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PRESERVING THE CITIZEN SUIT PROVISION: *CITIZENS FOR A BETTER ENVIRONMENT v. THE STEEL COMPANY*

REBECCA L. JUSTICE*

The "right-to-know" concept encompasses several federal, state, and local requirements regarding the planning of responses to a toxic substance release and the provision of information to public officials and citizens.¹ The idea originated during city and county attempts to deal with toxic substances and the concerns of workers who handled such materials.² State and federal attempts to provide a uniform method of responding to toxic substance releases and handling resulted in federal legislation enactment.³ For example, the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA)⁴ represents a federal government response to toxic substance release concerns.⁵ EPCRA objectives are "1) to provide the public access to information concerning hazardous chemicals in the community and 2) to use this information to formulate and administer local emergency response plans in case of a hazardous chemical release."⁶

EPCRA contains a citizen suit provision that allows a citizen to

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¹ Donald W. Stever, *SARA Title III: Federal Right-To-Know*, in *THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS: A SATELLITE PROGRAM 1988*, at 73 (PLI Real Estate Law & Practice Course Handbook Series No. N4-446, 1988) [hereinafter Stever].

² *Id.* See generally Paulette L. Stenzel, *Toxics Use Reduction Legislation: An Important "Next Step" After Right to Know*, 4 UTAH L. REV. 707 (1991) (discussing the history, provisions, and purposes of right to know laws and the basis of Toxic Use Reduction legislation).

³ Stever, *supra* note 1, at 73.

⁴ Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001-11050 (1994).

⁵ EPCRA is closely related to but separate from the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1994) [hereinafter CERCLA]. CERCLA focuses on the containment and clean-up of releases of hazardous substances, while EPCRA is concerned with being prepared in the event of a hazardous release. EPCRA also focuses upon eliciting an effective response to a hazardous release and community awareness of hazardous substance use and release in order to protect itself. See Stever, *supra* note 1.

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

sue anyone who is in violation of EPCRA requirements.⁷ Interpreting the provision was the issue in two recent cases in the Sixth and Seventh Circuits. The circuits are now split. The Seventh Circuit in *Citizens for a Better Environment v. The Steel Company (Citizens)*⁸ interpreted the provision to allow a cause of action to exist "for violations that are not ongoing at the time a citizen complaint is filed."⁹ Prior to the decision in *Citizens*, the Sixth Circuit in *Atlantic States Legal Foundation v. United Musical Instruments, U.S.A., Inc. (United Musical Instruments)*¹⁰ held that a citizen cannot pursue a claim if the alleged violator files overdue forms after receiving notification of a citizen suit.¹¹

Prohibiting a citizen suit simply because the alleged violator comes under compliance carries several implications, such as a decrease in citizen incentive to track and enforce EPCRA provisions.¹² For example, a plaintiff can render notice to the violator of an intent to file suit and, having received notice, the violator can then file the necessary reports in order to comply.¹³ In a jurisdiction that prohibits citizen enforcement of past violations under EPCRA, the citizen cannot file the complaint.¹⁴ The result is that an industrial manufacturer can operate without meeting EPCRA requirements until notice of a potential suit.¹⁵ Therefore, the decision in *Citizens* is relevant to foster citizen involvement and supplementation in enforcing EPCRA.¹⁶

In order to illustrate the significance of the decision in *Citizens*, this comment will first examine the origin and purposes of EPCRA. Part II examines the EPCRA reporting requirements. Part III discusses the citizen suit provision and the notice provision. Part IV examines the court's method of interpretation and the significance of the issues surrounding the notice provision.

I. EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT: PURPOSES

In 1984, a Union Carbide facility in Bhopal, India released a

⁷ 42 U.S.C. § 11046.

⁸ *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996).

⁹ *Id.* at 1244.

¹⁰ *Atlantic State Legal Found., Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995).

¹¹ *Id.* at 11.

¹² *Citizens*, 90 F.3d at 1244.

¹³ *Id.*

¹⁴ *United Musical Instruments*, 61 F.3d at 475.

¹⁵ *Citizens*, 9 F.3d at 1242.

¹⁶ *Id.* at 1244-45.

toxic pesticide killing over 2,500 people.¹⁷ In 1985, a Union Carbide facility in Institute, West Virginia released a toxic chemical used to make pesticides.¹⁸ Union Carbide officials for the West Virginia facility failed to notify local authorities of the pesticide release, believing the gas would be confined to the plant perimeter.¹⁹ As a result, local authorities were uninformed as to what was happening and how to protect citizens.²⁰ At that time, a nationwide plan for emergencies involving hazardous chemicals did not exist and an inadequate response ensued.²¹ Failure to respond in an appropriate manner resulted in injuries to over 150 individuals requiring medical attention.²²

Subsequently, the Environmental Protection Agency (EPA) determined that 6,900 incidents involving toxic chemicals had occurred over the past five years in the United States, resulting in 135 deaths.²³ Congress enacted EPCRA following the Bhopal tragedy to address the inadequacy in community emergency response.²⁴ Prior to Bhopal, Congress considered reworking the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),²⁵ but the Bhopal tragedy led Congress to enact EPCRA, "a free-standing law."²⁶ EPCRA is Title III of the Superfund Amendments and Reauthorization Act (SARA)²⁷ and is divided into the following subchapters: (1) Subchapter A, consisting of emergency planning and notification; (2) Subchapter B, describing reporting requirements; and (3) Subchapter C, listing the general provisions.²⁸

EPCRA has two primary purposes: (1) To establish emergency planning and notification requirements to protect the public in the event of a hazardous substance release, and (2) to provide the public with information regarding the release of hazardous chemicals within the community.²⁹ To facilitate these goals, EPCRA mandates that each state

¹⁷ Sidney M. Wolf, *Fear and Loathing about the Public Right-to-Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Act*, 11 J. LAND USE & ENVTL. L. 217, 218 (1996).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Wolf, *supra* note 17, at 218.

