 9602).

49. *See* 131 CONG. REC. 34,759 (1985) (statement of Rep. Bob Edgar (D-Pa.)). As Pennsylvania Representative Bob Edgar stated in floor debate:

Now, in the aftermath of Bhopal and Institute, WV, we have become much more aware of the fact that many Americans are exposed on a daily basis to hazardous substances that can cause cancer and other long-term health problems

three required documents, which facility owners or operators must prepare: (1) material safety data sheets, (2) emergency and hazardous chemical inventory forms, and (3) toxic chemical release forms.⁵⁰ Further, EPCRA provides that owners and operators must prepare or make available material safety data sheets for each hazardous chemical present at their facilities.⁵¹ These documents, which include lists of the chemical names and their hazardous components,⁵² must be available to the public upon request.⁵³

The owner or operator of a facility that must prepare material safety data sheets must also file an emergency and hazardous chemical inventory form.⁵⁴ These inventory forms contain either "Tier I" or "Tier II" information.⁵⁵ Tier I information, which is the minimum data required on such forms, includes (1) an estimate of the maximum amount of hazardous chemicals present at a facility at any time during the calendar year; (2) an estimate of the average daily amount of such chemicals; and (3) the general location of the substances at the facility.⁵⁶ Tier II information, which must be provided only upon the request of state or local emergency planning committees, comprises (1) Tier I information; (2) a description of the storage mechanism for each chemical; and (3) an indication of whether the owner wishes to withhold location

....

Information about these health dangers is the basis of the right-to-know concept.

Id.; see also *id.* at 34,762 (statement of Rep. James J. Florio (D-N.J.)) ("[T]here is a very important function to be served by our long-term emission data records that we are going to keep to let the community know that we get information as to annual emissions of chronic as well as acute contaminants."). These remarks relate to the debate on the Edgar amendment to this subchapter, an amendment that expanded the reporting requirements to include substances that are known to cause or are suspected of causing chronic health effects in humans. See *id.* at 34,758. The amendment passed and is now reflected in 42 U.S.C. §§ 11002(a)(4) and 11023(d)(2)(B). "[T]he list shall take into account . . . any *short- or long-term health effect which may result* from a short-term exposure to the substance." 42 U.S.C. § 11002(a)(4) (emphasis added).

50. See 42 U.S.C. §§ 11021-11023.

51. See *id.* § 11021(a). The hazardous chemicals referred to in this provision include hazardous chemicals under the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678 (1994), as well as other chemicals that fall below a threshold established by the Administrator. See 42 U.S.C. §§ 11021(a)(1), (b).

52. See 42 U.S.C. § 11021(a)(2)(A).

53. See *id.* § 11021(c)(2).

54. See *id.* § 11022(a)(1).

55. See *id.* § 11022(d).

56. See *id.* § 11022(d)(1)(B).

information from public disclosure.⁵⁷ EPCRA also requires that "[t]he [emergency and hazardous chemical] inventory form . . . shall be submitted on or before March 1, 1988, and annually thereafter on March 1, and shall contain data with respect to the preceding calendar year."⁵⁸ The emergency and hazardous chemical inventory forms are a straightforward and significant element in EPCRA's reporting requirements.

The final reporting requirement is a toxic chemical release form. Again, the purpose is to inform planning committees as well as the public of potential hazards. The owner or operator of a facility must complete a toxic chemical release form for each toxic chemical released, whether by intentional use or by accident, into any environmental media in quantities exceeding an established threshold quantity.⁵⁹ Like the requirement for the inventory forms, EPCRA also contains a strict timing requirement for the toxic chemical release forms.⁶⁰ These forms are made available to the public by a computerized database, which the EPA prepares and maintains.⁶¹ This database, called the Toxics Release Inventory (TRI),⁶² is the "first chemical-specific, multi-media accounting of toxic releases . . . ever mandated by federal law."⁶³ Finally, EPCRA delineates the various uses for these reporting forms: to inform the public about toxic releases, to assist in research, and to aid in the development of appropriate standards and guidelines.⁶⁴ Compliance with each of these reporting requirements is integral to fulfilling EPCRA's purposes.

c. general provisions

The third and final subchapter of EPCRA contains provisions

57. *See id.* § 11022(d)(2), (e).

58. *Id.* § 11022(a)(2).

59. *See id.* § 11023(a). The threshold amounts are 10,000 pounds for toxic chemicals used at a facility and 25,000 to 75,000 pounds for toxic chemicals manufactured or processed at a facility, depending on when the toxic chemical release form must be submitted. *See id.* § 11023(f)(1)(A), (B).

60. *See id.* § 11023(a) ("Such form shall be submitted . . . on or before July 1, 1988, and annually thereafter on July 1 . . .").

61. *See id.* § 11023(j).

62. *See* David J. Abell, Comment, *Emergency Planning and Community Right to Know: The Toxics Release Inventory*, 47 SMU L. REV. 581, 582 (1994).

63. Sidney M. Wolf, *Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Act*, 11 J. LAND USE & ENVT'L. L. 217, 230 (1996).

64. *See* 42 U.S.C. § 11023(h).

that apply generally to the entire Act. Among these are provisions for "trade secret" protection;⁶⁵ a provision that health professionals may access confidential chemical information in order to provide medical treatment;⁶⁶ and a multitude of enforcement and liability measures.⁶⁷

Under the EPCRA enforcement provisions, federal, state, and local governments, as well as citizens, may compel facilities to conform to the statute's various requirements.⁶⁸ For example, the EPA Administrator, on behalf of the United States, may order facility owners or operators to comply with the statute's emergency planning requirements.⁶⁹ Failure to comply may result in liability of up to \$25,000 for each day in which a violation occurs or failure to comply continues.⁷⁰ Furthermore, facilities are subject to civil, administrative, and criminal penalties for failure to comply with the emergency notification provision.⁷¹ The enforcement provisions also impose similar civil and administrative penalties for violations of the various reporting requirements.⁷²

One of the enforcement provisions confers authority on state and local governments and citizens to bring civil actions.⁷³ Prior to the commencement of any such action, notice must be given to both the facility and the EPA,⁷⁴ which must not have initiated a similar proceeding.⁷⁵ Another significant aspect of the enforce-

65. *See id.* § 11042. The trade-secret provision allows facilities to withhold information about the "specific chemical identity" of a hazardous substance if such information is a "trade secret" as defined in the section. *See id.* § 11042(a)(1)(A), (2)(A). If such information meets the requirements, the only information a facility must supply is a "generic class or category" of the hazardous substance or chemical. *See id.* § 11042(a)(1)(B).

66. *See id.* § 11043. This section provides that upon request facilities must provide health professionals with the specific chemical identities of a toxic substance if the professional provides a written statement of need and an agreement for confidentiality. *See id.* § 11043(a). A statement of need must assert that such information is needed for diagnosis or treatment. *See id.* § 11043(a)(1). In addition, such information must be available if a medical official determines that a medical emergency exists or that preventative measures are necessary. *See id.* § 11043(b)-(c).

67. *See id.* §§ 11045-11046.

68. *See id.*

69. *See id.* § 11045(a) (referring to §§ 11002(c), 11003).

70. *See id.*

71. *See id.* § 11045(b). The emergency notification provision is discussed *supra* note 48 and accompanying text.

72. *See id.* § 11045(c).

73. *See id.* § 11046(a).

74. *See id.* § 11046(d).

75. *See id.* § 11046(e) ("No action may be commenced . . . if the Administrator

ment provisions is the discretion of courts, in issuing any final order, to award costs of litigation to the "prevailing or the substantially prevailing party" should such an award be appropriate.⁷⁶ Thus, the provisions provide substantial liability and establish a variety of enforcement mechanisms, which discourage corporations from violating EPCRA's requirements.

The EPA considers the enforcement provisions "an important vehicle" in attaining full compliance with EPCRA.⁷⁷ Unfortunately, given the sheer number of potentially liable facilities, the EPA lacks the resources to single-handedly assure complete enforcement.⁷⁸ Therefore, a potent citizen-suit provision in EPCRA is crucial to furthering the EPA's goals.

3. The citizen-suit provision

The citizen-suit provision of EPCRA authorizes citizens, or "any person" as designated by the provision, to bring civil enforcement actions.⁷⁹ The provision, permitting citizen suits against

has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty . . . with respect to the violation of the requirement.").

76. *Id.* § 11046(f). These costs of litigation include reasonable attorney and expert witness fees. *See id.*

77. Press Release from the Environmental Protection Agency, *EPA Seeks \$2.8 Million for Toxic Chemicals Release Reporting Violations* 1 (June 3, 1993) (on file with the *Loyola of Los Angeles Law Review*) (stating that enforcement actions "reflect EPA's determination to vigorously enforce the data reporting requirements of our environmental laws Only through an active and informed public can we protect human health and our natural resources. These reporting requirements are an important vehicle for this and must be enforced." (quoting EPA Administrator Carol M. Browner)); *see also* Falkenberry, *supra* note 8, at 2 ("The [EPA], realizing the importance of full compliance with EPCRA, has undergone an aggressive campaign . . . to enforce all requirements."). *But see* Wolf, *supra* note 63, at 270-76 (stating that while EPCRA's reach is far, its enforcement has been negligible, with the overwhelming tendency toward settlement).

78. *See, e.g.*, 131 CONG. REC. 34,637 (1985) (statement of Rep. James J. Florio (D-N.J.)) ("If EPA were aggressively implementing the existing law, many of the provisions of this bill would be unnecessary. But EPA has performed poorly"); Falkenberry, *supra* note 8, at 2 ("Unfortunately, it is estimated that there are several million facilities subject to EPCRA reporting requirements. The EPA simply lacks the resources to assure total enforcement over all facilities." (footnote omitted)).