²³ *Id.*

²⁴ *Id.* at 218-19.

²⁵ 42 U.S.C. §§ 9601-9675.

²⁶ Wolf, *supra* note 17, at 219.

²⁷ Robert W. Shavelson, *EPCRA, Citizen Suits and the Sixth Circuit's Assault of the Public's Right-to-Know*, ALB. L. ENVTL. OUTLOOK, Fall 1995, at 29.

²⁸ Wolf, *supra* note 17, at 221-22.

²⁹ See Exec. Order No. 12,856, 58 Fed. Reg. 41,981 (1993).

provide emergency planning in the event a hazardous chemical is released from an industrial facility.³⁰ In addition, EPCRA requires covered facilities³¹ to list and describe the chemicals used.³² These lists are intended to provide information to the federal, state, and local governments as well as to the public.³³ As a result, these lists provide citizens with information of hazardous chemical releases and possession by businesses.³⁴

II. EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW REPORTING REQUIREMENTS

A. Emergency Planning

EPCRA requires each state to have a Governor-appointed state emergency response committee (SERC).³⁵ SERCs appoint local emergency planning committees (LEPCs) and supervise and coordinate the LEPC activities.³⁶ LEPCs carry the responsibility of designing and implementing local emergency plans.³⁷ However, the SERC and LEPC are responsible for "establish[ing] procedures for receiving and processing requests for information from the public [pertaining to hazardous chemicals]."³⁸

B. Right-to-know Component

EPCRA makes available two types of industry-provided information.³⁹ The first type involves the use and storage of hazardous

³⁰ Eric M. Falkenberry, *The Emergency Planning and Community Right-to-Know Act: A Tool For Toxic Release and Reduction in the 90's*, 3 BUFF. ENVTL. L.J. 1, 4 (1995).

³¹ EPCRA defines "facility" broadly to mean all buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person (or by any person who controls, is controlled by, or under common control with such person). "For purposes of section 11004 of this title (ed. Emergency Notification section), the term includes motor vehicles, rolling stock, and aircraft." 42 U.S.C. § 11049(4). Under EPCRA, "person" includes any "individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or interstate body." 42 U.S.C. § 11049(7).

³² Falkenberry, *supra* note 30, at 8.

³³ *Id.* at 12.

³⁴ Wolf, *supra* note 17, at 220.

³⁵ 42 U.S.C. § 11001(a). See generally, 42 U.S.C. §§ 11001-11005; Wolf, *supra* note 17, at 218-219 (discussing the emergency planning portion of EPCRA).

³⁶ 42 U.S.C. § 11001(a).

³⁷ Falkenberry, *supra* note 30, at 5.

³⁸ 42 U.S.C. § 11001 (a) and (c).

³⁹ Wolf, *supra* note 17, at 224-25.

chemicals.⁴⁰ A material safety data sheet (MSDS) and a hazardous chemical inventory form provide information concerning hazardous chemical storage and use.⁴¹ Forms known as Tier I and Tier II satisfy the hazardous chemical inventory requirement.⁴² The second type of information pertains to the release of toxic chemicals into the air, soil, or water.⁴³ Toxic chemical release reporting and emergency release notification provide the information.⁴⁴ Form R's contain this information, and describe how the chemical is used at the facility and treatment methods for the waste streams.⁴⁵ Emergency release notification mandates that a facility notify the community emergency coordinator in the event of a hazardous or extremely hazardous chemical release.⁴⁶

1. Material Safety Data Sheet Reporting

Any facility required under the Occupational Safety and Health Act of 1970⁴⁷ to have an MSDS⁴⁸ for a hazardous chemical must submit an MSDS or a list of the chemicals to three sources: “[1] the appropriate local emergency planning committee, [2] the State emergency response commission, and [3] the fire department having jurisdiction over the facility.”⁴⁹ A minimum threshold level exists below which a facility is not required to submit an MSDS or a list of chemicals.⁵⁰ Facilities must file an MSDS if: (1) 10,000 pounds or more of a hazardous chemical is present at a facility at any one time, or (2) 500 pounds or more of an extremely hazardous substance is present or the threshold planning quantity, whichever is lower.⁵¹ The EPCRA definition of a “hazardous substance” is broader than that under CERCLA,⁵² and broader than

⁴⁰ *Id.*

⁴¹ *Id.* at 225-227.

⁴² *Id.* at 227.

⁴³ *Id.* at 230.

⁴⁴ Wolf, *supra* note 17, at 224-25.

⁴⁵ Falkenberry, *supra* note 30, at 11-12.

⁴⁶ Wolf, *supra* note 17, at 223-24.

⁴⁷ Occupational Safety and Health Standards, 29 C.F.R. § 1910 (1996).

⁴⁸ 29 C.F.R. § 1910.1200(g) (requiring employers to maintain MSDS information readily accessible to employees during working shifts and listing eight sections into which MSDS's are divided).

⁴⁹ 42 U.S.C. § 11021(a)(1)(A)-(C).

⁵⁰ 42 U.S.C. § 11021(b).

⁵¹ 40 C.F.R. § 370.20(b)(1) (1996).

⁵² 42 U.S.C. § 9601(14). CERCLA defines “hazardous substance” as:

(A) any substance designated pursuant to § 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of [title 42], (C) any hazardous waste having the

“extremely hazardous substance”⁵³ as defined by EPCRA⁵⁴ itself. EPCRA adopts the 29 C.F.R. § 1910.1200(c) definition of “hazardous chemical” -- “any chemical which is a physical hazard or a health hazard.”⁵⁵ Therefore, common substances such as alcohol solutions, soaps, and oxygen are incorporated in the definition.⁵⁶ Setting a minimum threshold quantity for reporting exempts facilities utilizing such substances in small quantities from the reporting requirement.⁵⁷

The list of chemicals submitted includes the chemical name or common name of each chemical and any hazardous component of a chemical listed on an MSDS.⁵⁸ Members of a local emergency planning committee may obtain the information contained in an MSDS upon

characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. 6901 *et seq.*] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Id.

⁵³ See 40 CFR pt. 355, App. A (1996) (list of extremely hazardous substances and their reportable quantities).

⁵⁴ Kevin J. Finto, *Regulation by Information Through EPCRA*, NAT. RESOURCES & ENV'T, Winter 1990, at 15. See 42 U.S.C. § 9601(14) (1994).

⁵⁵ 42 U.S.C. § 11021(e). However, there is a list of exceptions:

- (1) Any food, food additive, color additive, drug, or cosmetic regulated by the Food and Drug Administration.
- (2) Any substance present as a solid in any manufactured item to the extent exposure to the substance does not occur under normal conditions of use.
- (3) Any substance to the extent it is used for personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public.
- (4) Any substance to the extent it is used in a research laboratory or a hospital or other medical facility under the direct supervision of a technically qualified individual.
- (5) Any substance to the extent it is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer.

Id.

⁵⁶ Telephone Interview with Barry Murphy, Ph.D. Organic Chemistry, OSHA Consultant (Jan. 31, 1997).

⁵⁷ *Id.*

⁵⁸ 42 U.S.C. § 11021(a)(2).

request, if the facility provides a list rather than an MSDS.⁵⁹ Such requests occur when a citizen requests from the LEPC the detailed MSDS information and the committee has only the list or when the committee needs the detailed information to carry out its functions.⁶⁰ EPCRA requires the LEPC to attain an MSDS requested by the public that is not in its possession.⁶¹ Additionally, any new information attained by a facility owner or operator concerning a hazardous material must be submitted on a revised sheet within three months of attaining the information.⁶²

2. Hazardous Chemical Inventory Form: Tier I or Tier II

Any facility required to submit an MSDS report must also submit an emergency and hazardous chemical inventory form.⁶³ The inventory form must be submitted to the LEPC, SERC, and the fire department having jurisdiction over that facility.⁶⁴ The facility may submit one of two types of forms to satisfy the hazardous chemical inventory form: Tier I or Tier II.⁶⁵ Tier I forms must be submitted annually, but a Tier II form may be requested by the SERC, LEPC, or fire department.⁶⁶ A Tier I form contains: (1) an estimate of the maximum amount of hazardous chemicals in each category present at the facility during the previous calendar year, (2) the estimated average daily amount of hazardous chemicals at the facility during the previous year, and (3) the general location of hazardous chemicals.⁶⁷ Tier II reports contain "more detailed Tier I information and a brief description of the manner in which each hazardous chemical is stored."⁶⁸ These forms are particularly important to the communities in disclosing potentially

⁵⁹ 42 U.S.C. § 11021(c)(1). Some states and localities request that a list of chemicals be submitted and not the MSDS, because the volume of MSDS's would be so large that the community would be required to rent a warehouse to store the sheets. Additionally, the volume of information would not be useful in the event of an emergency, delaying response time. Finto, *supra* note 54, at 15.

⁶⁰ 42 U.S.C. § 11021(c)(1) and (2).

⁶¹ 42 U.S.C. § 11021(c)(2). Each LEPC shall "annually publish a notice in local newspapers that the emergency response plan, [MSDSs], and inventory forms have been submitted" In addition, the notice must identify the location designated to allow the public to review any of the information. 42 U.S.C. § 11044(b).

⁶² 42 U.S.C. § 11021(d)(2).

⁶³ 42 U.S.C. § 11022(a)(1).

⁶⁴ 42 U.S.C. § 11022(a)(1)(A)-(C).

⁶⁵ Falkenberry, *supra* note 30, at 9-10.

⁶⁶ *Id.*

⁶⁷ 42 U.S.C. § 11022(d)(1)(B)(i)-(iii).

⁶⁸ Falkenberry, *supra* note 30, at 9.

dangerous chemicals in the respective areas. Some companies submit a Tier II form in place of a Tier I since the public readily attains Tier I information, while Tier II carries restrictions on disclosure.⁶⁹ Citizens may request Tier II information through an SERC or LEPC.⁷⁰ The request must be in writing and demonstrate a need for the information when the facility stores less than 10,000 pounds of a hazardous chemical.⁷¹ This information is considered part of the community right-to-know, but the majority of it is used by LEPCs to prepare emergency response plans.⁷²

3. Toxic Chemical Release Reporting: "R" Form

The most significant information section in EPCRA requires a facility using toxic chemicals to report toxic chemical releases for the preceding calendar year at that facility.⁷³ Facility owners and operators required to submit a toxic chemical release form meet the following criteria: (1) have ten or more full-time employees, (2) manufacture in Standard Industrial Classification Codes 20 through 39, and (3) manufacture, process, or use a toxic chemical in excess of the quantity allowed.⁷⁴ These forms are typically referred to as Form R's.⁷⁵ They must include the following items: 1) A description of how the toxic chemical is used at the facility, 2) an estimate the amounts of toxic chemicals at the facility anytime during the preceding calendar year, 3) a report of the treatment or disposal methods for waste streams and the estimate of the treatment efficiency, and 4) the annual quantity of toxic chemical entering the water, air, or soil.⁷⁶ Toxic release information

⁶⁹ Wolf, *supra* note 17, at 227-28.