79. 42 U.S.C. § 11046(a)(1). These citizen suits are divided into four groups of actions based upon the particular defendant's identity. In particular, the four groups of civil actions are against: (1) an owner or operator of a facility for failure to comply with the various requirements of the statute; (2) the Administrator of the EPA for failure to fulfill his or her duties under the Act; (3) the Administrator, a state governor, or a state emergency response commission for failure to provide a mechanism for public availability of information; and (4) a state governor or state emergency

facilities to enforce EPCRA's provisions, states that any person may commence a civil action on his own behalf against . . . :

(A) An owner or operator of a facility for failure to do any of the following:

(i) Submit a followup emergency notice under section 11004(c) of this title.

(ii) Submit a material safety data sheet or a list under section 11021(a) of this title.

(iii) Complete and submit an inventory form under section 11022(a) of this title containing tier [sic] I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason of the second sentence of section 11022(a)(2) of this title.

(iv) Complete and submit a toxic chemical release form under section 11023(a) of this title.⁸⁰

Despite the citizen-suit provision's specific language, several issues illustrate the inherent ambiguities of the statute.⁸¹

One such issue over which courts disagree is the meaning of the phrase "failure to . . . [c]omplete and submit" the forms required by EPCRA.⁸² The dispute has generated two distinct interpretations: (1) facility owners or operators are liable for failure to complete and submit the required forms annually—in other words, facilities may be liable for wholly past violations of the reporting requirements; and (2) owners or operators may escape liability by backfiling—completing and submitting any forms that have not been filed on an annual basis—any time prior to the commencement of a citizen's enforcement action.⁸³ This dispute over the in-

response commission for failure to respond to a request for Tier II information. See *id.* § 11046(a)(1)(A)-(D). This Comment does not address each group of actions but focuses primarily upon civil actions against owners or operators of a facility.

80. *Id.* § 11046(a)(1)(A).

81. Among these issues are: what constitutes an "injury in fact" under EPCRA; whether the citizen suit constitutes an unlawful delegation of executive power in contravention of the separation-of-powers doctrine and the Appointments Clause of the Constitution; whether attorney fees may be recovered; and what amount of research and discovery is required for citizens to identify EPCRA violations properly. For a discussion of the case law on each of these issues, see Falkenberry, *supra* note 8, at 16-21, and Shavelson, *supra* note 11, at 33-35.

82. 42 U.S.C. § 11046(a)(1)(A)(iii)-(iv).

83. See discussion *infra* Parts III.A (discussing the Sixth Circuit decision), III.B (discussing the Seventh Circuit's holding).

interpretation of facility liability under citizen actions confronted the Sixth Circuit in *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*⁸⁴ and the Seventh Circuit Court in *Citizens for a Better Environment v. Steel Co.*⁸⁵ The two decisions yielded a critical conflict that must be resolved if the citizen-suit provision is to have any consistent and substantive meaning in the future.

*B. The District Courts' Interpretations of EPCRA's
Citizen-Suit Provision*

Before the Sixth and Seventh Circuits confronted the citizen-suit issue, three district courts had interpreted the EPCRA provision. *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Manufacturing Corp.*⁸⁶ was the first opinion to address the issue of citizen suits for wholly past reporting violations. In that case, Atlantic States Legal Foundation, a citizens' environmental organization, brought an action against Whiting Roll-Up Door Manufacturing, an industrial facility, alleging that the defendant had failed to submit information in a timely manner as required by EPCRA.⁸⁷ Specifically, it claimed that Whiting failed to comply with the reporting requirements in 1987, 1988, and 1989.⁸⁸ Atlantic States conceded that the defendant had filed all required information as of the date of suit but maintained that EPCRA authorizes a citizen suit to recover civil penalties even when the defendant has "come into compliance . . . before the plaintiff commenced suit."⁸⁹ The defendant moved to dismiss and argued that the court lacked jurisdiction because the defendant had complied with the reporting provisions prior to the suit's commencement.⁹⁰

The court denied the defendant's motion to dismiss.⁹¹ The court held that, "based on the statute's plain language and the legislation's underlying purpose, which is well documented by its legislative history," EPCRA does indeed "authorize citizen suits for reporting violations which are not continuing at the time the law-

84. 61 F.3d 473 (6th Cir. 1995).

85. 90 F.3d 1237 (7th Cir. 1996) *cert. granted*, 65 U.S.L.W. 3581 (U.S. Feb. 25, 1997) (No. 96-643).

86. 772 F. Supp. 745 (W.D.N.Y. 1991).

87. *See id.* at 746.

88. *See id.*

89. *Id.*

90. *See id.*

91. *See id.*

suit is filed.”⁹²

The issue of EPCRA citizen suits for wholly past reporting violations appeared again in *Williams v. Leybold Technologies, Inc.*⁹³ In *Williams*, plaintiff Christopher Williams, a former process technician at the Leybold facility, sued Leybold and alleged that the facility had failed to timely submit a Material Safety Data Sheet as required by EPCRA for the nickel and nickel compounds that the facility used in its manufacturing operations.⁹⁴ Again, the defendant argued that because it was no longer in violation of the EPCRA requirements, Williams had no statutory authority for bringing a citizen suit.⁹⁵

The *Williams* court followed the lead of the *Whiting* court, which had looked to the legislative history and explicit text of EPCRA to determine the meaning of the citizen-suit provision.⁹⁶ In doing so, the *Williams* court concluded that “the legislative history and the plain language of the statute compel the conclusion that past violations are not exempt from EPCRA’s citizen suit [sic] provisions.”⁹⁷

In 1993 a third district court addressed the EPCRA citizen-suit issue. The court in *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*⁹⁸ responded to the defendant’s assertion that the court had no jurisdiction over wholly past violations of EPCRA, agreeing with the holdings of the *Whiting* and *Williams* courts.⁹⁹ The *Kurz-Hastings* court held that “42 U.S.C. § 11046(a)(1) does provide the federal courts with jurisdiction for wholly past violations of . . . EPCRA”¹⁰⁰ and that citizens could bring suit for past failures to comply even if the defendant had complied with

92. *Id.* at 749.

93. 784 F. Supp. 765 (N.D. Cal. 1992).

94. *See id.* at 766. EPCRA’s citizen-suit provision allows any person to bring an action against an owner or operator for failure to “[s]ubmit a material safety data sheet or a list under section 11021(a) of th[e] title.” 42 U.S.C. § 11046(a)(1)(A)(ii) (1994).

95. *See Williams*, 784 F. Supp. at 767-68.

96. *See Whiting*, 772 F. Supp. at 749.

97. *Williams*, 784 F. Supp. at 768.

98. 813 F. Supp. 1132 (E.D. Pa. 1993).

99. *See id.* at 1141.

100. *Id.* The court further validated EPCRA’s citizen-suit provision by finding that (1) the provision was a constitutional delegation of executive power since the executive branch retained authority under the Act to commence actions against alleged violators and (2) citizens met standing requirements for injury-in-fact merely by claiming they had suffered from a lack of information. *See id.* at 1138-40.

EPCRA prior to the filing of the complaint.¹⁰¹

After the court's decision in *Kurz-Hastings*, an apparent consensus existed among three United States district courts in New York, California, and Pennsylvania. That consensus appeared to resolve the citizen-suit issue; citizens could sue for wholly past EPCRA violations without violating the letter or spirit of the Act. In 1995, however, the Sixth Circuit issued an opinion that challenged the district court consensus of nearly four years.

III. THE CIRCUIT COURT SPLIT

A. *The Sixth Circuit's Decision in Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*

In *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*¹⁰² the Sixth Circuit Court of Appeals heard a citizen suit brought against a defendant for wholly past violations of EPCRA's reporting requirements.¹⁰³ The court disagreed with the holdings in *Whiting*, *Williams*, and *Kurz-Hastings*¹⁰⁴ and agreed with the defendant's argument that EPCRA does not authorize citizen suits for past violations that have been cured by the date the action commences.¹⁰⁵

1. Facts

The *Atlantic States* decision arose from a dispute between Atlantic States Legal Foundation (ASLF), a nonprofit organization,¹⁰⁶ and United Musical Instruments, U.S.A. (UMI), an Ohio manufacturer of musical instruments that utilized some of the toxic chemicals falling within the ambit of EPCRA.¹⁰⁷ In July 1992 ASLF informed UMI of its intention to file an enforcement action pursuant

101. *See id.*

102. 61 F.3d 473 (6th Cir. 1995).

103. *See id.* at 474.

104. *See* discussion *supra* Part II.B.

105. *See Atlantic States*, 61 F.3d at 475.

106. *See id.* at 474. Based in Syracuse, New York, ASLF is responsible for initiating most of the EPCRA citizen suits filed throughout the country. *See* Wolf, *supra* note 63, at 279. ASLF filed the first citizen suit against a corporate violator in July 1990 and by April of 1992 had sent notices of intent to sue to 30 alleged EPCRA violators. *See id.* at 279 & n.355. The EPA preempted several of these cases and others settled, but those remaining contributed much to the success of EPCRA citizen suits. *See id.* at 279-80 & nn. 355-58.

107. *See Atlantic States*, 61 F.3d at 474.

to EPCRA's citizen suit provision.¹⁰⁸ ASLF alleged that UMI had violated EPCRA by not filing the annually required toxic chemical release forms from 1987 to 1990.¹⁰⁹ Although UMI had not filed the forms at the time it received the notice, it did respond to ASLF's notice letter on August 21, 1992, by filing the required forms for the years at issue with the EPA.¹¹⁰

ASLF filed a complaint in an Ohio federal district court seeking declaratory judgment, injunctive relief, and civil penalties.¹¹¹ UMI responded with a motion to dismiss the complaint, primarily arguing that the statute of limitations had run on the claim and that the court lacked jurisdiction over ASLF's claim.¹¹² The court ignored the jurisdictional issue and granted the motion to dismiss solely on the grounds that the statute of limitations barred the claim.¹¹³

2. Holding

On appeal the Sixth Circuit affirmed the decision on other grounds. Rather than relying on the statute-of-limitations argument, the court focused on the issue of citizen suits brought for wholly past violations.¹¹⁴ The court concluded that "citizen plaintiffs may not bring actions that seek civil penalties for purely historical violations."¹¹⁵ Two arguments buttressed the court's conclusion. First, neither the plain language nor the legislative history of the Act supported plaintiff's claim involving the defendant's wholly past violation.¹¹⁶ Second, the court found support in an analogous Supreme Court case, *Gwaltney of Smithfield, Ltd. v.*

108. *See id.*

109. *See id.* When ASLF filed the complaint, it alleged violations for the years 1988 through 1991. *See id.*

110. *See id.*; Shavelson, *supra* note 11, at 35.

111. *See Atlantic States*, 61 F.3d at 474.

112. *See id.*

113. *See id.* at 474-75; Shavelson, *supra* note 11, at 36. The district court has been criticized for selecting an arbitrary statute of limitations. *See* Shavelson, *supra* note 11, at 36 (stating that the court had chosen "to ignore a long line of citizen suit [sic] caselaw [sic] supporting the application of the federal five year limitations period"). Because EPCRA does not contain a separate statute of limitations, the plaintiff argued that the court should apply a standard federal five-year limitations period, which would be consistent with a long line of citizen-suit case law. *See id.* Instead, the court borrowed a shorter one-year statute of limitations found in Ohio state law. *See id.*

114. *See* Shavelson, *supra* note 11, at 36.

115. *Atlantic States*, 61 F.3d at 478.

116. *See id.* at 475, 477-78.

Chesapeake Bay Foundation, Inc.,¹¹⁷ which addressed citizen suits brought under the Clean Water Act.¹¹⁸

3. Reasoning

The court began by discussing the plain language of the Act. The court stated that "[i]n determining the meaning of a statute, we of course begin with its plain language."¹¹⁹ The court pointed out the clear differences in the Act between the language of § 11046(a), the citizen-suit provision, and that of § 11023(a), the toxic chemical release form requirement.¹²⁰ On one hand, the citizen-suit provision authorizes citizen suits for "failure to . . . [c]omplete and submit [the required forms] under section 11023(a) of [the Act]."¹²¹ On the other hand, § 11023(a) requires submission of the required forms *annually* by a specific date.¹²² The court reasoned, however, that the language of the citizen-suit provision suggests that "*only the failure to complete and submit* the required forms can provide the basis for a citizen suit."¹²³ The court pointed out that, although § 11023(a) requires that forms be filed in a timely manner, the citizen-suit provision speaks only of the completion and filing of the document.¹²⁴ "The form is completed and filed even when it is not timely filed."¹²⁵ The court stated that the inherent distinctions between the sections clearly supported its holding that citizens may not sue for wholly past violations of EPCRA.¹²⁶

After describing the differences between the two provisions, the court discussed congressional intent and legislative history.¹²⁷ The court compared the citizen-suit provision to other provisions of EPCRA and concluded that "[r]ather than give citizen plaintiffs . . . broad power, . . . Congress limited citizen suits by emphasizing

117. 484 U.S. 49 (1987).

118. *See id.* at 52.

119. *Atlantic States*, 61 F.3d at 475.

120. *See id.*

121. 42 U.S.C. § 11046(a)(1)(A)(iv).

122. *See id.* § 11023(a). "The owner or operator of a facility . . . shall complete a toxic chemical release form Such form shall be submitted . . . on or before July 1, 1988, and annually thereafter on July 1" *Id.*

123. *See Atlantic States*, 61 F.3d at 475 (emphasis added).

124. *See id.*

125. *Id.*

126. *See id.* at 478 ("In sum, the plain language . . . of EPCRA lead[s] us to conclude" that citizen suits may not be brought for wholly past violations.).

127. *See id.* at 477.

that it is the failure to submit the requisite forms that gives rise to a citizen action. Congress did not authorize citizen suits for other violations of § 11023.¹²⁸ Considering the plain language of each provision of EPCRA, the court concluded that when Congress contemplated citizen suits, it did not intend a *delayed submission* of required forms to be tantamount to an *outright failure* to submit the information.¹²⁹

The court also addressed an argument by ASLF that EPCRA's legislative history authorizes citizen suits for historical violations.¹³⁰ The Sixth Circuit quickly dismissed this argument, reasoning that "[t]he only thing that is clear from [the legislative] history . . . is that Congress thought it important that the public receive the required information" and that "[o]nce the forms providing the information have been filed, this congressional goal has been achieved, and an enforcement suit is unnecessary."¹³¹ Although the court acknowledged that penalties for wholly past violations may be appropriate in some cases, the Sixth Circuit maintained that EPCRA's language confers upon the EPA complete discretion to determine the necessity of such suits.¹³²

The second basis of the *Atlantic States* holding was that an analogous Supreme Court decision, *Gwaltney of Smithfield v. Chesapeake Bay Foundation*,¹³³ supported the conclusion as to the limitations on citizen suits under EPCRA.¹³⁴ The *Gwaltney* Court held that the citizen-suit provision of the Clean Water Act¹³⁵ does not authorize suits for historical violations.¹³⁶ In *Gwaltney* the

128. *Id.* at 475. The court contrasted the citizen-suit provision with § 11045(c)(1), which authorizes civil penalties against an owner or operator "who violates any requirement" of § 11023, and § 11045(c)(4), which authorizes the EPA to assess and collect "any civil penalty for which a person is liable." *Id.* From this language the court concluded that Congress intended to limit the authority of citizen suits to ongoing violations and to give the EPA the sole authority to seek penalties for wholly past violations. *See id.*

129. *See id.*

130. *See id.* at 477. The court, however, neglected to specify the legislative history to which ASLF referred and dismissed the argument rather quickly. *See id.*

131. *Id.* For sources of the court's contention, see, for example, H.R. CONF. REP. NO. 99-962, at 281, 309-10 (1986), reprinted in 1986 U.S.C.C.A.N. 3374, 3402-03.

132. *See Atlantic States*, 61 F.3d at 477. The court attributed to the EPA a "broad perspective on the entire spectrum of enforcement and compliance," suggesting that citizens were in no position to judge when conduct by violators warranted such penalties. *Id.*

133. 484 U.S. 49 (1987).

134. *See Atlantic States*, 61 F.3d at 475-77.

135. 33 U.S.C. §§ 1251-1387.

136. *See Gwaltney*, 484 U.S. at 59 ("[O]ur conclusion [is] that citizens . . . may seek

Court found that the purpose of giving notice to the alleged violator was to provide the violator with an opportunity to bring itself into compliance and therefore render a citizen suit unnecessary.¹³⁷ The Supreme Court further held that to allow citizen suits for purely historical violations would contravene the purpose of the Clean Water Act's enforcement provisions—that "the citizen suit is meant to supplement rather than to supplant governmental action."¹³⁸

The Sixth Circuit analogized the enforcement provisions of the Clean Water Act to those contained in EPCRA.¹³⁹ In doing so the court reiterated that citizen suits are to be a secondary enforcement mechanism only¹⁴⁰ and that permitting citizen enforcement suits for wholly past violations "would render superfluous EPCRA's requirement of sixty-days' notice to the alleged violator."¹⁴¹ Thus, bolstered by the Supreme Court's rationale in a comparable case under the Clean Water Act, the court in *Atlantic States* concluded that citizen suits for past EPCRA violations were prohibited.¹⁴²

The *Atlantic States* opinion thereby departed from the three district court decisions, which had held that citizen suits for past EPCRA violations are consistent with the language and underly-

civil penalties *only* in a suit brought to enjoin or otherwise abate an ongoing violation." (emphasis added)).

137. See *id.* at 59-60. As the Supreme Court stated, "[i]f we assume . . . that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous." *Id.* at 60. This sentiment was subsequently echoed by the Supreme Court in *Hallstrom v. Tillamook County*, 493 U.S. 20, 33 (1989), which held the 60-day notice requirement to be a mandatory precondition for commencing a citizen suit under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992(k).

138. *Gwaltney*, 484 U.S. at 60. The Court felt that such purpose was supported by the Act's bar on citizen suits when governmental enforcement action is already underway. See *id.*

139. See *Atlantic States*, 61 F.3d at 476-77. In fact, the Clean Water Act and EPCRA have similar notice and citizen enforcement provisions. See 33 U.S.C. § 1365(a)-(b) (containing the authorization/jurisdiction and notice subdivisions of the Clean Water Act, which are comparable to EPCRA's citizen-suit and notice provisions, located at 42 U.S.C. § 11046(a)(1), (d)). As discussed *infra* Part IV.A, however, the provisions are distinguishable by their plain statutory language and by their underlying purposes.

140. See *Atlantic States*, 61 F.3d at 477 ("Congress envisioned citizen suits as primarily a means to enforce EPCRA when a violation continues because the EPA has failed to enforce the Act.").