⁷⁰ Falkenberry, *supra* note 30, at 10.

⁷¹ 42 U.S.C. § 11022(e)(3)(A) and (B).

⁷² Wolf, *supra* note 17, at 228-29.

⁷³ 42 U.S.C. § 11023(a) (1994).

⁷⁴ 42 U.S.C. § 11023(b)(1)(A).

⁷⁵ Wolf, *supra* note 17, at 230.

⁷⁶ 42 U.S.C. § 11023(g)(1)(C)(i)-(iv). Compiling Toxic Release Information (TRI) to complete Form R for a small to medium size facility may take three to six weeks. Larger facilities often hire employees whose job description is solely to meet environmental regulation requirements. Some may spend a portion of work time performing tasks in other areas. Such employees typically attend EPA seminars to stay abreast of any requirements changes and to ensure proper compliance. The larger facilities must maintain records year round in order to have a timely filed form. Completing the TRI information becomes technical. For example, all fittings on pipes or anything with a leak potential must be recorded. The amount of possible leakage from fittings under normal use must be calculated. Also, the temperature affects on the expansion or depression of a gas or liquid stored in a tank must be determined and the amount of escape under those conditions calculated for a given year. It may take the EPA as long as one year to compile the information it receives into the TRI database. There is no statute requiring a certain "turn around" time for the

must be made public by the EPA in a computerized data base.⁷⁷ A citizen can log on to the EPA Toxic Release Inventory database to discover whether a facility filed a Form R chemical release report.⁷⁸ Form Rs provide information to federal, state, and local governments, as well as to the public.⁷⁹ The information contained therein provides information regarding toxic releases, assists research, and aids in the development of appropriate regulations, guidelines and standards.⁸⁰

4. Emergency Release Notification

Additionally, EPCRA requires an emergency release notification in which a facility must report any release of hazardous or extremely hazardous substances outside the boundaries of the facility that exceeds the "reportable quantity."⁸¹ A reportable quantity is a predetermined amount of the hazardous or extremely hazardous substance.⁸² Immediate notice must be given to the community emergency coordinator for the LEPC and the SERC.⁸³ Facilities exempt from other EPCRA reporting must follow emergency release notification procedures, if a release occurs in a reportable quantity.⁸⁴

III. CITIZEN SUIT PROVISION

The Clean Air Act (CAA)⁸⁵ was the first environmental statute to incorporate a citizen suit provision.⁸⁶ Under the provision, citizens

EPA to compile the information received. Telephone interview with Barry Murphy, *supra* note 56.

⁷⁷ 42 U.S.C. § 11023(j). TRI information is available from a number of sources. It can be obtained on the Internet under TOXNET or RTKNET. *See* Wolf, *supra* note 17, at 324 n.381. The information on TOXNET is available only after calling 1-800-638-8480 to open an account, and accessing TOXNET requires a long distance call. In addition, the information is available from TOXNET on magnetic tape, microfiche, and soon on CD-ROM. More information on TOXNET is available from a TRI representative, (301) 496-6531. An explanation of TRI data is available on the TRI Hotline (1-800-535-0202), and a data release paper may be ordered for free on the Hotline. Roy Kinslow, *Accessing the Toxic Chemical Release Inventory Database* (last modified Nov. 13, 1997) <<http://emernet.emergency.com/epa-tri.htm>>.

⁷⁸ Falkenberry, *supra* note 30, at 16.

⁷⁹ 42 U.S.C. § 11023(h).

⁸⁰ *Id.*

⁸¹ 42 U.S.C. § 11004(a) (1994).

⁸² Wolf, *supra* note 17, at 223-24.

⁸³ 42 U.S.C. § 11004(a)(1) and (b)(1).

⁸⁴ Wolf, *supra* note 17, at 224.

⁸⁵ Clean Air Act, 42 U.S.C. §§ 7401-7642 (1994).

⁸⁶ Ann Powers, *Private Enforcement of Federal Pollution Control Laws: Citizens Suit Provisions*, CA 37 ALI-ABA COURSE OF STUDY, 815, 817 (1996) [hereinafter Powers]. *See also* Shavelson, *supra* note 27, at 29 (explaining that Congress, recognizing the limitation in governmental enforcement, adopted the concept of a citizen suit provision from a Michigan law

can act as "private attorney generals [sic]" and sue government agencies as well as private industries for failure to comply with federal environmental laws.⁸⁷ A citizen suit provision gives citizens and groups the legal tools that empower them to protect the environment when government enforcers lack the ability or desire to enforce the requirements.⁸⁸

Citizen suit provisions within environmental statutes are generally very similar.⁸⁹ Because the CAA was the first environmental statute to incorporate the citizen suit provision, abundant legislative history exists.⁹⁰ Consequently, the CAA serves as a model for

drafted by Professor Joseph Sax).

⁸⁷ Shavelson, *supra* at note 27, at 29.

⁸⁸ *Id.*

⁸⁹ Powers, *supra* note 86, at 817. The citizen suit provision of the CAA is as follows:

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf -

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged ... to be in violation of any condition of such permit. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties.

42 U.S.C. § 7604(a).

The EPCRA citizen suit provision closely parallels the CAA provision. EPCRA provides for a suit against a facility, the Administrator, a Governor, or a SERC for failure to comply with the reporting requirements. The CAA allows a suit against any person or agency in violation. In addition a suit may be brought against an Administrator or the United States. Thus, both attempt to allow a suit against a facility, agency representative, or government official in violation of the provisions within the acts. Compare 42 U.S.C. § 7604 with 42 U.S.C. § 11046(a)(1)(A)-(D).

⁹⁰ Powers, *supra* note 86, at 817. See also *Natural Resources Defense Council v. Trail*, 510 F.2d. 692, 701-702 (discussing the connection between the citizen suit provisions in the Clean Air Act and the Clean Water Act); *Envl. Defense Fund v. EPA*, 672 F.d. 42, 57 (1982); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (discussing the connection between the citizen suit provisions in the Clean Air Act and the Clean Water Act). The following illustrates the general structure of a citizen suit provision in any environmental statute:

A. A citizen suit may be brought by "any person," although a plaintiff must have standing to bring the action.

B. The statutes vary, but in general, suit may be brought against:

subsequent provisions and aids in interpreting citizen suits in other statutes.⁹¹

The citizen suit provision plays a significant role in the *Citizens*⁹² decision. The citizen suit provision in EPCRA empowers any person to bring a civil action against an owner or operator of a facility, the Administrator of the EPA,⁹³ a state Governor, or SERC.⁹⁴ A civil suit may be brought for failure to comply with any section of EPCRA.⁹⁵ Lack of compliance includes failure to file the appropriate and required reports, to publish information making it available to the public, or to respond to a request for Tier II information.⁹⁶ In addition, EPCRA provides for suits by state or local governments to enforce

1. "any person," including the government, who is alleged
 - a. to be in violation of a standard, limitation, condition, or order issued by EPA, or
 - b. to be contributing to an imminent and substantial endangerment (RCRA only); or
 2. the EPA Administrator for failure to perform a non-discretionary duty.
- C. Jurisdiction is granted to the district courts and venue is where the source of the violation is located or the violation occurs.
- D. The statutes vary considerably on the range of requirements that citizens may enforce. Under some statutes, citizens may enforce against violation of any requirement; under others, they may enforce only against violations of specified requirements. Under RCRA citizens may also sue to abate an imminent and substantial endangerment.
- E Citizens may have to give the government prior notice of their intent to file a suit, of the filing of the suit, and of a proposed settlement.
- F. Suit is barred if the government has commenced and is diligently prosecuting an enforcement action, although the precise type of action that will bar suit varies from statute to statute.
- G. The government may intervene in any citizen suit and citizens may intervene in government enforcement cases in federal courts, by right under FRCP 24.
- H. Judicial relief includes injunctions to comply with the statute and, under most statutes, civil penalties for the violations. Settlements, however, often involve payments in lieu of penalties for various environmental "good works."
- I. Courts may also award costs, including reasonable attorney fees to successful parties.

Powers, *supra* note 86, at 819-20.

⁹¹ Powers, *supra* note 86, at 817.

⁹² *Citizens*, 90 F.3d 1237 (7th Cir. 1996).

⁹³ 42 U.S.C. § 11049(1). EPCRA defines "Administrator" as "the Administrator of the Environmental Protection Agency." *Id.*

⁹⁴ 42 U.S.C. § 11046(a)(1)(A)-(D).

⁹⁵ *Id.*

⁹⁶ *Id.*

requirements.⁹⁷

The legislative history of the CAA reveals the tensions between those who sought to provide a stimulus for government enforcement and those who feared a flood of litigation would ensue.⁹⁸ These concerns brought about the requirement of prior notice of a suit and bars a citizen suit when there is prior government enforcement action.⁹⁹ Under EPCRA, a plaintiff must "give notice of the alleged violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator."¹⁰⁰ The plaintiff cannot file a suit until sixty days after such notice.¹⁰¹ In essence, legislative history indicates that the notice provision allows the government to have an opportunity to enforce laws and regulations.¹⁰² Courts use the notice provision to allow the violator to come into compliance and avoid litigation.¹⁰³

Although it appears to be simple to bring a citizen suit, various challenges such as standing and constitutional issues have been raised.¹⁰⁴ Courts generally grant standing "where a plaintiff or a member of a plaintiff organization lives or recreates in the area affected by a pollution source."¹⁰⁵ Establishing standing involves demonstrating that the plaintiff has been harmed by the defendant's failure to submit EPCRA reports.¹⁰⁶ However, corporations generally do not have standing because their injuries are often economic which are not among the types of injuries protected by environmental statutes.¹⁰⁷ Constitutional challenges based on the Separation of Powers doctrine and the Appointment Clause, claiming a citizen suit provision to be an unlawful delegation of executive power, have been raised.¹⁰⁸ Also, violation of the Due Process Clause has been raised due to varying threshold levels in

⁹⁷ 42 U.S.C. § 11046(a)(2)(A).

⁹⁸ Powers, *supra* note 86, at 815.

⁹⁹ *Id.*

¹⁰⁰ 42 U.S.C. § 11046(d)(1) and (2). The EPCRA notice provision is practically identical to that in the CAA. The CAA requires a sixty day wait and notice to the alleged violator, the Administrator, and the state in which the violation occurs. It also prevents a citizen plaintiff from filing if the government is "diligently prosecuting" a civil action. The CAA does list two exceptions to the sixty day wait whereas EPCRA does not. *Compare* 42 U.S.C. § 7604(b)(1)(A) and (2) with 42 U.S.C. § 11046(d)(1) and (2).