141. *Id.*

142. See *id.* at 478.

ing purposes of the Act.¹⁴³ The Sixth Circuit's decision was controversial.¹⁴⁴ Commentators criticized the decision,¹⁴⁵ and the opinion was subsequently rejected in the most recent case addressing EPCRA citizen suits, the Seventh Circuit Court's decision in *Citizens for a Better Environment v. Steel Co.*¹⁴⁶

B. The Seventh Circuit's Decision in Citizens for a Better Environment v. Steel Co.

In a comprehensive opinion, the Seventh Circuit held that EPCRA authorizes citizen suits not only for the failure to complete and submit required forms but also for the failure to do so in a timely manner, as required by the sections referenced in the citizen-suit provision.¹⁴⁷ The court explicitly rejected the holding of the Sixth Circuit's *Atlantic States* decision and thereby created a clear split among the circuit courts.

1. Facts

Citizens involved a dispute between Citizens for a Better Environment (CBE), a nonprofit environmental organization, and The Steel Company (TSC), a manufacturer of steel located in Chicago, Illinois.¹⁴⁸ In March 1995 CBE discovered that TSC was responsible for several violations of EPCRA's reporting requirements, specifically the mandatory filing of inventory forms and toxic chemical release forms.¹⁴⁹ As required by the citizen-suit

143. See discussion *supra* Part II.B.

144. As discussed *infra* Part IV.C, by validating a violator's ability to file required forms at any time, the decision threatens the future of the public's right to be informed about chemical hazards.

145. See, e.g., Shavelson, *supra* note 11, at 35-38; cf. Matthew J. Smith, Note, "Thou Shalt Not Violate!": Emergency Planning and Community Right-to-Know Act Authorizes Citizen Suits for Wholly Past Violations—Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Manufacturing Corp., 10 PACE ENVTL. L. REV. 1051, 1079-80 (1993) (praising the decision in *Whiting*, which the court in *Atlantic States* soundly rejected, as one that would "greatly enhance and buttress EPCRA's utility and enforcement").

146. 90 F.3d 1237 (7th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3581 (U.S. Feb. 25, 1997) (No. 96-643).

147. See *id.* at 1243.

148. See *id.* at 1241.

149. See *id.* Specifically, CBE "alleged that [TSC] used and released toxic chemicals covered by the EPCRA reporting requirements, and didn't . . . submit an inventory form as required by [42 U.S.C. § 11022] or a toxic chemical release form as required by [42 U.S.C. § 11023]." *Id.*

provision,¹⁵⁰ CBE gave TSC notice of its intent to sue, alleging that TSC used and released hazardous chemicals that were covered by EPCRA but failed to submit either an inventory form or a toxic chemical release form.¹⁵¹ TSC responded to the notice by promptly filing its overdue forms with the appropriate agencies, but CBE proceeded to file its complaint in federal district court anyway.¹⁵²

TSC filed a motion to dismiss for lack of jurisdiction, arguing that CBE's claims were based on wholly past violations and thus were not authorized by EPCRA's provisions.¹⁵³ In response CBE argued that Congress did not intend for such a narrow reading of the citizen-suit provision, citing the several district court cases that had allowed citizen suits for past reporting violations.¹⁵⁴ The district court dismissed the case, agreeing with TSC's interpretation of EPCRA's citizen suit provision in light of the Sixth Circuit's decision in *Atlantic States*.¹⁵⁵

CBE appealed the decision to the Seventh Circuit Court of Appeals. Several amicus curiae briefs, including one by the United States,¹⁵⁶ were filed in support of CBE's interpretation of the citizen-suit provision.¹⁵⁷ The court addressed the question of "whether citizens may seek penalties against EPCRA violators who file after the statutory deadline, after receiving notice of intent to sue, but before a complaint may be filed in the district court."¹⁵⁸

2. Reasoning

The Seventh Circuit began its opinion by addressing the Sixth Circuit's decision in *Atlantic States*.¹⁵⁹ The court criticized the de-

150. 42 U.S.C. § 11046(d)(1) (1994) ("No action may be commenced under subsection (a)(1)(A) . . . prior to 60 days after the plaintiff has given notice of the alleged violation to . . . the alleged violator.").

151. See *Citizens*, 90 F.3d at 1241.

152. See *id.*

153. See *Citizens for a Better Env't v. Steel Co.*, No. 95-C-4534, 1995 WL 758122, at *2 (N.D. Ill. Dec. 21, 1995).

154. See *id.* at *3.

155. See *id.* at *4.

156. In its brief, the Department of Justice argued that—unless overturned—the district court's decision would severely inhibit compliance with EPCRA and would place additional burdens on the already scarce enforcement resources of the EPA. See *Court Overturns Controversial Right-to-Know Citizen Suit Decision*, INSIDE CAL/EPA, Aug. 9, 1996, at 13.

157. See *Citizens*, 90 F.3d at 1241.

158. *Id.* at 1242.

159. See *id.* at 1241-42.

cision principally on the grounds that the court's reliance on *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*¹⁶⁰ was inappropriate.¹⁶¹ The Sixth Circuit erred in applying the literal holding of *Gwaltney* by analogy to EPCRA's citizen-suit provision.¹⁶² As the court pointed out, each district court that had previously considered EPCRA's citizen-suit provision distinguished *Gwaltney* on the basis of the inherent differences in the language of the two statutes that precluded a legitimate analogy.¹⁶³ In its analysis the Seventh Circuit used different reasoning than that of the Sixth Circuit, which appeared to borrow the literal holding of *Gwaltney*.¹⁶⁴ Instead, the Seventh Circuit chose to apply the interpretive methodology of *Gwaltney*.¹⁶⁵ This approach focuses on the plain meaning of a provision first, then turns to the legislative history for additional evidence of the statute's meaning.¹⁶⁶

Criticizing the Sixth Circuit's reliance on *Gwaltney*, the Seventh Circuit noted the inherent differences between the language in the citizen enforcement provisions of the Clean Water Act and EPCRA.¹⁶⁷ The Clean Water Act is primarily worded in the present tense,¹⁶⁸ whereas EPCRA's enforcement provisions are not.¹⁶⁹ The court underscored the *Gwaltney* Court's conclusion that, based on the "undeviating use" of the present verb tense through-

160. 484 U.S. 49 (1987).

161. See *Citizens*, 90 F.3d at 1242.

162. See *id.*

163. See *id.* at 1243. For a brief discussion of the distinctions between the Clean Water Act and EPCRA, see *infra* notes 167-73 and accompanying text.

164. See *Atlantic States Legal Found., Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 475-77 (6th Cir. 1995). The Sixth Circuit rejected the "hypertechnical parsing of the language of [EPCRA and the Clean Water Act]," *id.* at 477, and rather than look closely at the specific language of the EPCRA provision, chose instead to embrace the reasoning of *Gwaltney* as to why citizen suits for wholly past violations were inappropriate. See *id.* at 476-77.

165. See *Citizens*, 90 F.3d at 1242. In doing so the court examined EPCRA in light of the criteria used by the *Gwaltney* Court, beginning with a reading of the statute's plain meaning. See *id.* For the court's analysis of EPCRA's plain meaning, see *infra* notes 181-86 and accompanying text.

166. See *Gwaltney*, 484 U.S. at 56-63.

167. See *Citizens*, 90 F.3d at 1242-44.

168. See, e.g., 33 U.S.C. § 1365(f) (allowing citizens to bring suit for a permit violation "which is in effect" (emphasis added)); *id.* § 1365(h) (permitting a governor to sue under the guise of a citizen when an infraction "is occurring . . . and is causing an adverse effect on the public health or welfare" (emphasis added)).

169. See, e.g., 42 U.S.C. § 11046(b)(1) (stipulating that citizen suits "shall be brought in the district . . . in which the alleged violation occurred" (emphasis added)); *id.* § 11046(d)(1) (mandating that notice of intent to sue be given to "the State in which the alleged violation occurs" (emphasis added)).

out the Clean Water Act, "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past."¹⁷⁰ In contrast, EPCRA is not limited to the "is occurring" language of the Clean Water Act.¹⁷¹ "The presence of such language in the [Clean Water Act] shows that Congress knows how to require allegations of an ongoing violation as a condition of a citizen suit when it sees fit."¹⁷² The court concluded that (1) the absence of language limiting citizen suits to ongoing violations and (2) the inclusion of language referring to past violations signified that EPCRA authorizes citizen suits for purely historical violations.¹⁷³

The Seventh Circuit also criticized the Sixth Circuit's contention that allowing citizen suits for wholly past violations renders EPCRA's sixty-day notice provision superfluous.¹⁷⁴ The court reasoned that permitting citizen suits "even after violators have submitted overdue filings does not render the notice provision gratuitous."¹⁷⁵ The requirement of notice (1) "gives an alleged violator a chance to correct the citizen's information if the citizen is mistaken about the existence of a violation,"¹⁷⁶ (2) "gives a violator the opportunity to limit its exposure by filing late reports,"¹⁷⁷ (3) "preserves the EPA's enforcement discretion,"¹⁷⁸ and (4) "conserves resources by giving violators [an] opportunity and . . . incentive to enter into settlement negotiations."¹⁷⁹ Thus, the Seventh Circuit held that allowing citizen suits for historical violations is consistent with EPCRA's requirement of notice.¹⁸⁰

The court also focused on the plain language of the citizen-suit provision¹⁸¹ and declared that Congress intended for the words

170. *Gwaltney*, 484 U.S. at 59.

171. *Citizens*, 90 F.3d at 1243-44 (quoting 33 U.S.C. § 1365(h)).

172. *Id.* at 1244.

173. *See id.*

174. *See Atlantic States*, 61 F.3d at 477.

175. *Citizens*, 90 F.3d at 1244.

176. *Id.*

177. *Id.* The notice requirement limits exposure because, according to EPCRA, "each day in which [a] violation occurs or . . . failure to comply continues" is a separate violation carrying additional penalties. 42 U.S.C. § 11045(a).