¹⁰¹ 42 U.S.C. § 11046(d)(1)(2).

¹⁰² Powers, *supra* note 86, at 830.

¹⁰³ *Id.* at 830-31.

¹⁰⁴ *Id.* at 821-25.

¹⁰⁵ *Id.* at 824. *See, e.g.,* Atlantic States Legal Found., Inc. v. Colonial Tanning Corp., 827 F.Supp. 903 (N.D. N.Y. 1993).

¹⁰⁶ Shavelson, *supra* note 27, at 33.

¹⁰⁷ Powers, *supra* note 86, at 824.

¹⁰⁸ Falkenberry, *supra* note 30, at 18-19.

reporting for certain types of facilities.¹⁰⁹ These constitutional challenges have been found to be without merit.¹¹⁰

IV. COURT'S TREATMENT OF INTERPRETATION AND ARGUMENTS

A. Methodology in Interpreting the EPCRA Citizen Suit Provision

The Seventh Circuit in *Citizens* addressed "whether citizens may seek penalties against EPCRA violators who file reports after the statutory deadline."¹¹¹ The Seventh Circuit interpreted the provision to allow a suit when reports are submitted in response to notice of a potential suit.¹¹² The Sixth Circuit addressed the same issue in *United Musical Instruments*.¹¹³ The Sixth Circuit, however, issued a decision contrary to that of the *Citizens* court, creating a split among the circuits.¹¹⁴ Both courts relied upon the U.S. Supreme Court case *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation Inc (Gwaltney)*¹¹⁵ in their interpretation.¹¹⁶

The Court in *Gwaltney* examined the citizen suit provision in the Clean Water Act (CWA),¹¹⁷ not EPCRA.¹¹⁸ The Supreme Court determined that the provision did not allow a suit for "wholly past" violations of the CWA,¹¹⁹ but under the CWA a citizen may bring a suit when filed in "good faith" concern of a continuous or intermittent violation.¹²⁰ The Supreme Court reviewed the *Gwaltney* case after conflicting interpretations among the circuits.¹²¹ The analysis began by looking at the natural meaning of the language of the statute, relying

¹⁰⁹ *Id.*

¹¹⁰ *Id.* See Atlantic States Legal Found., Inc. v. Buffalo Envelope, Div. of American Envelope Co., 823 F.Supp. 1065 (W.D. N.Y. 1993); Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F.Supp. 1132 (E.D. Pa.1993).

¹¹¹ *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1242 (7th Cir. 1996).

¹¹² *Id.* at 1244.

¹¹³ Atlantic States Legal Found., Inc. v. United Musical Instruments, U.S.A., Inc., 61 F.3d 473, 475 (6th Cir. 1995).

¹¹⁴ *Id.* at 478.

¹¹⁵ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987).

¹¹⁶ *Citizens for a Better Env't v. Steel Co.*, 90 F.3d 1237, 1242 (7th Cir.1996).

¹¹⁷ 33 U.S.C. § 1365.

¹¹⁸ *Gwaltney*, 484 U.S. at 52.

¹¹⁹ *Id.* at 61.

¹²⁰ *Id.* at 64.

¹²¹ *Id.* at 55-56. See also *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985) (holding that a citizen suit brought under § 505 of the CWA must allege a violation occurring at the time the complaint is filed); *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1986) (holding that a citizen-plaintiff may bring a suit under § 505 of the CWA, when the allegation is a continuing likelihood that the defendant will again violate the Act).

upon the established principle that “the starting point in interpreting the statute is the statute itself.”¹²² Second, the Court considered that Congress knew how to incorporate language that targets “wholly past” violations, relying upon past Congressional amendments of certain environmental acts to specify past or present violations in a citizen suit.¹²³ The *Gwaltney* Court next examined the statute as a whole and determined that the phrase “to be in violation” indicated prospective citizen suits.¹²⁴ Bolstering this argument, the Court noted the Act’s present tense definition of “citizen” as “a person ... having an interest which is or may be adversely effected”.¹²⁵ The Court also considered the legislative history of the CWA and the significance of the required notice provision and determined that construing the Act to allow a suit for a past violation would render the notice requirement simply gratuitous to an alleged violator.¹²⁶

In deciding *Citizens*, the court employed the same interpretative methodology the U.S. Supreme Court used in *Gwaltney*, but held *Gwaltney* distinguishable.¹²⁷ The *Citizens* court began by examining the natural meaning of the statute.¹²⁸ The *Citizens* court noted that the language used in EPCRA differed significantly from that in the CWA.¹²⁹ Specifically, EPCRA allows a citizen to sue “for failure to” comply with the statute.¹³⁰ However, the CWA authorizes a citizen suit when a defendant is alleged “to be in violation” of the applicable statute.¹³¹ Additionally, the *Citizens* court noted that the language in EPCRA does not point to the present tense as does the citizen suit provision in the CWA.¹³² The Seventh Circuit determined that the phrasing, “under,” found in the citizen suit provision of EPCRA authorized a citizen suit not only for failure to complete and submit forms, but also for failure to complete and submit forms in accordance with the deadline requirements set forth in sections 11022 and 11023.¹³³ The *Citizens* court disagreed with the Supreme Court in *Gwaltney* on the issue of notice, determining

¹²² *Gwaltney*, 484 U.S. at 56 (quoting *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

¹²³ *Id.* at 57.

¹²⁴ *Id.* at 58-59.

¹²⁵ *Id.* at 59. (quoting 33 U.S.C. § 1365(g) (1982 ed.)).

¹²⁶ *Id.* at 60-61.