178. *Citizens*, 90 F.3d at 1244. As required by the notice provisions, "[n]o action may be commenced . . . prior to 60 days after the plaintiff has given notice of the alleged violation to the Administrator [of the EPA]." 42 U.S.C. § 11046(d)(1). Accordingly, such notice gives the EPA an opportunity to take enforcement action or decline to act if it so chooses. *See Citizens*, 90 F.3d at 1244.

179. *Citizens*, 90 F.3d at 1244.

180. *See id.*

181. "[A]ny person may commence a civil action . . . against . . . [a]n owner or op-

“under section 11022(a) of this title”¹⁸² and “under section 11023(a) of this title”¹⁸³ to carry independent significance.¹⁸⁴ As the court stated, “[t]he most natural reading of ‘under’ a section is ‘in accordance with the requirements of’ that section. It is simply a way to incorporate the requirements of the referenced section without listing them all over again.”¹⁸⁵ Thus, the court read the language of EPCRA’s citizen-suit provision to authorize “suits not only for failure to complete and submit forms, but [also] for failure to complete and submit forms *in accordance with [each of] the requirements set forth in the referenced sections.*”¹⁸⁶

One of the sections referred to in the citizen-suit provision mandates filing the required reports on a particular date.¹⁸⁷ According to the Seventh Circuit court, for a facility to fully comply with the “complete and submit” requirement, owners or operators must also comply with the requirement that the inventory forms “shall be submitted on or before March 1, 1988, and annually thereafter on March 1”¹⁸⁸ and that the toxic chemical release forms “shall be submitted . . . on or before July 1, 1988, and annually thereafter on July 1.”¹⁸⁹ The court emphasized that the timing requirements for the inventory and toxic chemical release forms are neither guidelines nor suggestions but, by virtue of the word “shall,” are binding—“essential elements of the provisions citizens have authority to enforce.”¹⁹⁰ The court concluded that to read the plain language of the provisions otherwise, as the Sixth Circuit had done, “‘would render gratuitous the compliance dates for initial submissions which Congress placed in EPCRA’s reporting provisions.’”¹⁹¹

The court also considered EPCRA’s legislative history to support its interpretation of the citizen-suit provision. Citing several

erator of a facility for failure to . . . [c]omplete and submit an inventory form under section 11022(a) . . . [or to] [c]omplete and submit a toxic chemical release form under section 11023(a) . . .” 42 U.S.C. § 11046(a)(1)(A)(iii)-(iv).

182. *Id.* § 11046(a)(1)(A)(iii) (regarding the requirements of inventory forms).

183. *Id.* § 11046(a)(1)(A)(iv) (delineating the requirements of the toxic chemical release forms).

184. *See Citizens*, 90 F.3d at 1243.

185. *Id.*

186. *Id.* (emphasis added).

187. *See* 42 U.S.C. §§ 11022(a)(2), 11023(a).

188. *Id.* § 11022(a)(2).

189. *Id.* § 11023(a). *See Citizens*, 90 F.3d at 1243.

190. *Citizens*, 90 F.3d at 1243.

191. *Id.* (citing *Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 750 (W.D.N.Y. 1991)).

reports,¹⁹² the court found that Congress clearly placed significant value on the timing component of EPCRA's reporting provisions.¹⁹³ This construction of EPCRA's legislative history is contrary to that of the Sixth Circuit in *Atlantic States*.¹⁹⁴

Finally, the Seventh Circuit sought to "interpret the specific language of the citizen suit [sic] provision in a way that gives meaning to the provision as a whole."¹⁹⁵ To preclude suits for past EPCRA violations, said the court, would render the citizen-suit provision "meaningless."¹⁹⁶ "If citizen suits could be fully prevented by 'completing and submitting' forms, however late, citizens would have no real incentive to incur the costs of learning about EPCRA, investigating suspected violators, and analyzing information."¹⁹⁷ Furthermore, citizen suits would only proceed when an alleged violator failed to expend the minimal effort to complete the required forms.¹⁹⁸ As a result, private enforcement "would undoubtedly drop off," and Congress's intent in enacting the citizen-suit provision would be subverted.¹⁹⁹ Thus, in the Seventh Circuit's opinion, citizen suits for wholly past violations of the reporting requirements of EPCRA are integral to the success of the statute as a whole.²⁰⁰

3. Holding

Considering the language and underlying purpose of EPCRA's citizen-suit provisions and of the Act in its entirety, the Seventh Circuit concluded that "a cause of action exists under EPCRA for violations that are not ongoing at the time a citizen complaint is filed."²⁰¹ The Seventh Circuit breathed life into the future of EPCRA citizen suits. This interpretation is entirely con-

192. *See id.* at 1243 n.2. The court referenced several sources, including H.R. REP. NO. 99-253, pt. 1, at 111 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2893 ("Once the material safety data sheets are developed, it is crucial that they *be made available to the public in the quickest, most efficient way possible*." (emphasis added)) and S. REP. NO. 99-11, at 14-15 (1985) (stating that EPCRA's goal is making "essential" information "available widely and *in a timely fashion*" (emphasis added)).

193. *See Citizens*, 90 F.3d at 1243 n.2.

194. *See supra* notes 130-32 and accompanying text.

195. *Citizens*, 90 F.3d at 1244.

196. *Id.*

197. *Id.*

198. *See id.*

199. *Id.* at 1245.

200. *See id.*

201. *Id.* at 1244.

sistent with that court's recent concern about the inability of the executive branch to protect the environment.²⁰² The decision appeared to reaffirm the holdings of the district courts that had first considered the issue of citizen suits for wholly past infractions.²⁰³ More importantly, the Seventh Circuit's holding also contradicted the Sixth Circuit's decision in *Atlantic States*.²⁰⁴ The legacy of the *Citizens* decision, therefore, is discord among the courts as to whether citizens may bring suit for historical violations of EPCRA.

IV. ANALYSIS: EMPLOYING THE *GWALTNEY* METHODOLOGY

Despite their contradictory conclusions, the Sixth and Seventh Circuits employed similar approaches to interpret EPCRA's citizen-suit provision. Each court began with the plain language of the statute²⁰⁵ and continued its analysis by considering the Act's legislative history.²⁰⁶ Thus, the circuit court decisions share common ground: the methodology dictated by *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*²⁰⁷ When the Supreme Court endeavors to resolve the circuit split, it must proceed from this common ground.

Indeed, resolution of the split depends entirely on an accurate application of the *Gwaltney* decision. Such application will enable the Court to properly analyze EPCRA's citizen-suit provision. Many commentators see the *Gwaltney* decision as the final word on citizen suits for past violations of all environmental legislation.²⁰⁸ Although *Gwaltney* specifically addressed citizen suits un-

202. See Barry Kellman, *The Seventh Circuit on Environmental Regulation of Business*, 65 CHI.-KENT L. REV. 757, 757 (1989). Kellman's article surveys seven decisions by the Seventh Circuit between 1985 and 1989 that "reveal a court deeply troubled by its perception of the executive branch's unwillingness (or incompetence) to perform its statutorily delegated functions to protect the environment." *Id.* at 757. Arguably, such concern underlies the 1996 *Citizens* decision as well—giving more authority to citizen enforcement suits seems to imply a belief that the EPA, an administrative agency created by the executive branch, simply cannot, or will not, enforce EPCRA on its own.

203. See discussion *supra* Part II.B.

204. See discussion *supra* Part III.A.2.

205. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1242-44 (7th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3581 (U.S. Feb. 25, 1997) (No. 96-643); *Atlantic States Legal Found., Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 475-77 (6th Cir. 1995).

206. See *Citizens*, 90 F.3d at 1243 n.2; *Atlantic States*, 61 F.3d at 477.

207. 484 U.S. 49 (1987).

208. See, e.g., Karl S. Coplan, *Private Enforcement of Federal Pollution Control Laws—The Citizen Suit Provisions*, in 3 ENVIRONMENTAL LITIGATION 1033, 1044

der the Clean Water Act,²⁰⁹ many recognize it as the decisive case on the issue of environmental citizen suits because many of the citizen-suit provisions in environmental statutes are similarly worded.²¹⁰

This Comment employs the two-step *Gwaltney* methodology and goes a step beyond by discussing various policy considerations that aid in the analysis. The first section views the issue as a technical dispute over statutory language, looking at the plain meaning of the citizen-suit provision in its own right and in light of the entirety of EPCRA. Next, the analysis moves to EPCRA's legislative history and looks for evidence of Congress's intent in enacting the citizen-suit provision. The third section uses a policy approach to resolve the EPCRA citizen-suit issue, arguing that EPCRA's dual purposes make it a unique environmental statute and that the Court must necessarily interpret the citizen-suit provision in a way that furthers both of EPCRA's purposes.

A. *The Plain Meaning of EPCRA's Language*

In construing the citizen-suit provision under the Clean Water Act, the *Gwaltney* Court began by addressing the provision's plain language.²¹¹ "It is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'"²¹² A proper resolution of EPCRA's citizen-suit issue, therefore, must begin by looking at the provision's plain language.

EPCRA's citizen-suit provision authorizes citizens to commence a civil action against "[a]n owner or operator of a facility

(ALI-ABA Course of Study No. SA85, June 24, 1996) ("Because most of the [environmental] statutes contain identical or nearly identical language, the [*Gwaltney*] opinion narrows considerably the scope of citizen enforcement actions." (citations omitted)); Charles N. Nauen, *Citizen Environmental Lawsuits After Gwaltney: The Thrill of Victory or the Agony of Defeat?*, 15 WM. MITCHELL L. REV. 327, 349 (1989) (stating that *Gwaltney* held that all citizen environmental suits for purely historical violations are prohibited); Diana L. Lee, Note, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation: Its Implications for Citizen Suits Under the Clean Water Act*, 16 ECOLOGY L.Q. 571, 593 (1989) (noting that "the future of citizen suits after the *Gwaltney* decision is not entirely clear").