¹²⁷ *Citizens for a Better Env’t v. Steel Co.*, 90 F.3d 1237, 1242 (7th Cir.1996).

¹²⁸ *Id.*

¹²⁹ *Id.* at 1243.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Citizens*, 90 F.3d at 1243.

¹³³ *Id.*

that the notice provision would not be rendered simply gratuitous by allowing a past violation.¹³⁴ Finally, the *Citizens* court looked at the statute as a whole in its interpretation.¹³⁵ The Seventh Circuit stated that “we must interpret the specific language of the citizen suit provision in a way that gives meaning to the provision as a whole.”¹³⁶ Failing to allow a citizen suit for a past violation “would render the citizen enforcement provision virtually meaningless” because the violator could come under compliance and avoid litigation.¹³⁷ The court expressed that allowing a citizen to bring a suit for a past violation provides an incentive to follow EPCRA reporting and enforce violations.¹³⁸

The Sixth Circuit in *United Musical Instruments* applied a similar methodology in interpreting EPCRA, but reached a different conclusion.¹³⁹ The *United Musical Instruments* court also began its interpretation by looking at the plain language of the statute.¹⁴⁰ The court specifically looked at the language of section 11046 which authorizes a citizen suit for “failure to ... [c]omplete and submit [form Rs] under section 11023 (a).”¹⁴¹ The court determined that this language allows a citizen to sue only upon an alleged violator’s failure to submit the required forms.¹⁴² The court emphasized in its opinion that a “form is completed and filed even when it is not timely filed.”¹⁴³ In addition, the court relied upon *Gwaltney* in determining that Congress could have used language that looked strictly to the past but did not exercise this option.¹⁴⁴ The Sixth Circuit concurred with the decision in *Gwaltney* on the issue of notice, stating that notice allows the violator to have an opportunity to come into compliance with the Act.¹⁴⁵ Therefore, the Sixth Circuit determined that the EPCRA citizen suit provision does not allow for past violations.¹⁴⁶

By comparison, the district court in *Atlantic States Legal Foundation, Inc. v. Whiting Roll-Up Door Manufacturing Corp. (Whiting)* determined that the EPCRA citizens suit provision does allow

¹³⁴ *Id.* at 1244.

¹³⁵ *Id.*

¹³⁶ *Id.* at 1244.

¹³⁷ *Citizens*, 90 F.3d at 1244.

¹³⁸ *Id.*

¹³⁹ *Atlantic States Legal Found., Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir.1995).

¹⁴⁰ *Id.* at 475.

¹⁴¹ *Id.* (quoting 42 U.S.C. § 11046(a)(1)(A)(iv) (1988 and Supp. V 1993)).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *United Musical Instruments*, 61 F.3d at 477.

¹⁴⁵ *Id.* at 477.

¹⁴⁶ *Id.*

enforcement for a past violation.¹⁴⁷ The *Whiting* court relied upon the *Gwaltney* methodology in interpreting the statute.¹⁴⁸ Looking first at the plain language of the statute, the *Whiting* court found that "failure to" comply with EPCRA reporting requirements was in opposition to the CWA's provision of "alleged to be in violation."¹⁴⁹ Also, the *Whiting* court noted that the CWA contained present tense language in the provision whereas the EPCRA provision did not, indicating an intent to allow past violation suits.¹⁵⁰ Additionally, the district court in *Whiting* did not give the same credence to the EPCRA notice provision that the United States Supreme Court gave it in *Gwaltney*.¹⁵¹ The *Whiting* court reinforced its opinion by noting that section 11046 (b)(1) of EPCRA provides that "any action under subsection (a) of this section against an owner or operator of a facility shall be brought in a district court in the district in which the alleged violation occurred."¹⁵² According to the *Whiting* court, the past tense language in the clause suggests that enforcement of past violations is allowed.¹⁵³

B. Notice Provision Issues

A prevalent issue in each of these cases was the notice provision of EPCRA. The notice demands that no action may be commenced prior to sixty days after the plaintiff has given notice to the Administrator, to the State in which the alleged violation occurs, and to the alleged violator.¹⁵⁴ The Supreme Court in *Gwaltney* determined that the notice provision in the CWA grants a violator an opportunity to comply and thus, render a citizen suit unnecessary.¹⁵⁵ The district court in *Whiting* distinguished the reasoning in *Gwaltney* by noting that Congress amended the CAA citizen suit provision following the *Gwaltney* decision to allow "citizens the right to sue for past violations, [but]...left a similar 60 day notice provision intact."¹⁵⁶ Therefore, legislative intervention

¹⁴⁷ Atlantic States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp., 772 F.Supp. 745 (W.D. N.Y. 1991).

¹⁴⁸ *Id.* at 751-752.

¹⁴⁹ *Id.* at 752.

¹⁵⁰ *Id.* at 752-753.

¹⁵¹ *Id.* at 753.

¹⁵² *Whiting*, 772 F.Supp. at 752-753.

¹⁵³ *Id.* at 753.

¹⁵⁴ 42 U.S.C. § 11046 (d)(1).

¹⁵⁵ *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59-60 (1987).