209. See *Gwaltney*, 484 U.S. at 52-56.

210. See, e.g., JEFFREY G. MILLER, ENVTL. LAW INST., CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 7 (1987). As Miller states, "[t]he citizen suit sections of the various environmental statutes are virtually identical There are perhaps no sections of the environmental statutes where precedent under one statute so clearly applies to others." *Id.*

211. See *Gwaltney*, 484 U.S. at 56.

212. *Id.* at 56 (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

for failure to . . . [c]omplete and submit an inventory form under section 11022(a) of [EPCRA] . . . [or] [c]omplete and submit a toxic chemical release form under section 11023(a) of [EPCRA].”²¹³ Like the Clean Water Act’s provision, EPCRA’s provision “is not [one] in which Congress’ [sic] limpid prose puts an end to all dispute.”²¹⁴ Accordingly, the *Gwaltney* Court recommended that the Supreme Court, when interpreting EPCRA, seek the “most natural reading” of the language.²¹⁵

The ambiguity of EPCRA’s provision lies not in the “complete and submit” language—both circuit courts agreed that the citizen-suit provision allows suits for failure to complete and submit the required forms.²¹⁶ Instead, the confusion lies in the language “under section 11022(a)” and “under section 11023(a).”²¹⁷ That language has perplexed the courts: does the word “under” subject the citizen-suit provision to the timing requirements contained in §§ 11022(a) and 11023(a)?²¹⁸

A hallmark of statutory construction is that statutes are properly interpreted by giving significance to each and every word of the provision.²¹⁹ Thus, an accurate interpretation of EPCRA’s citizen-suit provision must acknowledge the meaning of the word “under.” Two widely accepted definitions of the word offer some insight into the meaning of the citizen-suit provision. *Black’s Law*

213. 42 U.S.C. § 11046(a)(1)(A)(iii)-(iv) (1994).

214. *Gwaltney*, 484 U.S. at 57.

215. *Id.*

216. *See* *Citizens for a Better Env’t v. Steel Co.*, 90 F.3d 1237, 1243 (7th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3581 (U.S. Feb. 25, 1997) (No. 96-643); *Atlantic States Legal Found., Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 475 (6th Cir. 1995).

217. 42 U.S.C. § 11046(a)(1)(A)(iii)-(iv).

218. 42 U.S.C. § 11022(a) requires that inventory forms “be submitted on or before March 1, 1988, and annually thereafter on March 1.” *Id.* § 11022(a)(2). 42 U.S.C. § 11023(a) requires that toxic chemical release forms “be submitted . . . on or before July 1, 1988, and annually thereafter on July 1.” *Id.* § 11023(a). As discussed *supra* Part III, the Sixth Circuit found the “under” language to be insignificant whereas the Seventh Circuit held that facilities would be liable to citizens for violating either timing requirement. *See supra* notes 121-26, 181-86, and accompanying text.

219. *See, e.g.,* *Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660, 664 (1997) (“Statutes must be interpreted, if possible, to give each word some operative effect.”); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (“In construing a statute we are obliged to give effect, if possible, to every word Congress used.”); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute’ rather than to emasculate an entire section.” (citation omitted)).

Dictionary states that "under" can mean "according to,"²²⁰ and the *Oxford American Dictionary* defines "under" as "subject to an obligation imposed by."²²¹

Given these two definitions, the most obvious reading of EPCRA's citizen-suit provision is evident: citizens may commence a civil action against an owner or operator of a facility for failure to complete and submit forms according to the obligations imposed by §§ 11022(a) and 11023(a), including the annual filing of forms. It follows that citizens may sue facilities that have failed to annually file the requisite forms, regardless of whether the entity corrected the omission during the sixty-day notice period.

Employing the *Gwaltney* "natural reading" methodology, the logical interpretation of EPCRA's language differs from that reached by the Court in *Gwaltney*: while *Gwaltney* concluded that the Clean Water Act's citizen-suit provision language precludes suits for wholly past violations,²²² EPCRA's provision seems to authorize suits for past reporting violations. The reason for this deviation is readily apparent—the Clean Water Act, like many other environmental statutes,²²³ uses the language "to be in violation," which is clearly directed at present and ongoing violations, while EPCRA omits such language, thereby necessitating a broader reading of the provision. Thus, a conclusion that EPCRA allows citizen suits for past reporting violations is certainly contrary to the literal holding of *Gwaltney* but properly reflects the language differences between the two statutes.

After discussing the plain meaning of the Clean Water Act's citizen-suit provision, *Gwaltney* continued its analysis by stating that the given reading was "bolstered by the language and structure of the rest of the citizen suit provisions in . . . the Act."²²⁴ Similarly, an interpretation of the EPCRA citizen-suit provision that permits actions for wholly past violations is entirely consistent with the other requirements of the citizen-suit provision.

Perhaps the most compelling indication that EPCRA allows citizen suits for past reporting violations appears in the venue re-

220. BLACK'S LAW DICTIONARY 1525 (6th ed. 1990).

221. OXFORD AMERICAN DICTIONARY 1005 (Heald Colleges ed. 1980).

222. See *Gwaltney*, 484 U.S. at 57 ("The most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation . . .").

223. See Toxic Substances Control Act, 15 U.S.C. § 2619; Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972; Clean Air Act, 42 U.S.C. § 7604.

224. *Gwaltney*, 484 U.S. at 59.

quirement of the citizen-suit provision.²²⁵ The section states that any civil action, including citizen suits, "shall be brought in the district court for the district in which the alleged violation occurred."²²⁶ Although the *Gwaltney* Court relied on the "pervasive use of the present tense throughout [the Clean Water Act]"²²⁷ to conclude that suits could only be brought for present and ongoing violations, the use of the past tense in EPCRA's venue provision nevertheless evinces an intent for more comprehensive civil actions, including citizen suits for wholly past violations. Allowing citizens to bring such suits, then, is consistent not only with the natural reading of the citizen-suit provision but also with the use of the past tense in the venue requirement contained therein.

Two additional points in the *Gwaltney* opinion apply to a proper resolution of the EPCRA citizen-suit provision issue. First, the Court in *Gwaltney* declared that any conclusion other than one that limited citizen suits to ongoing violations of the Clean Water Act "would render incomprehensible" the statute's notice provision, which, like EPCRA, requires citizens to give a sixty-day notice of their intent to sue.²²⁸ Allowing EPCRA citizen suits, however, would not render EPCRA's notice provision incomprehensible; in fact, the two provisions are not mutually exclusive and can coexist. EPCRA's notice provision²²⁹ performs an important function: it allows facilities to avoid additional civil penalties for each day the violation continues.²³⁰ Thus, facilities

225. See 42 U.S.C. § 11046(b)(1).

226. *Id.* (emphasis added).

227. *Gwaltney*, 484 U.S. at 59.

228. *Id.* The notice provision of the Clean Water Act is located at 33 U.S.C. § 1365(b)(1)(A).

229. See 42 U.S.C. § 11046(d).

230. See *id.* § 11045(c). "Any person . . . who violates any requirements of section 11022 or 11023 of . . . [EPCRA] shall be liable . . . for a civil penalty . . . for each such violation." *Id.* § 11045(c)(1). Further, "[e]ach day a violation . . . continues shall . . . constitute a separate violation." *Id.* § 11045(c)(3). Admittedly, the Clean Water Act contains a similar provision stating that civil penalties incur for each day of a violation. See 33 U.S.C. § 1319(d). The two provisions may be distinguished easily, however. Under EPCRA, facilities may avoid additional violations by meeting EPCRA requirements such as filing reporting forms. See 42 U.S.C. § 11045(c)(1), (3). Under the Clean Water Act, in contrast, parties must comply with requirements such as attaining effluent limitations, meeting national standards of performance, or providing records and reports in order to avoid additional days of violation. See 33 U.S.C. § 1319(d) (referencing § 1311, effluent limitations; § 1316, national standards of performance; § 1318, records and reports). Comparatively, filing requisite forms seems less costly and time-intensive than striving to meet effluent limitations. Providing notice to EPCRA violators can motivate facilities to achieve compliance with the

may avoid incurring additional monetary penalties while remaining liable to citizens for the days during which the violation occurred.

Second, the limitation on citizen suits when governmental enforcement action is in progress "suggests that the citizen suit is meant to supplement rather than to supplant governmental action."²³¹ Like the Clean Water Act,²³² EPCRA has a provision limiting citizen suits.²³³ The limitation prohibits a civil action if the EPA "has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned."²³⁴ Another section of the Act describes the EPA's enforcement authority: "[a]ny person . . . who violates any requirement of section 11022 or 11023 of . . . [the Act] shall be liable to the United States."²³⁵ The government's authority extends to *any requirement of §§ 11022 and 11023*, while the citizen-suit authority only extends to §§ 11022(a) and 11023(a) of the Act.²³⁶ The government, therefore, has *independent authority* to enforce other parts of the provision, such as §§ 11022(e)²³⁷ or 11023(f).²³⁸ Thus, allowing citizens to bring suit for past reporting violations of §§ 11022(a) and 11023(a) does not supplant but rather supplements the government's enforcement power under EPCRA, because the government still retains sole enforcement authority for the remaining provisions of §§ 11022 and 11023.

Following the dictates of the *Gwaltney* methodology, resolution of EPCRA's citizen-suit issue requires an examination of the natural meaning of the specific provision and must consider that meaning in light of the remainder of the citizen-suit provision.

filing requirements quickly, whereas giving notice to Clean Water Act violators may not affect the ability of violators to comply with effluent standards or limitations. Thus, the role of EPCRA's notice provision differs from that of the Clean Water Act's provision.

231. *Gwaltney*, 484 U.S. at 60.

232. The limitation provision of the Clean Water Act is codified at 33 U.S.C. § 1365(b)(1)(B).

233. *See* 42 U.S.C. § 11046(e).

234. *Id.*

235. *Id.* § 11045(c)(1).

236. *See id.* § 11046(a)(1)(A)(iii)-(iv).

237. This provision discusses the availability of "Tier II" information, *see discussion supra* notes 55-57 and accompanying text, and requires the owner or operator of a facility to provide such information to state planning commissions, local planning committees, or fire departments upon request. *See* 42 U.S.C. § 11022(e)(1)-(2).

238. This provision establishes threshold amounts at which facilities must report toxic chemicals. *See id.* § 11023(f)(1).

Clearly, both considerations support a reading of EPCRA's citizen-suit provision to allow citizen suits for purely historical reporting violations.

B. EPCRA's Legislative History

After discussing the plain statutory meaning of the Clean Water Act's citizen-suit provision, the *Gwaltney* Court looked to legislative history for further support of its opinion.²³⁹ Similarly, the Supreme Court, when confronting the circuit split over the EPCRA citizen-suit provision, must look to legislative history to determine whether Congress intended a citizen in an EPCRA enforcement proceeding to have broad authority.²⁴⁰

Several recurring themes permeate EPCRA's legislative history. First, the overriding concern of Congress was to make reporting and inventory forms available in a timely fashion.²⁴¹ Second, Congress intended to empower citizens with information.²⁴² It follows that, in order for citizens to receive the intended benefits of EPCRA, citizens must have broad enforcement authority to compel facilities to provide citizens the information to which EPCRA entitles them. During floor debate, for example, one representative recognized "the increased public participation called for by [the Act] [By] allowing for citizen suits in specific cases to ensure proper conformance with the law, our citizens are given the opportunity to be heard in the operation of [the Act]."²⁴³

239. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61-63 (1987).

240. See H.R. REP. NO. 99-253, pt. 1, at 111 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2893; S. REP. NO. 99-11, at 14 (1985); 132 CONG. REC. 29,763 (1986) (statement of Rep. John S. McCain III (R-Ariz.)); *id.* at 29,747-48 (statement of Rep. Bob Edgar (D-Pa.)); 131 CONG. REC. 34,637, 34,759 (1985) (statement of Rep. James J. Florio (D-N.J.)).

241. See, e.g., H.R. REP. NO. 99-253, pt. 1, at 111 ("Once the material safety data sheets are developed, it is crucial that they be made available to the public in the *quickest*, most efficient way possible." (emphasis added)); S. REP. NO. 99-11, at 14 (discussing one of the statute's goals as "making the inventory available widely and in a timely fashion").

242. See, e.g., 131 CONG. REC. 34,759 (1985) (statement of Rep. James J. Florio (D-N.J.)) ("The people we represent have a right to know if they are being exposed to chemicals that could potentially kill them Information about these health dangers is the basis of the right-to-know concept."); *id.* at 34,637 (statement of Rep. Florio) (praising the "[e]stablishment of a strong and effective community right to know program which requires the disclosure of basic information").

243. 132 CONG. REC. 29,763 (1986) (statement of Rep. John S. McCain III (R-Ariz.)).

EPCRA's legislative history is replete with statements of the overlying purpose of the Act:²⁴⁴ "A . . . major principle of this program is to make information . . . available to the public For too long, the public has been left in the dark about its exposure to toxic chemicals."²⁴⁵ Interpreting EPCRA's citizen-suit provision in a manner consistent with this purpose would also give citizens a broad power of enforcement—to do otherwise would frustrate Congress's intent and even render the provision hypocritical. This sentiment was echoed in EPCRA's legislative history as well: "Consequently, the reporting requirements should be construed to allow the public the broadest possible access to . . . information."²⁴⁶ Thus, an interpretation of EPCRA's citizen-suit provision that permits suits for historical violations would be most consistent with Congress's intent.

C. A Policy Argument: The Need for an Interpretation Which Will Further EPCRA's Purposes

Beyond utilizing the interpretive methodology employed in *Gwaltney*, the Supreme Court, when resolving the existing circuit split, should also consider policy concerns in an effort to construe EPCRA's citizen-suit provision correctly. The first policy concern is the powerful role that citizen suits play in the enforcement of environmental legislation. Citizen-suit provisions have recently been the subject of a significant amount of academic commentary,²⁴⁷ largely due to their unique ability to supplement federal, state, and local enforcement efforts.²⁴⁸ In a time of increasingly

244. See, e.g., *id.* at 29,761 (statement of Rep. Al Swift (D-Wash.)); *id.* at 29,747 (statement of Rep. Bob Edgar (D-Pa.)).

245. *Id.* at 29,747 (statement of Rep. Bob Edgar (D-Pa.)).

246. *Id.*

247. See generally MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS (1993) (discussing the development and operation of citizen suits in environmental statutes); MILLER, *supra* note 210 (providing an overview of the citizen suit's origins and general provisions); Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1 (1995) (analyzing the role of citizen suits in the scheme of an environmental justice movement); Ann Powers, *Private Enforcement of Federal Pollution Control Laws: The Citizen Suit Provisions*, in ENVIRONMENTAL LAW 815 (ALI-ABA Course of Study No. CA37, Feb. 14, 1996) (describing the common attributes of citizen-suit provisions in environmental legislation); Beverly McQueary Smith, *Recent Developments in Citizens' Suits Under Selected Federal Environmental Statutes*, in 2 ENVIRONMENTAL LAW 701 (ALI-ABA Course of Study No. C981, Feb. 15, 1995) (discussing judicial treatment of various citizen-suit provisions).

248. See Smith, *supra* note 247, at 703.

limited governmental resources, "citizens' suits remain appealing gapfillers . . . [and] provide another vehicle for doing more with less."²⁴⁹

Often, citizen-suit provisions are incorporated into environmental statutes to encourage governmental enforcement and provide a safety valve when the government fails to adequately perform its enforcement duties.²⁵⁰ In general, citizen enforcement suits are often the sole recourse when a devastating impact threatens the environment and the government fails to act.²⁵¹ Such suits are especially valuable when the government has neither the time nor the money to address pressing environmental issues.

EPCRA's citizen-suit provision clearly promotes these policy concerns. Considering the infrequency of successful governmental enforcement of EPCRA's provisions,²⁵² citizen suits, as provided for in EPCRA, may best represent the future of enforcement actions. In every EPCRA citizen suit to date, the EPA has either failed or declined to act, yet in each case the court found that a legitimate cause of action existed.²⁵³ Considering that many facilities subject to EPCRA have failed to comply with it,²⁵⁴ citizen suits such as those in the *Citizens*, *Williams*, and *Delaware Valley* cases may be the only way to achieve full compliance. An interpretation by the Supreme Court that restricts citizen suits will frustrate future compliance by environmental polluters with environmental statutes.

A second point is that EPCRA is a unique environmental statute because it demands compliance with informational re-

249. *Id.*

250. See Powers, *supra* note 247, at 818 (discussing the legislative history of the citizen enforcement provision of the Clean Air Act).

251. See Shavelson, *supra* note 11, at 29 ("The intent and effect of [the citizen suit] provisions is to empower citizens and groups with the legal tools necessary to protect their health and environment when government enforcers cannot—or will not—press forward.").

252. See Wolf, *supra* note 63, at 274 ("Despite the fact that EPCRA's coverage extends more widely than other environmental laws, its enforcement is minuscule compared to theirs." (citation omitted)); Abell, *supra* note 62, at 599 (stating that "a lack of funding has slowed the EPA's enforcement activities") (citing Kevin J. Finto, *Regulation by Information Through EPCRA*, NAT. RESOURCES & ENV'T, Winter 1990, at 13, 47).

253. See cases discussed *supra* Part II.B. According to EPCRA, no citizen suits may be brought "if the [EPA] has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned." 42 U.S.C. § 11046(e) (1994).

254. See Falkenberry, *supra* note 8, at 2.

quirements rather than precise emission limitations, which permeate a majority of other environmental statutes.²⁵⁵ Admittedly, EPCRA is one of the more obscure environmental statutes.²⁵⁶ Unlike high-profile statutes such as the Clean Water Act,²⁵⁷ the Clean Air Act,²⁵⁸ and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),²⁵⁹ EPCRA has not materialized into the specter of federal enforcement or heavy judicial and administrative penalties²⁶⁰ as had first been feared.²⁶¹ EPCRA enforcement has tended overwhelmingly toward settlement.²⁶² The relative lackluster results stem in part from the EPA's failure to "cast out" EPCRA's "regulatory net . . . often enough to make any significant catches."²⁶³ Another factor in EPCRA's inability to achieve a high profile is the fact that states, which generally enforce the specific requirements of environmental legislation, play a secondary role in EPCRA enforcement.²⁶⁴

Despite EPCRA's obscurity and sparse prosecutions, however, the Act "arguably has done more than any other federal statute to raise corporate, government and citizen [consciousness] about toxic pollution."²⁶⁵ The Act's toxic chemical release form provision has made EPCRA one of the more significant pieces of

255. See, e.g., 33 U.S.C. § 1311 (Clean Water Act provision requiring that all sources which discharge pollutants comply with strict effluent limitations); 42 U.S.C. § 7410(a)(1)(A) (Clean Air Act provision requiring each state to adopt enforceable emission limitations in order to achieve national ambient air quality standards).