¹⁵⁶ Atlantic States Legal Found., Inc. v. Whiting Roll-up Door Mfg. Corp., 772 F.Supp. 745, 753 (W.D. N.Y. 1991).

allowing citizen suits “for past violations, while simultaneously leaving the Clean Air Act’s notice provision unchanged undercuts the importance of the Supreme Court’s discussion in *Gwaltney*....”¹⁵⁷ By contrast, the court in *United Musical Instruments* recognized the validity of such an argument as given in *Whiting*, but also noted an equally forceful, alternative argument.¹⁵⁸ In essence, the *United Musical Instruments* court stated that, since “Congress did not also amend EPCRA, Congress intended to limit EPCRA’s citizen suit provision to violations existing at the time the suit is filed.”¹⁵⁹ However, the Seventh Circuit in *Citizens* held that the notice provision served other purposes.¹⁶⁰

The *Citizens* court stated that notice is a positive means for EPCRA efficiency. Notice allows the violator the opportunity correct any information that may be mistaken. Notice gives the violator the opportunity to limit his exposure by filing late reports since each day of an EPCRA violation constitutes a separate violation and carries additional penalties.¹⁶¹ It “preserves the EPA’s enforcement discretion by allowing the Agency to take enforcement of the action if it so chooses.”¹⁶² Finally, notice, as viewed by the *Citizens* court, conserves resources by providing the violator the opportunity to settle with the individual plaintiff or the EPA.¹⁶³ Thus, the role that a court determines a notice provision plays in an environmental statute influences the court’s interpretation of the citizen suit provision.

V. CONCLUSION

The *Citizens* case has significant implications for the future of the citizens suit provision in EPCRA. The Seventh Circuit decision permits a suit for past violations. Otherwise, a violator can ignore EPCRA requirements and come under compliance only upon receiving notification of a suit. The violating company can use the funds that should be used for EPCRA compliance for other sources, placing them at an economic advantage over competitors. Additionally, the information provided by EPCRA aids in emergency response planning

¹⁵⁷ *Id.*

¹⁵⁸ *Atlantic States Legal Found. Inc., v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 477 (6th Cir. 1995).

¹⁵⁹ *Id.*

¹⁶⁰ *Citizens for a Better Env’t v. Steel Co.*, 90 F.3d 1237, 1244 (7th Cir.1996).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1243.

in the event of a release. When a company fails to report hazardous chemical use, a community cannot take proper measures to protect itself. Companies who ignore EPCRA requirements will also ignore polluting processes occurring at the facility and measures to decrease the emissions.¹⁶⁴

The Seventh Circuit decision provides the incentive for private citizen monitoring of filed reports by recognizing a cause of action for a past violation. Little incentive exists for tracking if the individual cannot pursue a suit. The citizen plaintiff would invest time and money with no hope of recovery for expenses or that the company will meet EPCRA requirements in the future. The company would not file reports in the future since no real penalty would exist.

EPCRA requires that a citizen suit be brought in the district court in which the alleged violation occurred.¹⁶⁵ The split in the circuits, therefore, will allow violators to evade penalties in some circuits while others are subject to penalties. For example, a company located in the Seventh Circuit faces penalties for failure to comply with EPCRA reporting. However, a company in the Sixth Circuit evades penalties and then files reports. Companies located in jurisdictions that have not addressed the issue may or may not evade penalties.

The U. S. Supreme Court reviewed the *Gwaltney* case, after varying opinions ensued from the circuits in interpreting the citizen suit provision of the CWA.¹⁶⁶ Therefore, it is likely that if interpretations of the EPCRA citizen suit provision follow a similar pattern, the Supreme Court will issue an opinion. Alternatively, Congress may see the need

¹⁶⁴ Shavelson, *supra* note 27, at 38.

¹⁶⁵ 42 U.S.C. § 11046(d)(1).

¹⁶⁶ Prior to publication of this comment, a district court in the Ninth Circuit addressed the EPCRA citizen suit provision issue in *Don't Waste Ariz., Inc. v. McLane Foods, Inc.*, 950 F.Supp 972 (D. Ariz. 1997). The plaintiff requested summary judgment pursuant to FRCP 56(d) after establishing that the defendant failed to meet EPCRA reporting requirements in a timely manner. The defendant submitted late filings upon receiving notification of the plaintiff's suit. The court granted summary judgment for the plaintiff, relying upon the Seventh Circuit's decision in *Citizens*. The district court, following the Seventh Circuit, applied the same methodology the Supreme Court used in *Gwaltney* to interpret the citizen suit provision. The district court concluded that "[t]he plain language of the statute, the policies underlying the EPCRA citizen provision, and the more persuasive case law concerning the issue before the Court compel the conclusion that EPCRA does authorize citizen suits for wholly past violations...[when] the alleged violator has come into compliance after receipt of the citizen plaintiff's intent to sue but before suit has been filed in federal court." The *McLane* court attached the same significance to the notice provision as did the Seventh Circuit and interpreted EPCRA to allow suits for a past violation. The defendant in *McLane* relied upon *Gwaltney* and the Sixth Circuit decision in *United Musical Instruments*. However, the district court chose to align with the Seventh Circuit decision to permit a suit for past violations. The United States Supreme Court granted certiorari to the Seventh Circuit *Citizens* case. 117 S.Ct. 1079 (1997). Oral arguments were heard on February 24, 1997. At the time of publication, the Supreme Court has not issued an opinion. See 1997 WL 631058 for a transcript of the oral arguments.

to step in and clarify its intent for the citizen suit provision by amending the EPCRA to clearly allow or disallow for past violations.

Currently, a split exists between the circuits addressing the citizen suit provision in EPCRA. Future decisions among other circuits will determine the accepted interpretation of the provision and may result in the issue going to the U.S. Supreme Court. The Seventh Circuit interpretation furthers public interest and concern, allowing a cause of action against an alleged violator even if the violator submits overdue forms upon receiving the required notice of the violation. The Seventh Circuit's broad interpretation of the EPCRA citizen suit provision facilitates community involvement in preserving natural resources by encouraging citizens to track industrial reporting.