256. See Wolf, *supra* note 63, at 220.

257. 33 U.S.C. §§ 1251-1387.

258. 42 U.S.C. §§ 7401-7642.

259. *Id.* §§ 9601-9675.

260. See generally Wolf, *supra* note 63, at 270-76 (describing the infrequent enforcement of EPCRA by the EPA in comparison to the numerous penalties from other environmental statutes).

261. See *id.* at 244 ("EPCRA created widespread industry dread about expensive lawsuits and costly damages which might result from the enforcement or use of the legislation. This anticipated legislation was expected to rise from . . . numerous citizen suits, federal enforcement actions and penalties, and toxic torts based upon information generated by EPCRA." (footnote omitted)). Fear arose that EPCRA suits would increase the exposure of businesses to significant toxic tort litigation. See *id.* at 245.

262. See *id.* at 271 (citing *Criminal Cases, Fine Collections Rise in 1993, EPA Says in Report on Enforcement*, 24 *Env't Rep.* (BNA) 1516 (Dec. 17, 1993)).

263. *Id.* at 276.

264. See *id.* at 276-77 (asserting that state enforcement actions are infrequent, are not highly regarded by the EPA, and have a grim prospect due to widespread budget-cutting throughout the states).

265. Shavelson, *supra* note 11, at 37.

environmental legislation in years.²⁶⁶ The requirement that the EPA "establish and maintain in a computer data base a national toxic chemical inventory [(the TRI)] based on data submitted . . . under this section"²⁶⁷ has had a fundamental impact on toxics reporting.²⁶⁸ EPA officials have described TRI availability²⁶⁹ as one of the most significant weapons in the effort to combat pollution.²⁷⁰ In fact, EPCRA reporting may prove to be a valuable asset to the EPA in its efforts to achieve compliance with other environmental statutes.²⁷¹

EPCRA has also had a significant impact on shaping industry behavior.²⁷² The public availability of toxic release reports causes industries to scrutinize and revamp their internal processes in order to reduce chemical discharges in an attempt to avoid potentially damaging publicity.²⁷³ The readily available reporting information also affects market forces, which have motivated companies to "conduct pollution prevention audits, implement company-wide policies to protect workers and the environment, and take other proactive measures aimed at lowering toxic re-

266. See Wolf, *supra* note 63, at 220.

267. 42 U.S.C. § 11023(j).

268. See Falkenberry, *supra* note 8, at 25-26. In his article Falkenberry describes several uses of the TRI data. First, it allows environmental groups to monitor a facility's compliance with various release restrictions. See *id.* Second, it assists the EPA and state environmental agencies in checking for compliance. See *id.* at 26. Finally, it allows environmental groups to influence permitting procedures and to negotiate with individual contributors. See *id.*

269. TRI data has been widely available to citizens who may access the information by ordering computer diskettes from the EPA, by accessing a computer modem at many public libraries across the country, or by obtaining hard copies of EPCRA reports from state or federal agencies. See Gary D. Bass & Alair MacLean, *Enhancing the Public's Right-to-Know About Environmental Issues*, 4 VILL. ENVTL. L.J. 287, 296 & n.59 (1993); Falkenberry, *supra* note 8, at 25 & n.124; Nicholas C. Yost & John M. Schultz, *The Chemicals Among Us*, WASH. LAW., Mar.-Apr. 1990, at 24, 54.

270. See Wolf, *supra* note 63, at 220-21.

271. See Pritchard, *supra* note 42, at 244. As Pritchard points out:

[The] EPA plans to use information obtained under EPCRA not only to enforce EPCRA, but in the enforcement of RCRA, CERCLA, the Clean Air Act, and the Clean Water Act. [The] EPA will be able to look at EPCRA reports and determine if the reporter has violated its permit issued under one of the other environmental statutes.

Id.

272. See Shavelson, *supra* note 11, at 30.

273. See *id.*; see also Wolf, *supra* note 63, at 308 ("The most important impact is that public availability and disclosure of inventory data has motivated industry to promise to meet sharp pollution reduction goals in well-publicized campaigns. They have done this to fend off public outcry and the implications which come from it.").

leases.”²⁷⁴ Public disclosure of toxic releases causes industries to fear EPCRA liability and considerably improves industry behavior as a result.

Because EPCRA is an informational statute, compliance is less expensive and strenuous compared to other environmental legislation.²⁷⁵ “Facilities simply need to account for the amounts of chemicals used, stored and released from the site—activities which should come naturally to a good business.”²⁷⁶ As compared to other environmental statutes such as CERCLA and the Clean Air Act, which require compliance with specific discharge or disposal limitations,²⁷⁷ EPCRA only asks that a company report the chemicals that it releases or stores.²⁷⁸ To properly confront the split among the circuits over the EPCRA citizen-suit issue, the Supreme Court should acknowledge the impact that EPCRA has on industry and on shaping the future of the public’s awareness of toxic hazards.

A third policy concern that the Supreme Court should confront in properly resolving the issue of EPCRA citizen suits is an extension of the Act’s legislative history—the need to interpret the provision in a way that gives full effect to the intent behind Congress’s inclusion of the provision in the statute. Congress knows how to define the boundaries of citizen enforcement authority—it clearly did so when it enacted the citizen enforcement provision of the Clean Water Act.²⁷⁹ By using broad language within the EPCRA provision, Congress clearly intended to impart broad enforcement authority. If Congress intended to preclude citizen suits for wholly past reporting violations, it knew how to do so. While courts must be sensitive to the effect of such requirements on in-

274. Shavelson, *supra* note 11, at 30. *But see* Wolf, *supra* note 63, at 239-40 (stating that “large companies can afford the cost of . . . compliance with EPCRA more easily than small companies” and that “small business[es] . . . complain about [such] regulation as both unnecessary and overly burdensome and inflexible”).

275. Furthermore, based on the EPA’s estimates that “EPCRA would cost the average business between \$400 and \$10,000 a year,” Wolf, *supra* note 63, at 239, compliance is less costly than noncompliance. *See* 42 U.S.C. § 11045(c)(1)-(3) (EPCRA’s enforcement provision stating that each day of a violation of EPCRA’s reporting requirements can cost up to \$25,000).

276. Shavelson, *supra* note 11, at 30.

277. *See, e.g.*, 42 U.S.C. § 7410 (a)(2)(A) (Clean Air Act requirement that all state implementation plans “include enforceable emission limitations”); *id.* § 9602(a) (CERCLA provision requiring the EPA to “promulgate regulations establishing that quantity of any hazardous substance the release of which shall be reported”).

278. *See id.* §§ 11021-11023.

279. *See supra* notes 168-72 and accompanying text.

dustry and the economy, they must not allow recalcitrant facilities to frustrate the purposes of EPCRA, which are to inform the public of toxic hazards and to motivate emergency planning. Considering the ease of compliance, a broad enforcement authority can only facilitate full compliance. Interpreting EPCRA's citizen suit broadly would accomplish this goal.

Each of these policy concerns properly acknowledges EPCRA's individuality among environmental statutes. While *Gwaltney* seems to apply to citizen suits brought under any environmental statute, the Supreme Court should hesitate to apply its literal holding to the citizen-suit provision of EPCRA as well. By employing the interpretive technique of *Gwaltney* and in consideration of several important policy concerns, the Court must find that EPCRA citizen suits may be brought for purely historical reporting violations.

V. CONCLUSION: A PROPER RESOLUTION OF THE CIRCUIT SPLIT WILL ALLOW CITIZEN SUITS FOR PAST VIOLATIONS

Because the *Citizens* decision created a split among the circuits, resolution of the issue is necessary and inevitable. When the Supreme Court addresses the EPCRA citizen-suit provision, it must adopt the interpretive methodology employed by the Court in *Gwaltney* to determine how much authority EPCRA's provision gives citizens. The Court must engage in a comprehensive statutory analysis, considering the significance of and interrelationship among each of the provisions. Because EPCRA is a unique environmental statute, the Court should also consider underlying policies and interpret EPCRA's provision in a way that furthers the purposes of the Act.

Between the decisions constituting the circuit split, the Seventh Circuit's opinion in *Citizens for a Better Environment v. Steel Co.* best resolved EPCRA's citizen-suit issue in a manner consistent with the above analysis. First, the decision interpreted the statute fully, accounting for each word in the citizen-suit provision.²⁸⁰ Second, the decision acknowledged the legislative history, which emphasizes the importance of the timing element in the reporting requirements.²⁸¹ Finally, the court addressed some of the

280. See *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1242-44 (7th Cir. 1996), cert. granted, 65 U.S.L.W. 3581 (U.S. Feb. 25, 1997) (No. 96-643).

281. See *id.* at 1243 n.2.

policy concerns underlying the enactment of EPCRA's citizen-suit provision.²⁸² Thus, if the Court correctly analyzes the EPCRA citizen-suit provision according to the *Gwaltney* methodology, it will conclude that the Sixth Circuit resolved the citizen-suit issue incorrectly in the *Atlantic States* opinion. The Supreme Court would be prudent to uphold the Seventh Circuit's decision when it resolves the circuit split.

In order to continue the successes of EPCRA,²⁸³ the Supreme Court must interpret the citizen-suit provision in a way that allows EPCRA suits for historical violations. In doing so, the Court would properly arm the Davids of the environmental arena with the resources to fell the corporate and industrial Goliaths in the battle for information. This significant victory would teach the Goliaths that they cannot escape the obligations imposed by the Emergency Planning and Community Right-to-Know Act.

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

283. See discussion *supra* notes 265-74 and accompanying text.

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